

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2010

Volume I

*Summary records
of the meetings
of the sixty-second session
3 May–4 June and
5 July–6 August 2010*

UNITED NATIONS



YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2010

Volume I

*Summary records
of the meetings
of the sixty-second session
3 May–4 June and
5 July–6 August 2010*

UNITED NATIONS
New York and Geneva, 2016



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2010*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

*

* *

This volume contains the summary records of the meetings of the sixty-second session of the Commission (A/CN.4/SR.3036–A/CN.4/SR.3079), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2010

UNITED NATIONS PUBLICATION
<i>Sales No.:</i> E.15.V.2 ISBN: 978-92-1-133834-8 e-ISBN: 978-92-1-057176-0
ISSN: 0082-8289

CONTENTS

	<i>Pages</i>		<i>Pages</i>
Note.....	ii	3040th meeting	
Members of the Commission.....	vii	<i>Friday, 7 May 2010, at 10.05 a.m.</i>	
Officers.....	vii	Expulsion of aliens (<i>continued</i>)	29
Agenda	viii	Sixth report of the Special Rapporteur (<i>continued</i>) and Draft articles on the protection of the human rights of persons who have been or are being expelled, as re- structured by the Special Rapporteur (<i>concluded</i>)	29
Abbreviations.....	ix	Organization of the work of the session (<i>continued</i>)	32
Note concerning quotations.....	ix	3041st meeting	
Cases cited in the present volume.....	xi	<i>Monday, 10 May 2010, at 3 p.m.</i>	
Multilateral instruments cited in the present volume.....	xv	Expulsion of aliens (<i>continued</i>).....	33
Checklist of documents of the sixty-second session.....	xix	Sixth report of the Special Rapporteur (<i>continued</i>)	33
 SUMMARY RECORDS OF THE 3036th TO 3079th MEETINGS		3042nd meeting	
<i>Summary records of the first part of the sixty-second session, held at Geneva from 3 May to 4 June 2010</i>		<i>Tuesday, 11 May 2010, at 10 a.m.</i>	
3036th MEETING		Reservations to treaties (<i>continued</i>)	41
<i>Monday, 3 May 2010, at 3.10 p.m.</i>		Fourteenth (<i>continued</i>) and fifteenth reports of the Special Rapporteur	41
Opening of the session	1	3043rd meeting	
Tribute to the memory of Sir Ian Brownlie, former member of the Commission	1	<i>Wednesday, 12 May 2010, at 10.10 a.m.</i>	
Statement by the outgoing Chairperson	1	Reservations to treaties (<i>continued</i>)	50
Election of officers	1	Fourteenth and fifteenth reports of the Special Rapporteur (<i>continued</i>)	50
Adoption of the agenda	2	3044th meeting	
Organization of the work of the session.....	2	<i>Friday, 14 May 2010, at 10.05 a.m.</i>	
Reservations to treaties.....	2	Expulsion of aliens (<i>continued</i>).....	55
Fourteenth report of the Special Rapporteur.....	2	Sixth report of the Special Rapporteur (<i>continued</i>)	55
Expulsion of aliens	5	3045th meeting	
Draft articles on the protection of the human rights of persons who have been or are being expelled, as re- structured by the Special Rapporteur	5	<i>Monday, 17 May 2010, at 3.10 p.m.</i>	
3037th meeting		Reservations to treaties (<i>continued</i>)	58
<i>Tuesday, 4 May 2010, at 10.05 a.m.</i>		Fourteenth report of the Special Rapporteur (<i>concluded</i>) ...	58
Tribute to the memory of Sir Ian Brownlie, former member of the Commission (<i>concluded</i>)	7	Fifteenth report of the Special Rapporteur (<i>continued</i>) ...	62
Reservations to treaties (<i>continued</i>)	8	3046th meeting	
Fourteenth report of the Special Rapporteur (<i>continued</i>)	8	<i>Tuesday, 18 May 2010, at 10.05 a.m.</i>	
Organization of the work of the session (<i>continued</i>)	12	Reservations to treaties (<i>continued</i>)	63
3038th meeting		Fifteenth report of the Special Rapporteur (<i>continued</i>) ...	63
<i>Wednesday, 5 May 2010, at 10.05 a.m.</i>		Sixteenth report of the Special Rapporteur	67
Reservations to treaties (<i>continued</i>)	12	3047th meeting	
Fourteenth report of the Special Rapporteur (<i>continued</i>)...	12	<i>Wednesday, 19 May 2010, at 10.10 a.m.</i>	
Organization of the work of the session (<i>continued</i>)	14	Reservations to treaties (<i>continued</i>)	69
Expulsion of aliens (<i>continued</i>).....	14	Sixteenth report of the Special Rapporteur (<i>continued</i>)...	69
Draft articles on the protection of the human rights of persons who have been or are being expelled, as re- structured by the Special Rapporteur (<i>continued</i>).....	14	Fifteenth report of the Special Rapporteur (<i>continued</i>) ...	71
Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel.....	17	Cooperation with other bodies	73
3039th meeting		Statement by the representative of the Inter-American Juridical Committee	73
<i>Thursday, 6 May 2010, at 10.15 a.m.</i>		3048th meeting	
Expulsion of aliens (<i>continued</i>).....	25	<i>Thursday, 20 May 2010, at 10.10 a.m.</i>	
Sixth report of the Special Rapporteur (<i>continued</i>) and Draft articles on the protection of the human rights of persons who have been or are being expelled, as re- structured by the Special Rapporteur (<i>continued</i>)	25	Reservations to treaties (<i>continued</i>)	76
Organization of the work of the session (<i>continued</i>)	29	Sixteenth report of the Special Rapporteur (<i>continued</i>)...	76

	Pages		Pages
3049th meeting		<i>Summary records of the second part of the sixty-second session, held at Geneva from 5 July to 6 August 2010</i>	
<i>Friday, 21 May 2010, at 10.05 a.m.</i>			
Reservations to treaties (<i>continued</i>)	80		
Sixteenth report of the Special Rapporteur (<i>continued</i>)...	80	3058th meeting	
3050th meeting		<i>Monday, 5 July 2010, at 3.10 p.m.</i>	
<i>Tuesday, 25 May 2010, at 10.05 a.m.</i>		Election of a new Chairperson	167
Reservations to treaties (<i>continued</i>)	83	Reservations to treaties (<i>continued</i>)	167
Sixteenth report of the Special Rapporteur (<i>continued</i>)...	83	Report of the Drafting Committee (<i>continued</i>)	167
3051st meeting		Effects of armed conflicts on treaties (<i>continued</i>)	168
<i>Wednesday, 26 May 2010, at 10.05 a.m.</i>		First report of the Special Rapporteur (<i>continued</i>)	168
Effects of armed conflicts on treaties	89	Organization of the work of the session (<i>continued</i>)	172
First report of the Special Rapporteur	89	3059th meeting	
Reservations to treaties (<i>continued</i>)	97	<i>Tuesday, 6 July 2010, at 10 a.m.</i>	
Report of the Drafting Committee	97	Effects of armed conflicts on treaties (<i>continued</i>)	172
Organization of the work of the session (<i>continued</i>)	101	First report of the Special Rapporteur (<i>continued</i>)	172
3052nd meeting		3060th meeting	
<i>Thursday, 27 May 2010, at 10.05 a.m.</i>		<i>Wednesday, 7 July 2010, at 10 a.m.</i>	
Effects of armed conflicts on treaties (<i>continued</i>)	101	Effects of armed conflicts on treaties (<i>continued</i>)	179
First report of the Special Rapporteur (<i>continued</i>)	101	First report of the Special Rapporteur (<i>continued</i>)	179
3053rd meeting		Organization of the work of the session (<i>continued</i>)	186
<i>Friday, 28 May 2010, at 11.05 a.m.</i>		3061st meeting	
Programme, procedures and working methods of the Commission and its documentation	104	<i>Thursday, 8 July 2010, at 10.05 a.m.</i>	
Effects of armed conflicts on treaties (<i>continued</i>)	104	Effects of armed conflicts on treaties (<i>concluded</i>)	186
First report of the Special Rapporteur (<i>continued</i>)	104	First report of the Special Rapporteur (<i>concluded</i>)	186
Organization of the work of the session (<i>continued</i>)	111	Reservations to treaties (<i>continued</i>)	189
3054th meeting		Report of the Drafting Committee (<i>continued</i>)	189
<i>Tuesday, 1 June 2010, at 10 a.m.</i>		3062nd meeting	
Effects of armed conflicts on treaties (<i>continued</i>)	111	<i>Friday, 9 July 2010, at 10 a.m.</i>	
First report of the Special Rapporteur (<i>continued</i>)	111	Organization of the work of the session (<i>continued</i>)	196
Reservations to treaties (<i>continued</i>)	118	Cooperation with other bodies (<i>continued</i>)	196
Sixteenth report of the Special Rapporteur (<i>concluded</i>)	118	Statement by the President of the International Court of Justice	196
Protection of persons in the event of disasters	121	Expulsion of aliens (<i>continued</i>)	201
Third report of the Special Rapporteur	121	Sixth report of the Special Rapporteur (<i>continued</i>)	201
3055th meeting		3063rd meeting	
<i>Wednesday, 2 June 2010, at 10.05 a.m.</i>		<i>Tuesday, 13 July 2010, at 10.05 a.m.</i>	
Effects of armed conflicts on treaties (<i>continued</i>)	125	Expulsion of aliens (<i>continued</i>)	204
First report of the Special Rapporteur (<i>continued</i>)	125	Sixth report of the Special Rapporteur (<i>continued</i>)	204
Protection of persons in the event of disasters (<i>continued</i>)	134	3064th meeting	
Third report of the Special Rapporteur (<i>continued</i>)	134	<i>Wednesday, 14 July 2010, at 10.05 a.m.</i>	
Organization of the work of the session (<i>continued</i>)	138	Filling of a casual vacancy in the Commission (article 11 of the statute)	205
3056th meeting		Expulsion of aliens (<i>continued</i>)	205
<i>Thursday, 3 June 2010, at 10.05 a.m.</i>		Sixth report of the Special Rapporteur (<i>continued</i>)	205
Protection of persons in the event of disasters (<i>continued</i>) ..	139	Reservations to treaties (<i>continued</i>)	209
Third report of the Special Rapporteur (<i>continued</i>)	139	Fifteenth report of the Special Rapporteur (<i>continued</i>) ...	209
Effects of armed conflicts on treaties (<i>continued</i>)	148	Cooperation with other bodies (<i>continued</i>)	214
First report of the Special Rapporteur (<i>continued</i>)	148	Statement by the representative of the Asian–African Legal Consultative Organization	214
3057th meeting		3065th meeting	
<i>Friday, 4 June 2010, at 10.05 a.m.</i>		<i>Thursday, 15 July 2010, at 10 a.m.</i>	
Protection of persons in the event of disasters (<i>continued</i>)	150	Expulsion of aliens (<i>continued</i>)	216
Third report of the Special Rapporteur (<i>concluded</i>)	150	Sixth report of the Special Rapporteur (<i>continued</i>)	216
Reservations to treaties (<i>continued</i>)	156	Reservations to treaties (<i>continued</i>)	225
Report of the Drafting Committee (<i>continued</i>)	156	Fifteenth report of the Special Rapporteur (<i>continued</i>) ...	225
Organization of the work of the session (<i>continued</i>)	166	3066th meeting	
		<i>Friday, 16 July 2010, at 10 a.m.</i>	
		Expulsion of aliens (<i>continued</i>)	228
		Sixth report of the Special Rapporteur (<i>concluded</i>)	228
		Reservations to treaties (<i>continued</i>)	233
		Fifteenth report of the Special Rapporteur (<i>continued</i>) ...	233

	Pages		Pages
3067th meeting			
<i>Tuesday, 20 July 2010, at 10.05 a.m.</i>			
Reservations to treaties (<i>continued</i>)	240	B. Consideration of the topic at the present session	277
Fifteenth report of the Special Rapporteur (<i>concluded</i>)...	240	C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission.....	277
Protection of persons in the event of disasters (<i>concluded</i>) ...	245		
Report of the Drafting Committee	245	3074th meeting	
Cooperation with other bodies (<i>concluded</i>)	248	<i>Tuesday, 3 August 2010, at 3.05 p.m.</i>	
Statement by the Director of Legal Advice and Public International Law of the Council of Europe.....	248	Draft report of the International Law Commission on the work of its sixty-second session (<i>continued</i>)	285
Statement by the Chairperson of the Committee of Legal Advisers on Public International Law of the Council of Europe	250	Chapter IV. Reservations to treaties (<i>continued</i>).....	285
		C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (<i>continued</i>).....	285
3068th meeting		Programme, procedures and working methods of the Commission and its documentation (<i>concluded</i>)	287
<i>Friday, 23 July 2010, at 10.05 a.m.</i>		Report of the Planning Group	287
Organization of the work of the session (<i>concluded</i>).....	253		
Expulsion of aliens (<i>concluded</i>)	253	3075th meeting	
Report of the Drafting Committee	253	<i>Wednesday, 4 August 2010, at 10.10 a.m.</i>	
3069th meeting		Draft report of the International Law Commission on the work of its sixty-second session (<i>continued</i>)	288
<i>Tuesday, 27 July 2010, at 10 a.m.</i>		Chapter XIII. Other decisions and conclusions of the Commission	288
Reservations to treaties (<i>concluded</i>)	254	C. Cooperation with other bodies.....	288
Report of the Drafting Committee (<i>concluded</i>)	254	D. Representation at the sixty-fifth session of the General Assembly	288
Shared natural resources.....	260	E. International Law Seminar.....	289
Report of the Working Group.....	260	Other business (<i>concluded</i>)	289
3070th meeting			
<i>Thursday, 29 July 2010, at 10 a.m.</i>		3076th meeting	
Other business	261	<i>Wednesday, 4 August 2010, at 3.05 p.m.</i>	
Settlement of disputes clauses.....	261	Draft report of the International Law Commission on the work of its sixty-second session (<i>continued</i>)	289
3071st meeting		Chapter IV. Reservations to treaties (<i>continued</i>).....	289
<i>Friday, 30 July 2010, at 10.05 a.m.</i>		B. Consideration of the topic at the present session (<i>continued</i>).....	289
Treaties over time.....	268	C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (<i>continued</i>).....	290
Report of the Study Group	268	B. Consideration of the topic at the present session (<i>continued</i>).....	293
The most-favoured-nation clause	269	Chapter II. Summary of the work of the Commission at its sixty-second session	293
Report of the Study Group	269		
The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>)	270	3077th meeting	
Report of the Working Group.....	270	<i>Thursday, 5 August 2010, at 10.10 a.m.</i>	
3072nd meeting		Draft report of the International Law Commission on the work of its sixty-second session (<i>continued</i>)	293
<i>Monday, 2 August 2010, at 3.05 p.m.</i>		Chapter IV. Reservations to treaties (<i>continued</i>).....	293
Draft report of the International Law Commission on the work of its sixty-second session.....	271	C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (<i>continued</i>).....	293
Chapter VI. Effects of armed conflicts on treaties	271		
A. Introduction	271	3078th meeting	
B. Consideration of the topic at the present session	271	<i>Thursday, 5 August 2010, at 3.10 p.m.</i>	
Chapter VII. Protection of persons in the event of disasters	273	Draft report of the International Law Commission on the work of its sixty-second session (<i>continued</i>)	300
A. Introduction.....	273	Chapter IV. Reservations to treaties (<i>concluded</i>)	300
B. Consideration of the topic at the present session	273	C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (<i>concluded</i>).....	300
C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted so far by the Commission	274	Chapter VIII. The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>).....	303
Chapter IX. Immunity of State officials from foreign criminal jurisdiction.....	276	A. Introduction.....	303
Chapter XII. Shared natural resources	276	B. Consideration of the topic at the present session	303
3073rd meeting		Chapter X. Treaties over time.....	303
<i>Tuesday, 3 August 2010, at 10 a.m.</i>		A. Introduction.....	303
Draft report of the Commission on the work of its sixty-second session (<i>continued</i>).....	277	B. Consideration of the topic at the present session	303
Chapter IV. Reservations to treaties	277		
A. Introduction.....	277		

	<i>Pages</i>		<i>Pages</i>
Chapter III. Specific issues on which comments would be of particular interest to the Commission	303	Chapter XIII. Other decisions and conclusions of the Commission (<i>concluded</i>)	304
B. Treaties over time.....	303	A. Programme, procedures and working methods of the Commission and its documentation.....	304
A. Reservations to treaties	303	B. Date and place of the sixty-third session of the Commission	305
Chapter IV. Reservations to treaties (<i>concluded</i>)	303		
B. Consideration of the topic at the present session (<i>concluded</i>).....	303	3079th meeting	
Chapter XI. The most-favoured-nation clause.....	304	<i>Friday, 6 August 2010, at 10.10 a.m.</i>	
A. Introduction.....	304	Draft report of the International Law Commission on the work of its sixty-second session (<i>concluded</i>)	305
B. Consideration of the topic at the present session	304	Chapter V. Expulsion of aliens.....	305
Chapter I. Organization of the session.....	304	A. Introduction.....	305
A. Membership	304	B. Consideration of the topic at the present session	305
B. Casual vacancy.....	304	Chairperson's concluding remarks	307
C. Officers and the Enlarged Bureau	304	Closure of the session.....	307
D. Drafting Committee	304		
E. Working Groups and Study Groups.....	304		
F. Secretariat	304		
G. Agenda	304		

MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Ali Mohsen Fetais AL-MARRI	Qatar	Mr. Shinya MURASE	Japan
Mr. Lucius CAFLISCH	Switzerland	Mr. Bernd NIEHAUS	Costa Rica
Mr. Enrique CANDIOTI	Argentina	Mr. Georg NOLTE	Germany
Mr. Pedro COMISSÁRIO AFONSO	Mozambique	Mr. Bayo OJO	Nigeria
Mr. Christopher John Robert DUGARD	South Africa	Mr. Alain PELLET	France
Ms. Paula ESCARAMEIA	Portugal	Mr. A. Rohan PERERA	Sri Lanka
Mr. Salifou FOMBA	Mali	Mr. Ernest PETRIČ	Slovenia
Mr. Giorgio GAJA	Italy	Mr. Gilberto Vergne SABOIA	Brazil
Mr. Zdzislaw GALICKI	Poland	Mr. Narinder SINGH	India
Mr. Hussein A. HASSOUNA	Egypt	Mr. Eduardo VALENCIA-OSPINA	Colombia
Mr. Mahmoud D. HMOUD	Jordan	Mr. Edmundo VARGAS CARREÑO	Chile
Mr. Huikang HUANG*	China	Mr. Stephen C. VASCIANNIE	Jamaica
Ms. Marie G. JACOBSSON	Sweden	Mr. Marcelo VÁZQUEZ-BERMÚDEZ	Ecuador
Mr. Maurice KAMTO	Cameroon	Mr. Amos S. WAKO	Kenya
Mr. Fathi KEMICHA	Tunisia	Mr. Nugroho WISNUMURTI	Indonesia
Mr. Roman KOLODKIN	Russian Federation	Sir Michael WOOD	United Kingdom of Great Britain and Northern Ireland
Mr. Donald M. McRAE	Canada		
Mr. Teodor Viorel MELESCANU	Romania	Ms. Hanqin XUE*	China

OFFICERS

Chairperson: Ms. Hanqin XUE and Mr. Nugroho WISNUMURTI

First Vice-Chairperson: Mr. Christopher John Robert DUGARD

Second Vice-Chairperson: Mr. Zdzislaw GALICKI

Chairperson of the Drafting Committee: Mr. Donald M. McRAE

Rapporteur: Mr. Stephen C. VASCIANNIE

Ms. Patricia O'Brien, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission.

* See the 3064th meeting below.

AGENDA

The Commission adopted the following agenda at its 3036th meeting, held on 3 May 2010:

1. Organization of the work of the session.
2. Reservations to treaties.
3. Shared natural resources.
4. Effects of armed conflicts on treaties.
5. Expulsion of aliens.
6. The obligation to extradite or prosecute (*aut dedere aut judicare*).
7. Protection of persons in the event of disasters.
8. Immunity of State officials from foreign criminal jurisdiction.
9. Treaties over time.
10. The most-favoured-nation clause.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the sixty-third session.
13. Cooperation with other bodies.
14. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
CADHI	Committee of Legal Advisers on Public International Law
CICIG	International Commission against Impunity in Guatemala
GATT	General Agreement on Tariffs and Trade 1994
IAJC	Inter-American Juridical Committee
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFAD	International Fund for Agricultural Development
IFRC	International Federation of Red Cross and Red Crescent Societies
NGO	non-governmental organization
OAS	Organization of American States
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WTO	World Trade Organization

*

* *

BYBIL	<i>The British Yearbook of International Law</i>
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

*

* *

In the present volume, “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

*

* *

NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

*

* *

The Internet address of the International Law Commission is <http://legal.un.org/ilc>.

CASES CITED IN THE PRESENT VOLUME

Case	Nature and source of the decision
<i>Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo</i>	Advisory Opinion, <i>I.C.J. Reports 2010</i> , p. 403.
<i>Aerial Herbicide Spraying</i>	(<i>Ecuador v. Colombia</i>), Order of 25 June 2010, <i>I.C.J. Reports 2010</i> , p. 307.
<i>Aerial Incident of 10 August 1999</i>	(<i>Pakistan v. India</i>), Jurisdiction of the Court, Judgment, <i>I.C.J. Reports 2000</i> , p. 12.
<i>Ahmadou Sadio Diallo</i>	(<i>Republic of Guinea v. Democratic Republic of the Congo</i>), Merits, Judgment, <i>I.C.J. Reports 2010</i> , p. 639.
<i>Amnesty International v. Zambia</i>	Preliminary Objections, Judgment, <i>I.C.J. Reports 2007</i> , p. 582.
<i>Anna Maroufidou v. Sweden</i>	Communication No. 212/98, African Commission on Human and Peoples' Rights, Twelfth annual activity report of the African Commission on Human and Peoples' Rights, 1998–1999 (AHG/215 (XXXV)), p. 76.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	Communication No. 58/1979, Views adopted on 9 April 1981, Report of the Human Rights Committee, <i>Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)</i> , annex XVII, p. 172.
<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination</i>	(<i>Bosnia and Herzegovina v. Serbia and Montenegro</i>) Judgment, <i>I.C.J. Reports 2007</i> , p. 43.
<i>Armed Activities on the Territory of the Congo</i>	(<i>Georgia v. Russian Federation</i>), Provisional Measures, Order of 15 October 2008, <i>I.C.J. Reports 2008</i> , p. 353.
<i>Avena</i>	(<i>Democratic Republic of the Congo v. Uganda</i>), Judgment, <i>I.C.J. Reports 2005</i> , p. 168.
<i>Ballo v. United Nations Educational, Scientific and Cultural Organization</i>	<i>Avena and Other Mexican Nationals (Mexico v. United States of America)</i> , Judgment, <i>I.C.J. Reports 2004</i> , p. 12.
<i>Barbados v. Trinidad and Tobago</i>	Judgement No. 191 of 15 May 1972, Administrative Tribunal of the International Organization, United Nations, <i>Juridical Yearbook 1972 (ST/LEG/SER.C/10, Sales No. E.74.V.1)</i> , p. 144.
<i>Barcelona Traction</i>	Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006, UNRIAA, vol. XXVII (Sales No. E/F.06.V.8), pp. 147–251.
<i>Belilos</i>	Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, <i>I.C.J. Reports 1970</i> , p. 3.
<i>Ben Tillett</i>	<i>Belilos v. Switzerland</i> , Application No. 10328/83, Judgement of 29 April 1988, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 132.
<i>Bozano v. France</i>	<i>Ben Tillett Arbitration (Great Britain v. Belgium)</i> , C. G. Fenwick, <i>Cases on International Law</i> , Chicago, Callaghan and Company, 1935, p. 181.
<i>Carlos Stetter</i>	Application No. 9990/82, Judgement of 18 December 1986, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 111.
<i>Certain Expenses of the United Nations</i>	Case 7378 (Guatemala), Resolution 30/81 of 25 June 1981, document OEA/Ser.L/V/II.54, Doc. 9 rev. 1, Inter-American Commission on Human Rights, <i>Annual Report of the Inter-American Commission on Human Rights 1980–1981</i> .
<i>Certain Questions concerning Diplomatic Relations</i>	(Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, <i>I.C.J. Reports 1962</i> , p. 151.
<i>Chahal v. the United Kingdom</i>	(<i>Honduras v. Brazil</i>), Order of 12 May 2010, <i>I.C.J. Reports 2010</i> , p. 303.
<i>Corfu Channel</i>	Application No. 22414/93, Judgement of 15 November 1996, European Court of Human Rights, <i>Reports of Judgments and Decisions 1996-V</i> .
<i>Daniel Dillon</i>	Merits, Judgment, <i>I.C.J. Reports 1949</i> , p. 4.
<i>Dispute regarding Navigational and Related Rights</i>	<i>Daniel Dillon (U.S.A.) v. United Mexican States</i> , decision of 3 October 1928, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 368–371.
<i>The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (arts. 74 and 75)</i>	(<i>Costa Rica v. Nicaragua</i>), Judgment, <i>I.C.J. Reports 2009</i> , p. 213.
<i>Eichmann</i>	Advisory Opinion OC–2/82 of 24 September 1982, Inter-American Court of Human Rights, Series A, No. 2.
	<i>Attorney-General (Israel) v. Adolf Eichmann</i> , ILR, vol. 36 (1961), p. 5.

<i>ELSI</i>	<i>Elektronika Sicula S.p.A. (ELSI) (United States of America v. Italy)</i> , Judgment of 20 July 1989, <i>I.C.J. Reports</i> 1989, p. 15.
<i>English Channel</i>	Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, decisions of 30 June 1977 and 14 March 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271.
<i>Eric Hammel v. Madagascar</i>	Communication No. 155/1983, Views adopted on 1 August 1983, Report of the Human Rights Committee, <i>Official Records of the General Assembly, Forty-second Session, Supplement No. 40 (A/42/40)</i> , annex VIII, p. 133.
<i>Ethiopia/Eritrea</i>	Eritrea–Ethiopia Claims Commission, Partial Award: Civilian Claims–Ethiopia's Claim 5, 17 December 2004, UNRIAA, vol. XXVI (Sales No. E/F.06.V.7), pp. 249–290.
<i>Fisheries Jurisdiction</i>	(<i>Spain v. Canada</i>), Jurisdiction of the Court, Judgment, <i>I.C.J. Reports</i> 1998, p. 432.
<i>Hilaire v. Trinidad and Tobago</i>	Preliminary objections, Judgement of 1 September 2001, Inter-American Court of Human Rights, Series C, No. 80.
<i>H.L.R. v. France</i>	Application No. 24573/94, Judgment (merits) of 29 April 1997, Grand Chamber, European Court of Human Rights, <i>Reports of Judgments and Decisions</i> 1997-III.
<i>Interhandel</i>	(<i>Switzerland v. United States of America</i>), Preliminary Objections, Judgment of 21 March 1959, <i>I.C.J. Reports</i> 1959, p. 6.
<i>Ireland v. the United Kingdom</i>	Application No. 5310/71, Judgement of 18 January 1978, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 25.
<i>Jabari v. Turkey</i>	Application No. 40035/98, Judgement of 11 July 2000, European Court of Human Rights, <i>Reports of Judgments and Decisions</i> 2000-VIII.
<i>Josu Arkauz Arana v. France</i>	Communication No. 63/1997, Views adopted on 9 November 1999, (A/55/44, pp. 87-88), Committee against Torture, <i>Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 44 (A/55/44)</i> , p. 87.
<i>Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization</i>	Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International Fund for Agricultural Development, Request for an advisory opinion transmitted to the Court pursuant to the Executive Board of the IFAD resolution of 22 April 2010, ICJ, 2010 General List No. 146.
<i>Jurisdictional Immunities of the State</i>	(<i>Germany v. Italy</i>), Application instituting proceedings filed in the Registry of the Court on 23 December 2008, ICJ, 2008 General List No. 143.
<i>Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters</i>	(<i>Belgium v. Switzerland</i>), Application instituting proceedings filed in the Registry of the Court on 21 December 2009, ICJ, 2010 General List No. 145.
	Order of 4 February 2010, <i>I.C.J. Reports</i> 2010, p. 8.
<i>Kennedy v. Trinidad and Tobago</i>	Communication No. 845/1999, Views adopted on 2 November 1999, Report of the Human Rights Committee, <i>Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)</i> , vol. II, annex XI.A, p. 258.
<i>LaGrand</i>	(<i>Germany v. United States of America</i>), Judgment, <i>I.C.J. Reports</i> 2001, p. 466.
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i>	Advisory Opinion, <i>I.C.J. Reports</i> 2004, p. 136.
<i>Legality of the Threat or Use of Nuclear Weapons</i>	Advisory Opinion, <i>I.C.J. Reports</i> 1996, p. 226.
<i>Loizidou</i>	<i>Loizidou v. Turkey</i> , Preliminary Objections, Judgment of 23 March 1995, Application No. 15318/89, European Court of Human Rights, <i>Series A: Judgments and Decisions</i> , vol. 310.
<i>Maffezini</i>	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision of the tribunal on objections to jurisdiction of 25 January 2000, ICSID Review—Foreign Investment Law Journal, vol. 16, No. 1 (2001), p. 1; the text of the decision is also available online from https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx .
<i>Mamatkulov and Askarov v. Turkey</i>	Application Nos. 46827/99 and 46951/99, Judgment of 4 February 2005, European Court of Human Rights, <i>Reports of Judgments and Decisions</i> 2005-I.
<i>Mansour Ahani v. Canada</i>	Communication No. 1051/2002, Views adopted on 29 March 2004, Report of the Human Rights Committee, <i>Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)</i> , vol. II, annex IX, BB, p. 260.
<i>Maritime Delimitation in the Black Sea</i>	(<i>Romania v. Ukraine</i>), Judgment, <i>I.C.J. Reports</i> 2009, p. 61.
<i>Medellín v. Texas</i>	<i>Medellín v. Texas</i> , Judgment of 25 March 2008, 552 U.S. 491 (2008).
<i>Military and Paramilitary Activities in and against Nicaragua</i>	(<i>Nicaragua v. United States of America</i>), Merits, Judgment, <i>I.C.J. Reports</i> 1986, p. 14.

<i>Nuclear Tests</i>	(<i>Australia v. France</i>), Judgment of 20 December 1974, <i>I.C.J. Reports</i> 1974, p. 253.
<i>Öcalan v. Turkey</i>	Application No. 46221/99, Judgment of 12 May 2005, European Court of Human Rights, <i>Reports of Judgments and Decisions</i> 2005-IV.
<i>Oil Platforms</i>	(<i>Islamic Republic of Iran v. United States of America</i>), Judgment, <i>I.C.J. Reports</i> 2003, p. 161.
<i>Oviedo</i>	Lino César Oviedo Silva, 26 June 2002, Habeas Corpus No. 19.966, Case No. 2001/0195569-8, Brasília, Superior Tribunal de Justiça.
<i>Pecastaing</i>	<i>Josette Pecastaing v. Belgian State</i> , Case C-98/79, Judgment of 5 March 1980, Court of Justice of the European Communities, <i>European Court Reports</i> , p. 693.
<i>Pulp Mills on the River Uruguay</i>	(<i>Argentina v. Uruguay</i>), Judgment, <i>I.C.J. Reports</i> 2010, p. 14.
<i>Questions relating to the Obligation to Prosecute or Extradite</i>	<i>Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)</i> , Provisional Measures, Order of 28 May 2009, <i>I.C.J. Reports</i> 2009, p. 139.
<i>Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)</i>	Judgment, <i>I.C.J. Reports</i> 2009, p. 3.
<i>Reservations to the Convention on Genocide</i>	Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, <i>I.C.J. Reports</i> 1951, p. 15.
<i>Short v. Iran</i>	Award No. 312-11135-3, Judgment of 14 July 1987, <i>Iran–United States Claims Tribunal Reports (1987-III)</i> , vol. 16, p. 76.
<i>South West Africa</i>	(<i>Ethiopia v. South Africa; Liberia v. South Africa</i>), Second Phase, Judgment, <i>I.C.J. Reports</i> 1966, p. 6.
<i>Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)</i>	Judgment, <i>I.C.J. Reports</i> 2008, p. 12.
<i>Svenska Journalistförbundet</i>	<i>Svenska Journalistförbundet v. Council of the European Union</i> , Case No. T-174/95, Judgment of 17 June 1998, Court of First Instance of the European Communities, <i>European Court Reports</i> 1998, p. II-02289.
<i>Tadić</i>	<i>Prosecutor v. Duško Tadić a/k/a “Dule”</i> , Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, International Tribunal for the Former Yugoslavia, <i>Judicial Reports 1994–1995</i> , vol. I, pp. 352 <i>et seq.</i> See also United Nations, <i>Juridical Yearbook 1995</i> , Part Three, p. 501; and ILM, vol. 35, No. 1 (January 1996), p. 37.
<i>United States Diplomatic and Consular Staff in Tehran</i>	Judgment, <i>I.C.J. Reports</i> 1980, p. 3.
<i>Western Sahara</i>	Advisory Opinion, <i>I.C.J. Reports</i> 1975, p. 12.
<i>Weber v. Switzerland</i>	Application No. 11034/84, Judgment of 22 May 1990, European Court of Human Rights, <i>Judgments and Decisions: Series A</i> , vol. 177.
<i>Whaling in the Antarctic</i>	(<i>Australia v. Japan</i>), Application instituting proceedings filed in the Registry of the Court on 31 May 2010, ICJ, 2010 General List No. 148.
<i>Xuncax et al. v. Gramajo</i>	886 F. Supp. 162 (D. Mass. 1995), 12 April 1995.

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

Pacific settlement of international disputes

Declaration Respecting Maritime Law (Declaration of Paris of 1856) (Paris, 16 April 1856)	<i>British State Papers 1856</i> , vol. LXI, p. 155.
Covenant of the League of Nations (Versailles, 28 April 1919)	League of Nations, <i>Official Journal</i> , No. 1, February 1920, p. 3.

Privileges and immunities, diplomatic and consular relations, etc.

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, <i>Treaty Series</i> , vol. 500, No. 7310, p. 95.
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (Vienna, 18 April 1961)	<i>Ibid.</i> , No. 7312, p. 241.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, No. 8638, p. 261.
Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (Vienna, 24 April 1963)	<i>Ibid.</i> , No. 8640, p. 487.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	A/CONF.117/14.
United Nations Convention on Jurisdictional Immunities of States and their Property (New York, 2 December 2004)	<i>Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)</i> , vol. I, Resolution 59/38.

Human rights

Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004)	<i>Ibid.</i> , vol. 2677–2678, No. 2889, p. 3.
Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (Strasbourg, 27 May 2009)	Council of Europe, <i>European Treaty Series</i> , No. 204.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	United Nations, <i>Treaty Series</i> , vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i>
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989)	<i>Ibid.</i> , vol. 1642, p. 414.
American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990)	<i>Ibid.</i> , vol. 2220, No. 39481, p. 3.
Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (The Hague, 29 May 1993)	<i>Ibid.</i> , vol. 1870, No. 31922, p. 167.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	<i>Ibid.</i> , vol. 2515, No. 44910, p. 3.

International Convention for the Protection of All Persons from Enforced Disappearance
(New York, 20 December 2006)

Official Records of the General Assembly, Sixty-first Session, Supplement No. 49 (A/61/49), vol. I, resolution 61/177, Annex.

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007)

Council of Europe, *European Treaty Series*, No. 201.

Refugees and stateless persons

Convention relating to the Status of Refugees (Geneva, 28 July 1951)

United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.

Protocol relating to the Status of Refugees (New York, 31 January 1967)

Ibid., vol. 606, No. 8791, p. 267.

Convention relating to the Status of Stateless Persons (New York, 28 September 1954)

Ibid., vol. 360, No. 5158, p. 117.

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (Kampala, 22 October 2009)

Available from <http://au.int>.

Narcotic drugs and psychotropic substances

Convention on psychotropic substances (Vienna, 21 February 1971)

United Nations, *Treaty Series*, vol. 1019, No. 14956, p. 175.

International trade and development

General Agreement on Tariffs and Trade (Geneva, 30 October 1947)

United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.

Transport and communications

Convention on road signs and signals (Vienna, 8 November 1968)

United Nations, *Treaty Series*, vol. 1091, No. 16473, p. 3.

Educational and cultural matters

Convention on the Protection and Promotion of the Diversity of Cultural Expressions
(Paris, 20 October 2005)

United Nations, *Treaty Series*, vol. 2440, No. 43977, p. 311.

Penal matters

European Convention on Extradition (Paris, 13 December 1957)

United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273.

Third Additional Protocol to the European Convention on Extradition
(Strasbourg, 10 November 2010)

Council of Europe, *European Treaty Series*, No. 209.

Convention on jurisdiction and the enforcement of judgements in civil and commercial matters
(Lugano, 16 September 1988)

United Nations, *Treaty Series*, vol. 1659, No. 28551, p. 13.

International Convention for the Suppression of Terrorist Bombings
(New York, 15 December 1997)

Ibid., vol. 2149, No. 37517, p. 256.

Rome Statute of the International Criminal Court (Rome, 17 July 1998)

Ibid., vol. 2187, No. 38544, p. 3.

International Convention for the Suppression of the Financing of Terrorism
(New York, 9 December 1999)

Ibid., vol. 2178, No. 38349, p. 197.

International Convention for the Suppression of Acts of Nuclear Terrorism
(New York, 13 April 2005)

Ibid., vol. 2445, No. 44004, p. 89.

Law of the sea

Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958)

United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311.

Convention on the Continental Shelf (Geneva, 29 April 1958)

Ibid., vol. 450, No. 6465, p. 11.

Convention on the High Seas (Geneva, 29 April 1958)

Ibid., vol. 1833, No. 31363, p. 3.

United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)

Ibid., vol. 2167, No. 37924, p. 3.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)

Commercial arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral Awards
(New York, 10 June 1958)

United Nations, *Treaty Series*, vol. 330,
No. 4739, p. 3.

Law of treaties

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)

United Nations, *Treaty Series*, vol. 1155,
No. 18232, p. 331.

Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978)

Ibid., vol. 1946, No. 33356, p. 3.

Vienna Convention on the Law of Treaties between States and International Organizations
or between International Organizations (Vienna, 21 March 1986)

A/CONF.129/15.

Telecommunications

Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation
and Relief Operations (Tampere, 18 June 1998)

United Nations, *Treaty Series*, vol. 2296,
No. 40906, p. 5.

Law applicable in armed conflict

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field
(Geneva, 22 August 1864)

ICRC, *International Red Cross
Handbook*, 12th ed. (1983), p. 19.

Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land:

J. B. Scott (ed.), *The Hague Conventions
and Declarations of 1899 and 1907*,
New York, Oxford University Press.

Hague Conventions I of 1899 (The Hague, 29 July 1899) and 1907
(The Hague, 18 October 1907) for the Pacific Settlement of International Disputes

Convention (II) respecting the limitation of the employment of force for the recovery
of contract debts (The Hague, 18 October 1907)

Regulations concerning the Laws and Customs of War on Land
(annex to the Hague Conventions II and IV of 1899 and 1907)

D. Schindler and J. Toman, *The Laws
of Armed Conflicts*, Martinus Nijhoff,
1988, pp. 69–93.

Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)

United Nations, *Treaty Series*, vol. 75,
Nos. 970–973, p. 31.

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the
protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)

Ibid., vol. 1125, No. 17512, p. 3.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating
to the protection of victims of non-international armed conflicts (Protocol II)
(Geneva, 8 June 1977)

Ibid., No. 17513, p. 609.

Disarmament

Treaty for the Prohibition of Nuclear Weapons in Latin America (“Treaty of Tlatelolco”)
(with annexed Additional Protocols I and II) (Mexico City, 14 February 1967)

United Nations, *Treaty Series*, vols. 634
and 1894, No. 9068, p. 281 and p. 335,
respectively.

Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington,
D.C., 1 July 1968)

Ibid., vol. 729, No. 10485, p. 161.

Convention on the prohibition of military or any other hostile use of environmental
modification techniques (New York, 10 December 1976)

Ibid., vol. 1108, No. 17119, p. 151.

Environment

International Convention for the Regulation of Whaling (Washington, 2 December 1946)

United Nations, *Treaty Series*, vol. 161,
No. 2124, p. 72.

Convention on the Protection and Use of Transboundary Watercourses and International Lakes
(Helsinki, 17 March 1992)

Ibid., vol. 1936, No. 33207, p. 269.

Convention on biological diversity (Rio de Janeiro, 5 June 1992)

Ibid., vol. 1760, No. 30619, p. 79.

Convention to combat desertification in those countries experiencing serious drought and/or
desertification, particularly in Africa (Paris, 14 October 1994)

Ibid., vol. 1954, No. 33480, p. 3.

Convention on the Law of the Non-Navigational Uses of International Watercourses
(New York, 21 May 1997)

*Official Records of the General Assembly,
Fifty-first Session, Supplement No. 49
(A/51/49)*, vol. III, resolution 51/229,
Annex.

Miscellaneous

- Convention on Private International Law (Bustamante Code) (Havana, 20 February 1928)
- Treaty establishing the European Economic Community (Rome, 25 March 1957)
- Treaty instituting the Benelux Economic Union (The Hague, 3 February 1958)
- Convention of application of articles 55 and 56 of the Treaty instituting the Benelux Economic Union (Brussels, 19 September 1960)
- European Social Charter (Turin, 18 October 1961)
- Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) (Lisbon, 13 December 2007)
- European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (Madrid, 21 May 1980)
- Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) (Utrecht, 16 November 2009)
- European Charter of Local Self-Government (Strasbourg, 15 October 1985)
- Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (Utrecht, 16 November 2009)
- Convention on Mutual Administrative Assistance in Tax Matters (Strasbourg, 25 January 1988)
- Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (Paris, 27 May 2010)
- Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen, Luxembourg, 14 June 1985)
- Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen, Luxembourg, 19 June 1990)
- Inter-American Democratic Charter (Lima, 11 September 2001)
- League of Nations, *Treaty Series*, vol. LXXXVI, No. 1950, p. 111.
- United Nations, *Treaty Series*, vol. 294, No. 4300, p. 3. See also the consolidated version of the Treaty establishing the European Community, *Official Journal of the European Communities*, No. C 340, 10 November 1997, p. 173.
- United Nations, *Treaty Series*, vol. 381, No. 5471, p. 165.
- Ibid.*, vol. 480, No. 5471, p. 432.
- Ibid.*, vol. 529, No. 7659, p. 89.
- Ibid.*, vol. 1757, No. 30615, p. 3.
- Official Journal of the European Union*, C 306, vol. 50. Partial publication in United Nations, *Treaty Series*, vol. 2702, No. 47938, p. 3.
- Council of Europe, *Treaty Series*, No. 106.
- Ibid.*, No. 206.
- Ibid.*, No. 122.
- Ibid.*, No. 207.
- Ibid.*, No. 127.
- Ibid.*, No. 208.
- Official Journal of the European Communities*, No. L 239, 22 September 2000, pp. 13–18.
- Ibid.*, pp. 19–62.
- OEA, *Official Documents*, OEA/Ser.G/CP-I. See also ILM, vol. 40, No. 5 (September 2001), p. 1289.

CHECKLIST OF DOCUMENTS OF THE SIXTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/619	Provisional agenda for the sixty-second session	Mimeographed. The agenda as adopted is reproduced on p. viii above.
A/CN.4/620 and Add.1	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session	Mimeographed.
A/CN.4/621	Shared natural resources: feasibility of future work on oil and gas, paper prepared by Mr. Shinya Murase	Reproduced in <i>Yearbook ... 2010</i> , vol. II (Part One).
A/CN.4/622 and Add.1	Effects of armed conflicts on treaties: Comments and information received from Governments	<i>Idem.</i>
A/CN.4/623	Settlement of disputes clauses: Note by the Secretariat	<i>Idem.</i>
A/CN.4/624 and Add.1–2	Fifteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/625 and Add.1–2	Sixth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/626 and Add.1	Sixteenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/627 and Add.1	First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur	<i>Idem.</i>
A/CN.4/628 and Add.1	Expulsion of aliens: Comments and information received from Governments	<i>Idem.</i>
A/CN.4/629	Third report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/630	Survey of multilateral instruments which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>)”, Study by the Secretariat	<i>Idem.</i>
A/CN.4/631	Second report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman A. Kolodkin, Special Rapporteur	<i>Idem.</i>
A/CN.4/632 and Add.1	Filling of casual vacancies in the Commission, Note by the Secretariat	A/CN.4/632 reproduced in <i>Yearbook ... 2010</i> , vol. II (Part One); A/CN.4/632/Add.1 mimeographed.
A/CN.4/633	Shared natural resources: Comments and observations received from Governments	Reproduced in <i>Yearbook ... 2010</i> , vol. II (Part One).
A/CN.4/L.760 and Add.1–3	Reservations to treaties: Text and titles of the draft guidelines provisionally adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.761	Draft report of the International Law Commission on the work of its sixty-second session, chapter I (Introduction)	<i>Idem.</i> See the text approved in <i>Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10</i> (A/65/10). The final text appears in <i>Yearbook ... 2010</i> , vol. II (Part Two).
A/CN.4/L.762	<i>Idem.</i> , chapter II (Summary of the work of the Commission at its sixty-second session)	<i>Idem.</i>
A/CN.4/L.763 and Add.1	<i>Idem.</i> , chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.764 and Add.1–10	<i>Idem.</i> , chapter IV (Reservations to treaties)	<i>Idem.</i>
A/CN.4/L.765	<i>Idem.</i> , chapter V (Expulsion of aliens)	<i>Idem.</i>
A/CN.4/L.766 and Add.1	<i>Idem.</i> , chapter VI (Effects of armed conflicts on treaties)	<i>Idem.</i>
A/CN.4/L.767 and Add.1	<i>Idem.</i> , chapter VII (Protection of persons in the event of disasters)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.768	<i>Idem</i> , chapter VIII (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem</i> .
A/CN.4/L.769	<i>Idem</i> , chapter IX (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem</i> .
A/CN.4/L.770	<i>Idem</i> , chapter X (Treaties over time)	<i>Idem</i> .
A/CN.4/L.771	<i>Idem</i> , chapter XI (The Most-Favoured-Nation clause)	<i>Idem</i> .
A/CN.4/L.772	<i>Idem</i> , chapter XII (Shared natural resources)	<i>Idem</i> .
A/CN.4/L.773 and Add.1	<i>Idem</i> , chapter XIII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.774	Bases for discussion in the Working Group on the topic “The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>)”, paper prepared by Mr. Zdzislaw Galicki, Special Rapporteur	Reproduced in <i>Yearbook ... 2010</i> , vol. II (Part One).
A/CN.4/L.775	Report of the Planning Group	Mimeographed.
A/CN.4/L.776	Protection of persons in the event of disasters: Texts and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010	<i>Idem</i> .
A/CN.4/SR.3036–A/CN.4/SR.3079	Provisional summary records of the 3036th to 3079th meetings	<i>Idem</i> . The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-SECOND SESSION

Held at Geneva from 3 May to 4 June 2010

3036th MEETING

Monday, 3 May 2010, at 3.10 p.m.

Outgoing Chairperson: Mr. Ernest PETRIČ

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-second session of the International Law Commission.

Tribute to the memory of Sir Ian Brownlie, former member of the Commission

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note as Commission members recalled the accidental death of Sir Ian Brownlie, of which he had informed them in January 2010. Sir Ian's untimely death had deprived the international law community of one of its most brilliant practitioners and academics. As a former member of the International Law Commission and one of its Special Rapporteurs, Sir Ian had contributed immensely to the Commission's work.

At the invitation of the outgoing Chairperson, the members of the Commission observed a minute of silence.

Statement by the outgoing Chairperson

3. The OUTGOING CHAIRPERSON provided a brief overview of the discussion held in the Sixth Committee during its consideration of the report of the International Law Commission on the work of its sixty-first session, a topical summary of which was contained in document A/

CN.4/620, except for the comments on the draft articles adopted on first reading on the topic "Responsibility of international organizations", which were summarized in document A/CN.4/620/Add.1. International Law Week had provided an opportunity for delegations to engage in dialogue with some Commission members and Special Rapporteurs present in New York, as they had been encouraged to do by the General Assembly in paragraph 12 of its resolution 59/313 of 12 September 2005. The particular subjects addressed were the responsibility of international organizations, universal jurisdiction and the strengthening of the interaction between the Sixth Committee and the International Law Commission. That dialogue had been continued at the meetings of legal advisers.

4. Based on the consideration of the report of the Commission by the Sixth Committee, the General Assembly had adopted resolution 64/114 of 16 December 2009, in paragraphs 2 and 5 of which it expressed its appreciation to the Commission for the completion, on first reading, of the draft articles on the topic "Responsibility of international organizations"¹ and drew the attention of Governments to the importance for the Commission of receiving their comments and observations by 1 January 2011 on the draft articles and commentaries on the topic. In paragraph 6 of the same resolution, the General Assembly took note of the report of the Secretary-General on assistance to special rapporteurs of the International Law Commission² and of paragraphs 240 to 242 of the report of the Commission on the work of its sixty-first session,³ and requested the Secretary-General to submit to the General Assembly at its sixty-fifth session options regarding additional support for the work of special rapporteurs.

Election of officers

Ms. Xue was elected Chairperson by acclamation.

Ms. Xue took the Chair.

5. The CHAIRPERSON thanked the members of the Commission for the confidence they had placed in her and

¹ *Yearbook ... 2009*, vol. II (Part Two), chap. IV, pp. 19 *et seq.*, paras. 50–51.

² A/64/283.

³ *Yearbook ... 2009*, vol. II (Part Two), pp. 151–152.

paid tribute to the contribution the outgoing Chairperson had made to the success of the sixty-first session.

Mr. Dugard was elected first Vice-Chairperson by acclamation.

Mr. Galicki was elected second Vice-Chairperson by acclamation.

Mr. McRae was elected Chairperson of the Drafting Committee by acclamation.

Mr. Vasciannie was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/619)

The provisional agenda was adopted.

The meeting was suspended at 3.35 p.m. and resumed at 4 p.m.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the Commission's session. The Commission would begin by considering the topic "Reservations to treaties" at the current meeting. Thereafter it would consider the revised draft articles on protection of the human rights of persons who had been or were being expelled and the new draft workplan with a view to structuring the draft articles on the expulsion of aliens, which would be introduced by Mr. Kamto, the Special Rapporteur on the topic. The Drafting Committee would continue its work on reservations to treaties and on the expulsion of aliens. Members who wished to participate in the Drafting Committee in connection with those two topics were invited to contact the Chairperson of the Drafting Committee. In addition, the Commission would receive a visit from the Legal Counsel of the United Nations. Lastly, the Bureau proposed that the next plenary meeting be dedicated to the memory of the late Sir Ian Brownlie.

The programme of work for the first two weeks of the session was adopted.

Reservations to treaties⁴ (A/CN.4/620 and Add.1, sect. B,⁵ A/CN.4/624 and Add.1–2,⁶ A/CN.4/626 and Add.1,⁷ A/CN.4/L.760 and Add.1–3⁸)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR⁹

7. The CHAIRPERSON invited the Special Rapporteur to present the chapter of his fourteenth report on

⁴ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *ibid.*, chapter V, section C, pp. 94 *et seq.*

⁵ Mimeographed; available on the Commission's website.

⁶ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

⁷ *Idem.*

⁸ Mimeographed; available on the Commission's website.

⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2.

reservations to treaties dealing with the effects of reservations and interpretative declarations (paras. 179–290).

8. Mr. PELLET (Special Rapporteur) said that, for a number of reasons, much of the sixty-second session would be devoted to the consideration of reservations to treaties. First of all, the time had come to complete the study, which had been in progress for more than 15 years, owing to the highly technical nature of the topic and the complex problems of principle to which it gave rise. Secondly, the Special Rapporteur was particularly anxious to finish it, as he planned to leave the Commission at the end of the sixty-third session. Lastly, it so happened that the Commission, and in particular the Drafting Committee, did not have a large amount of other work scheduled for the first part of the session. Reservations to treaties would therefore constitute the bulk of the programme of work.

9. The Commission had before it, among other things, the chapter of his fourteenth report on reservations to treaties dealing with the effects of reservations and interpretative declarations (paras. 179–290). He would begin by introducing the draft guidelines under the subsection beginning with draft guideline 4.1 (Establishment of a reservation) (paras. 179–236); they constituted the first section of Part 4, which dealt more generally with the legal effects of reservations and interpretative declarations. He would then introduce the draft guidelines under section 4.2 (Effects of an established reservation) (paras. 237–290). These sections 4.1 and 4.2 constituted the final chapter of the fourteenth report, consideration of which the Commission had begun at its sixty-first session.¹⁰ However, the Commission still needed to finalize sections 3.4, 3.5 and 3.6 concerning the permissibility of acceptances of and objections to reservations of interpretative declarations and of approval of, opposition to or recharacterization of an interpretative declaration—the formulation of which had been revised by the Drafting Committee (A/CN.4/L.760) but had not yet been debated by the plenary Commission.¹¹

10. Other documents were also before the Commission, and he hoped that they could be discussed in a plenary meeting and by the Drafting Committee prior to the end of the first part of the session. He was referring, in particular, to his sixteenth report (A/CN.4/626 and Add.1), which dealt with reservations in the case of the succession of States. The greater part of that report was based on the excellent memorandum that had been prepared by the Secretariat on the matter.¹² As the sixteenth report would form the basis for Part 5 of the Guide to Practice, he proposed that the Commission begin considering it as soon as it had completed its consideration of the fourteenth report. If he seemed to have skipped over his fifteenth report (A/CN.4/624 and Add.1–2), it was because it was in a sense merely a continuation of his fourteenth report and had been assigned a separate symbol for technical reasons that appeared to be somewhat rigid in nature. He also planned to introduce a seventeenth report, which, in keeping with his previous practice, would begin with a summary of the preceding session. The seventeenth report would also

¹⁰ *Ibid.*, vol. II (Part Two), chap. V, sect. B, pp. 79 *et seq.*

¹¹ See, below, the 3051st meeting, paras. 78–113.

¹² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/616.

contain two annexes: one on the reservations dialogue and the other on the settlement of disputes concerning reservations. It would mark the end of the Guide to Practice, and the Commission would then have to decide whether it wished to proceed to a traditional second reading or to envisage a special procedure, in view of the exceptional nature of the instrument.

11. Introducing the chapter of his fourteenth report dealing with the effects of reservations and interpretative declarations (paras. 179–290), he said that it concerned a crucial aspect of the topic under consideration, namely the legal effects of reservations and interpretative declarations, which would constitute Part 4 of the Guide to Practice. He expressed his appreciation for the valuable contribution made by Daniel Müller to that effort. The question of the effects of reservations was covered in an often partial and ambiguous fashion by articles 20 and 21 of the Vienna Convention on the Law of Treaties (hereinafter “the 1969 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the 1986 Vienna Convention”); nevertheless, the Commission had agreed not to tamper with the substance of the provisions of those Conventions, despite their peculiarities, and he was therefore bound to respect that agreement. An analysis of the articles and the *travaux préparatoires* relating to them could be found in paragraphs 183 to 196 of the report.

12. It seemed logical to address the issue of effects beginning with the effects produced by valid reservations, and in particular, those referred to as “established”. Valid reservations were those that met the conditions for formal validity and for permissibility, terms defined in the Guide to Practice, in Parts 2 and 3, respectively. Common article 21 of the 1969 and 1986 Vienna Conventions was based on a logical and clear distinction—albeit only in appearance—between the various effects of an established reservation. Paragraph 1 of that article deserved careful consideration, as it referred to the effects of a “reservation established with regard to another party in accordance with articles 19, 20 and 23”. It therefore specified when and how a reservation was established, which was important, as it implied that the establishment of a reservation was a condition for the reservation to produce the normal effects attributed to it by article 21 in the absence of an objection. (The effects of an objection would be dealt with subsequently in the fifteenth report.) In view of the fact that articles 19, 20 and 23 of the Vienna Conventions would be reproduced in full in the Guide to Practice, it might seem necessary and sufficient to adopt a guideline stating that a reservation was deemed to be established from the moment it met the conditions set out in the guidelines reproducing those three articles. While that would be convenient, things were unfortunately not that simple, since the comprehensive references in article 21 to articles 19, 20 and 23 were rather cavalier. Article 23, for example, set out only some of the conditions for the formal validity of reservations, while article 20, paragraph 4 (b), merely described the legal effect of an objection to a reservation.

13. That was perhaps attributable to ineptitude or, more likely still, to a past legacy. It was only at a very late stage

in the drafting of the Vienna Convention that States had decided to reverse the traditional presumption that an objection to a reservation precluded the entry into force of a treaty, at least as between the reserving and objecting States. That presumption had been maintained by the Commission, despite its belated conversion to the flexible system of reservations. The consequence of that traditional presumption was that the question of the effect on treaty relations of a reservation to which an objection had been made did not arise, since the reservation precluded such relations. That was the position that had been maintained by the International Law Commission and its Special Rapporteur, Sir Humphrey Waldock, until 1966,¹³ as indicated in paragraphs 202 and 203 of the current report.

14. Things would nevertheless change with the reversal of that traditional notion. Once it became possible for the reserving State and the objecting State to be bound by a treaty in spite of the reservation, the reservation would produce certain effects on their relations; it would do so even though the reservation in question was not established, inasmuch as there was no consent, which was in conformity with article 20 of the 1969 Vienna Convention, but to which article 21, paragraph 1, nevertheless referred. The non-establishment of the reservation was consistent with the principle enunciated by the International Court of Justice (ICJ) in its advisory opinion of 1951 on *Reservations to the Convention on Genocide*—a principle that had been recalled by Sir Humphrey Waldock in his first report¹⁴ and that, in the view of the Special Rapporteur, remained completely valid; in that opinion, the Court stated: “It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto” [p. 21]. In other words, not only were the comprehensive references to articles 20 and 23 debatable, but also, and most importantly, the *chapeau* of article 21 remained rather allusive in its description of basic elements specifying what constituted an established reservation, namely that a reservation was established: (a) if it met the requirements for permissibility set out in article 19—which meant that it must be compatible with the object and purpose of the treaty; (b) if it also met the conditions for formal validity set out in article 23 of the Vienna Convention; and (c) if it was accepted by the other contracting party. If the latter formulated an objection, the reservation could possibly produce certain effects but it could not be deemed to be established.

15. That was the sense of draft guideline 4.1, which appeared in paragraph 206 of the fourteenth report and which read: “A reservation is established with regard to another Contracting Party if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the other Contracting Party has accepted it.” However, that was merely a general principle that needed to be qualified and to which certain exceptions applied, as demonstrated by article 20 of the 1969 Vienna

¹³ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, draft articles on the law of treaties, p. 193. See also *Yearbook ... 1962*, vol. II, document A/CN.4/144 (first report on the law of treaties by Sir Humphrey Waldock), pp. 62–68 (commentary to draft articles 17–19).

¹⁴ *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 63 (para. (2) of the general commentary to articles 17–19).

Convention. According to that article, the rules applicable to the normal effects of a reservation did not, in fact, apply when the reservation was expressly authorized by the treaty, when the treaty was a multilateral treaty all provisions of which had to be applied in their entirety and/or when the treaty was the constituent instrument of an international organization. The first hypothesis, that of expressly authorized reservations, was addressed in article 20, paragraph 1: “A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States”. That was logical, since in that case the other parties’ consent to the reservation had been given in advance. But it was also necessary, in that case, for the authorization to be express and not implicit, as had wrongly been envisaged by the Commission in its draft article in 1966, a position that would not be compatible with the basic principle of respecting the object and purpose of the treaty. That conclusion followed from guideline 3.1.3, which had been provisionally adopted by the Commission at its fifty-eighth session¹⁵ and appeared in the Guide to Practice. The same reasoning applied when the treaty authorized reservations in general: granted, they were authorized by the treaty, but the authorization must be interpreted as being subject to the general regime of reservations in the framework of the Vienna Conventions, since a reservation could not logically be considered to be established if it deprived the treaty of its substance, in other words, if it was contrary to the object and purpose of the treaty.

16. It was clear from those considerations that the expression “[a] reservation expressly authorized by a treaty” referred either to reservations expressly excluding certain provisions of the treaty or to what was sometimes referred to as “negotiated reservations”—reservations whose very content was contained in the treaty.

17. Those complex and varied considerations were the ones that draft guideline 4.1.1 (Establishment of a reservation expressly authorized by the treaty) (para. 220) attempted to synthesize in three paragraphs:

“A reservation expressly authorized by the treaty is established with regard to the other Contracting Parties if it was formulated in accordance with the form and procedure specified for the purpose.

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

“The term ‘reservation expressly authorized by the treaty’ applies to reservations excluding the application of one or more provisions of the treaty or modifying the legal effect of one or more of its provisions or of the treaty as a whole, pursuant to and to the extent provided by an express provision contained in the treaty.”

18. What was important in that regard was to make it clear that the authorization to formulate a reservation was not a sort of blank check or licence to undermine the object and purpose of the treaty, since, if it was not compatible

with the object and purpose, the reservation could not be deemed to be established. Of course, as was indicated in paragraph 222 of his report, if a reservation was thus established, it meant that the contracting parties could no longer object to it. He nevertheless had not proposed an express draft guideline along those lines because, in his view, that conclusion seemed to go without saying, and it would suffice to mention it in the commentary.

19. The second specific case was that envisaged in article 20, paragraph 2, of the 1969 Vienna Convention concerning treaties with limited participation. Such treaties were the only remaining vestiges of the traditional system that required the unanimous acceptance of reservations before they could be considered established. Paragraphs 224 to 228 of the fourteenth report described the *travaux préparatoires* of that provision and showed how it had been profoundly changed following the general reorientation of the project by Sir Humphrey Waldock, when he had persuaded the Commission to switch to the flexible system recommended by the ICJ in its 1951 advisory opinion. From then on, treaties with limited participation were no longer defined solely by the number of participants to which they were opened for signature, but also, and perhaps more so, by the intention of the parties to preserve the integrity of the treaty completely, which might be based on its object and purpose. However, that clarification hardly helped to narrow down the notion of a treaty with limited participation. As he had shown in paragraphs 230 to 232 of his report, the wording of article 20, paragraph 2, contained other “mysteries”, or rather gaffes, in the wording of the Vienna Convention. However, he had not considered it appropriate to correct the drafting weaknesses of that paragraph when he had elaborated draft guideline 4.1.2 (Establishment of a reservation to a treaty with limited participation), which followed article 20, paragraph 2, rather closely and read:

“A reservation to a treaty with limited participation is established with regard to the other Contracting Parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if all the other Contracting Parties have accepted it.

“The term ‘treaty with limited participation’ means a treaty of which the application in its entirety between the parties is an essential condition of the consent of each one to be bound by the treaty.”

20. Draft guideline 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization) expressed the general principle deriving from article 20, paragraph 3, of the Vienna Convention, that the establishment of a reservation to the constituent instrument of an international organization required the acceptance of the competent organ of that organization. That requirement had already been recalled in guideline 2.8.7 of the Guide to Practice, but that reminder appeared in Part 2 of the Guide and concerned the procedure for the acceptance of a reservation to a constituent instrument of an international organization. Guideline 2.8.7 reproduced the text of article 20, paragraph 3, common to the 1969 and 1986 Vienna Conventions, whereas guidelines 2.8.8 to 2.8.11, which the Commission had already adopted,

¹⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 154–155.

spelled out the meaning and consequences of the concepts of the organ competent to accept a reservation to a constituent instrument, the modalities of the acceptance of a reservation to a constituent instrument, the acceptance of a reservation to a constituent instrument that had not yet entered into force and the reaction by a member of an international organization to a reservation to its constituent instrument (para. 235 of the report). He proposed the following wording for draft guideline 4.1.3:

“A reservation to a constituent instrument of an international organization is established with regard to the other Contracting Parties if it meets the requirements for permissibility of a reservation and was formulated in accordance with the form and procedures specified for the purpose, and if the competent organ of the organization has accepted it in conformity with guidelines 2.8.7 and 2.8.10.”

Expulsion of aliens¹⁶ (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2,¹⁷ A/CN.4/628 and Add.1¹⁸)

[Agenda item 6]

DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPOREUR¹⁹

21. Mr. KAMTO (Special Rapporteur) introduced the changes made to chapter 4 (Protection of the human rights of persons who have been or are being expelled) of the draft articles on the expulsion of aliens following the Commission's consideration of the fifth report on the topic.²⁰ He explained that when the Commission had considered the report, it appeared that a large majority of the Commission members did not understand what he had meant to say about the protection of the human rights of persons who had been or were being expelled as a limitation on the State's right of expulsion. The Commission had wanted the principle of full protection of the rights of persons who had been or were being expelled to be clearly stated in the context of the expulsion of aliens and had therefore requested that draft article 8 be reformulated in that sense.

22. Following the same logic, the Commission had also requested a restructuring of draft articles 9 to 14 that took into account the changes proposed to some of those draft articles during the debate, so that the set of draft articles 8 to 14 contained in the fifth report could be referred to the Drafting Committee.

¹⁶ At its sixty-first session in 2009, the Commission began the consideration of the fifth report of the Special Rapporteur (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611) and decided to leave to the sixty-second session the consideration of draft articles 8 to 14 as revised and restructured by the Special Rapporteur in light of the discussion in plenary (*ibid.*, document A/CN.4/617) (*Yearbook ... 2009*, vol. II (Part Two), chap. VI, sect. B, p. 129, para. 91). For the Commission's consideration of draft articles 1 to 7 introduced by the Special Rapporteur, see *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

¹⁷ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

¹⁸ *Idem.*

¹⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617.

²⁰ *Ibid.*, document A/CN.4/611.

23. As set out in the document containing the revised and restructured draft articles on the protection of the human rights of persons who have been or are being expelled (hereinafter “restructured draft articles”), the set of draft articles had been restructured into a chapter 4²¹ with four sections entitled, respectively, “General rules”, “Protection required from the expelling State”, “Protection in relation to the risk of violation of human rights in the receiving State” and “Protection in the transit State”.

24. The general rules were set out in draft articles 8, 9 and 10.

25. Draft article 8 (General obligation to respect the human rights of persons who have been or are being expelled) incorporated the changes proposed during the plenary debate. The term “fundamental rights” had been replaced by the broader and non-limitative term “human rights”. The phrase “in particular those mentioned in the present draft articles” had been inspired by the plenary debate; its purpose was to emphasize not only that there was no intention to establish a hierarchy among the human rights to be respected in the context of expulsion, but also that the rights specifically mentioned in the draft articles were neither exhaustive nor exclusive.

26. Draft article 9 (Obligation to respect the dignity of persons who have been or are being expelled) corresponded to former draft article 10 but had been moved forward in section A, “General rules”, in order to emphasize that it was general in scope. Paragraph 1 of former draft article 10, setting forth the general rule that human dignity was inviolable, had been eliminated in order to indicate that the right to dignity was being considered in the specific context of expulsion rather than in a general context.

27. Draft article 10 (Obligation not to discriminate [Non-discrimination rule]), which corresponded to former draft article 14, had also been moved forward into section A, “General rules”, in order to emphasize that it was general in scope. In paragraph 2, the phrase “among persons who have been or are being expelled” had been added to take into account the comments of several Commission members who had stressed that, in that context, the discrimination prohibited was discrimination among the aliens subject to expulsion, not discrimination between such aliens and the nationals of the expelling State.

28. Section B (Protection required from the expelling State) comprised draft articles 11, 12 and 13.

29. Draft article 11 (Obligation to protect the lives of persons who have been or are being expelled) combined paragraph 1 of former draft guideline 9 and paragraph 1, which had become paragraph 2, of former draft article 11. That rearrangement was in response to the strongly expressed desire of some Commission members to differentiate the obligations of the expelling State from those

²¹ Chapter 4 and its title, “Protection of the human rights of persons who have been or are being expelled”, correspond to the new draft workplan presented by the Special Rapporteur (*ibid.*, document A/CN.4/618). It replaces the text entitled “Limits relating to the requirement of respect for fundamental human rights”, contained in the fifth report (*ibid.*, document A/CN.4/611).

of the receiving State. The phrase “in a territory under its jurisdiction” had been added in paragraph 2 in order to take into account the concerns expressed by other Commission members.

30. Draft article 12 (Obligation to respect the right to family life) corresponded to former draft article 13. The phrase “to private life” had been eliminated from the title and from paragraph 1 of the draft article, as some Commission members wished. The words “by law” had been changed to read “by international law”, as other Commission members had requested.

31. Draft article 13 (Specific case of vulnerable persons) had been taken from former draft article 12, which had dealt with the specific case of the protection of children being expelled. It had been expanded to cover all vulnerable persons, as indicated by its title. Paragraph 1 specified what persons were meant, and paragraph 2 was a new provision, which replaced paragraph 2 of the former draft article. It stressed that when a child was involved in expulsion, the child’s best interests must prevail; in some cases the child’s best interests might require the child to be detained in the same conditions as an adult so that the child was not separated from the adult.

32. In his sixth report (A/CN.4/625 and Add.1–2), he planned to formulate a draft article (x) on conditions of custody (or detention, since those two terms were examined in his sixth report) of persons who had been or were being expelled.

33. Section C (Protection in relation to the risk of violation of human rights in the receiving State) consisted of draft articles 14 and 15.

34. Draft article 14 (Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled) was a reformulation of former draft article 9, particularly paragraph 1 thereof, which sought to take into account the desire expressed by some Commission members to extend the scope of protection of the right to life to all expelled persons. That provision of general scope also covered the situation of asylum seekers, which therefore did not require separate treatment. Some Commission members would have preferred to generalize the principle of *non-refoulement* in order for the protection thus afforded to extend to all persons who had been or were being expelled, whether or not they were lawfully present. On that point, it should be recalled that the principle of *non-refoulement* was a fundamental principle of international refugee law. As such, it had been incorporated, since the 1951 Convention relating to the Status of Refugees, in many conventions and declarations of principle at both the universal and regional levels. However, the principle of *non-refoulement* had passed beyond the bounds of international refugee law to become part of international humanitarian law, and it was also deemed to be an integral part of international human rights protection.

35. With specific reference to the field of human rights, the principle had been introduced into a number of international instruments, notably in article 22, paragraph 8, of the 1969 American Convention on Human Rights: “Pact

of San José, Costa Rica” and in article 3, paragraph 1, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

36. However, only the provisions of the American Convention on Human Rights: “Pact of San José, Costa Rica” expressly accorded the principle of *non-refoulement* general scope with respect to human rights. Article 22, paragraph 8, of the Convention provided: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.” That provision echoed article 3 of the Universal Declaration of Human Rights,²² which stated: “Everyone has the right to life, liberty and security of person.” The provision had been taken up, with differences or nuances of formulation, in a variety of international human rights instruments (International Covenant on Civil and Political Rights, African Charter on Human and Peoples’ Rights, Arab Charter on Human Rights²³).

37. While noting the preference expressed by some Commission members for a formulation tending towards the abolition of the death penalty, he did not believe that he should make changes in that sense to the provision contained in paragraph 2 of draft article 14 for the reasons explained in paragraph 58 of his fifth report.

38. Paragraph 3 had been added in order to address a concern expressed by the Drafting Committee when it had considered draft article 6 (Non-expulsion of stateless persons).

39. Draft article 15 (Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment) corresponded to former draft article 11, which had been divided in two because of the need, strongly expressed by some Commission members, to distinguish, when restructuring former draft articles 8 to 14, between the protection of the human rights of an alien who had been or was being expelled which was required in the expelling State and the protection required in the receiving State. Draft article 15 drew on paragraphs 2 and 3 of former draft article 11. The words “and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection” had been added to former paragraph 3 in order to reflect the jurisprudence of the European Court of Human Rights in the case of *H.L.R. v. France*.

40. Section D (Protection in the transit State) consisted of draft article 16 (Application of the provisions of this chapter in the transit State). The provision had been added in order to complete the set of provisions governing the rights of the expelled person during the entire process and the whole of the journey from the expelling State to the receiving State. Of course, the question had arisen as to whether all the provisions relating to the protection of human rights applied automatically in the transit State. At

²² General Assembly resolution 217 A (III) of 10 December 1948.

²³ Adopted at Tunis in May 2004, at the 16th Summit of the League of Arab States (for the English version, see *Boston University International Law Journal*, vol. 24, No. 2 (2006), p. 147).

the current stage of reflection on the topic, he did not see why, in that regard, a distinction should be made in regard to the protection of human rights depending on whether the person in question was in the expelling State or the transit State, or even in the receiving State.

41. With regard to the new draft workplan presented by the Special Rapporteur with a view to structuring the draft articles,²⁴ he explained that he had felt the need to introduce it following the plenary debates on his third²⁵ and fifth²⁶ reports on the expulsion of aliens, where on occasion it had happened that members' comments, despite being well founded and legitimate, had anticipated chapters that had not yet been elaborated. He had therefore considered it useful to provide an overview of the treatment of the topic as he envisaged it through the new workplan, Parts Two and Three of which were obviously not very detailed as they were still in the process of being developed.

42. Part One, which concerned general rules, had been completed at the same time as his sixth report, which he would introduce at the sixty-third session of the Commission.

43. With regard to the two last parts, which concerned, respectively, expulsion procedures and the legal consequences of expulsion, he intended to prepare a report on them, which he would submit to the Commission in the course of the current session, his objective being to submit the entire set of draft articles on the topic to the Commission at its sixty-second session.

The meeting rose at 5.40 p.m.

3037th MEETING

Tuesday, 4 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

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

Tribute to the memory of Sir Ian Brownlie, former member of the Commission (concluded)

1. The CHAIRPERSON recalled that at the previous meeting, members of the Commission had observed a minute of silence in memory of Sir Ian Brownlie, who had served on the Commission from 1997 to 2008 and had

chaired it in 2007. In his many appearances before the International Court of Justice, he had helped to shape its jurisprudence; as lead counsel for Nicaragua,²⁷ he had played a crucial role in the Court's historic judgment in *Military and Paramilitary Activities in and against Nicaragua*. His scholarly writings addressed a wide range of topics, including African boundaries, State responsibility and human rights; his *Principles of Public International Law*²⁸ was a classic text on that subject.

2. In the International Law Commission, he had made a substantial contribution as Special Rapporteur on the effects of armed conflicts on treaties. He would be remembered for his sound judgement, formidable integrity and independent mind.

3. Mr. PELLET said he had been devastated to hear of the passing of a mentor, accomplice—and sometimes adversary. As a junior member of the team headed by Sir Ian in the *Military and Paramilitary Activities in and against Nicaragua* case, he had been impressed by his intimate knowledge of the Court and its proceedings. When they had subsequently worked on the same or opposing legal teams, he had always had great respect for Sir Ian, even when they disagreed. Within the Commission, while they had sometimes differed on the substance of legal matters, they had still been good friends. Sir Ian had been an excellent companion, a good-natured man with a wonderful sense of humour.

4. Mr. HASSOUNA said that in his work entitled *International Law and the Use of Force by States*,²⁹ Sir Ian had gained the admiration of African legal experts for his defence of the small, fragile States of that region. His *African Boundaries: a Legal and Diplomatic Encyclopaedia*,³⁰ was a much valued text. *Basic Documents on Human Rights*,³¹ which he had edited, attested to his profound belief in the need to defend human rights.

5. As a member and Chairperson of the Commission, he had combined academic depth with a barrister's experience. He had been able to forge compromise, sometimes using his British sense of humour to defuse tension. He would be remembered for his achievements by academics, as well as by practitioners of international law.

6. Mr. VARGAS CARREÑO noted that Sir Ian had consistently enriched the Commission's debates through his profound knowledge of international law. His efforts as Special Rapporteur on the effects of armed conflicts on treaties had culminated in the adoption on first reading of the relevant draft articles. His writings were essential texts for the teaching of international law, noteworthy for their clarity.

²⁷ I.C.J. Pleadings, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, vol. III, pp. 41–79 and pp. 98–101, and vol. V, pp. 147–174 and 224–234.

²⁸ I. Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, 2008.

²⁹ I. Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1991.

³⁰ I. Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, London, C. Hurst and Co, 1979.

³¹ I. Brownlie and G. S. Goodwin-Gill (eds.), *Basic Documents on Human Rights*, 5th ed., Oxford University Press, 2006.

²⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/618.

²⁵ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

²⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

7. Mr. GALICKI said he had first met Sir Ian through his published works, which were recognized worldwide as valuable research guides. Sir Ian had had a very classical approach to public international law, sparked with originality and intellectual independence, a mixture that was especially visible in his conception of the effects of armed conflicts on treaties. Among his outstanding traits were linguistic precision, great optimism and deep devotion to his family.

8. Though sorrow was the legacy of his passing, Sir Ian had also left another legacy in his writings. *Principles of Public International Law* and his other works would ensure that he would not be forgotten.

9. Mr. CAFLISCH said that the Commission had lost a great friend and the academic and professional worlds had suffered a great loss. Sir Ian had brought much to the Commission.

10. As Special Rapporteur, he had tackled one of the most thorny topics in international law, one that had long defied codification. He himself was both pleased and apprehensive about pursuing that codification effort, having succeeded him as Special Rapporteur on the effects of armed conflict on treaties.

11. *Principles of Public International Law* and Sir Ian's other works revealed him to be not only a gifted scholar but also an able practitioner of international law. While a formidable opponent as a barrister, he had never let disagreements poison friendly or collegial relations. His sense of humour and of humanity, as well as his ferocious intolerance of intellectual posturing, would be much missed.

12. Mr. DUGARD said that Sir Ian had taught and supervised many African students who today played a prominent role in international law. His seminal work on African boundaries was essential for an understanding of the political map of the continent. He had appeared before the ICJ in over 40 cases, many of them involving African countries. The *Military and Paramilitary Activities in and against Nicaragua* case, in which he had been lead counsel, had emboldened countries in the developing world, and in Africa in particular, to bring cases before the Court.

13. In the Court, Sir Ian had repeatedly taken on unpopular causes that had not been espoused by his own Government and on a number of occasions had even appeared against the United Kingdom of Great Britain and Northern Ireland. Sir Ian had been an expert in many fields and had made a major contribution in many areas, particularly State responsibility and diplomatic protection.

14. As a member of the Commission, he had been entertaining, humorous, light-hearted and at times confrontational. He had above all been someone to whom every member of the Commission had listened with great interest.

15. Mr. SINGH said that Sir Ian had been as successful in his practice before the courts as in the academic community. He had been widely respected for his integrity and his knowledge of international law. His books were read by students, practitioners and judges the world over.

16. He had represented India in a case before the ICJ in 1999 and 2000 [*Aerial Incident of 10 August 1999*] and had been made an honorary member of the Indian Society of International Law. His loss would be deeply felt by all in the international community, especially by those who had known and worked with him.

17. Sir Michael WOOD said that he had never worked on the same legal team as Sir Ian, but had sometimes been on the opposing side—which was, arguably, where one learned best to appreciate another advocate's merits. The fact that Sir Ian had often represented parties against his own Government had probably enhanced rather than diminished his reputation among international lawyers, and even with his Government. Her Majesty had twice honoured him for his contribution to international law.

18. Sir Ian had strongly believed that everyone, however unattractive their cause, should have access to a lawyer. He had been an unashamed positivist, but at the same time had had the mix of idealism and realism so necessary for the practising lawyer. It would be a fitting tribute if Sir Ian's memory inspired the Commission to even greater achievements in the remainder of the quinquennium and beyond.

19. The CHAIRPERSON said that it had been a great honour and privilege to have worked with Sir Ian in the Commission. She had learned much from him and had been impressed by his dedication to the cause of international law. In 2009, Sir Ian had visited China for the first time, and had promised to return. Although that would no longer be possible, she was certain that his great contributions in the field of international law would always be remembered by Chinese lawyers.

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

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR³² (continued)

20. Mr. GAJA said that the Special Rapporteur's general approach was convincing, even when the Guide to Practice seemed to be more akin to a "critique of practice".

21. In draft guideline 4.1, the Special Rapporteur introduced a new category of reservation, that of established reservations. It was new because in State practice and international jurisprudence, whether or not a reservation was "established" was not usually a matter for consideration. The category did not appear in either of the 1969 and 1986 Vienna Conventions, common article 21, paragraph 1, which merely spoke of a "reservation established with regard to another party in accordance with articles 19, 20 and 23" with reference to reservations that met certain substantive and procedural criteria and that had been accepted. While the category of established reservations might facilitate the elaboration of certain draft guidelines, for example draft guideline 4.2, the Commission could also dispense with it to focus directly on the effects which the

³² See footnote 9 above.

reservations produced when they met the same substantive and procedural conditions, including acceptance.

22. He agreed with the distinction drawn between an expressly authorized reservation, whose content must be sufficiently predetermined in the treaty, and a specified reservation, whose content could be enunciated less precisely, simply by reference to specific articles of a convention. It would, however, be useful to include in the commentary some mention of the 1982 advisory opinion of the Inter-American Court of Human Rights on *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (arts. 74 and 75), which took a stance that differed from the one chosen by the Special Rapporteur.

23. Article 20, paragraph 2, of the 1969 Vienna Convention described a situation in which the application of a treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty. Such treaties were referred to in draft guideline 4.1.2 as treaties “with limited participation”. However, the scope of that term extended beyond the type of treaty described in article 20, paragraph 2, which in fact referred to a subcategory of treaties with limited participation. There were treaties with limited participation to which the requirement of unanimous acceptance of reservations did not apply, such as those that had first emerged under the flexible regime of the Pan American Union. It would be useful to cite examples of State practice illustrating the category of treaties described in article 20, paragraph 2; possibly, a more appropriate term for them than “treaties with limited participation” should be sought.

24. The commentary to draft guideline 4.1.3 could perhaps elucidate the reasons underlying an idea brought up in the report and implicit in draft guideline 4.1.3, namely that a reservation to a constituent instrument of an international organization needed to be accepted only by the competent organ of the organization and not necessarily by its members. The commentary could explain, for example, that it had been necessary to find a uniform solution applicable to all members of the organization. While another uniform solution might be to require, in addition, that reservations be accepted by all the members of the organization, that solution would ultimately render acceptance of the reservations by the competent body of the organization completely superfluous.

25. In conclusion, he was in favour of referring draft guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 to the Drafting Committee, provided that the question of whether the category of “established reservations” was to be included was left pending, subject to further consideration in the Drafting Committee.

26. Mr. NOLTE said that the Commission had arrived at a crucial stage in its work on reservations to treaties: the effects of reservations and interpretative declarations were probably the most difficult and controversial aspect of the whole endeavour. It was therefore particularly commendable that the Special Rapporteur had delved back into the *travaux préparatoires* of the 1969 Vienna Convention in order to identify the ideas and objectives underlying its reservations regime.

27. He fully endorsed the Special Rapporteur’s suggestion that a clear distinction be drawn between the effects of permissible and impermissible reservations, as the lack of such a distinction was one of the recognized weaknesses of the Vienna Convention. On the other hand, the usefulness and possible implications of such a distinction depended on how clearly it could be drawn, as had been illustrated by the Commission’s discussion of draft guideline 3.3 (Consequences of the non-permissibility of a reservation). It was therefore worrying that the Special Rapporteur had described as “far from clear-cut” and even “enigmatic” the most important criterion for determining the permissibility of a reservation, namely its compatibility with the object and purpose of a treaty. Although he agreed that this criterion was far from clear-cut, he did not believe that its application was any more enigmatic than that of the many other criteria in which the object and purpose of a rule or a treaty came into play. The Commission should accordingly assume that the criterion was applicable, but when spelling out the various effects of permissible and impermissible reservations, it should refrain from attributing greater clarity to the distinction between those effects than was warranted, given the lack of clarity of the criteria on which they were based.

28. As to the effects of permissible reservations, he admitted feeling somewhat confused by the Special Rapporteur’s use of the term “established reservation”. While the purpose was to distinguish between permissible reservations that had been accepted by other parties and those to which an objection had been made, that implied that the establishment of a reservation was essentially a relative concept: a reservation was “established” *vis-à-vis* those States that had accepted it and was not “established” *vis-à-vis* those States that had formulated an objection to it. However, elsewhere in the report, the Special Rapporteur had used language suggesting that the establishment of a reservation was an absolute concept, or a concept with *erga omnes* effect. In paragraph 201 of his fourteenth report, for example, he stated that “a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1”.

29. As he understood the Special Rapporteur’s argument, particularly in paragraph 205 of the fourteenth report, the “establishment” of a reservation was to be seen in relative terms. If that was the case, then he agreed with the Special Rapporteur’s substantive points concerning the effects on the entry into force of the treaty. However, the term “established” reservation was somewhat misleading, since it simply described a reservation that was fully effective *vis-à-vis* those States that had accepted it.

30. It was also confusing that a reservation that was not established *vis-à-vis* an objecting State could nevertheless have the limited effects on that State described in article 21, paragraph 3, of the Vienna Conventions. In his fifteenth report (A/CN.4/624 and Add.1–2), the Special Rapporteur used the term “valid” reservations, thereby increasing the confusion: a reservation could be both permissible and valid, while still not being “established”. Perhaps the *erga omnes partes* effect suggested by the term “establishment” could be clarified in the course of the drafting process.

31. With regard to expressly authorized reservations, described in paragraphs 208 to 222 of the fourteenth report, the question was whether they precluded the formulation of objections. While that might be true in most cases, in some instances the possibility of formulating an objection might depend on the interpretation of the treaty in question. Perhaps the parties, by authorizing specific reservations, were merely emphasizing that such reservations were not contrary to the object and purpose of the treaty, while preserving contracting parties' opportunity to object to those reservations. In contrast to Derek Bowett's reasoning³³ cited in paragraph 222, he did not consider it a logical necessity that by making the permissibility of a reservation "the object of an express agreement", the parties renounced any right to object to such a reservation. The arbitral award in the *English Channel* case, to which the Special Rapporteur referred in paragraph 215 of his report, did not exclude that possibility either.

32. The parties to a treaty might have a variety of reasons for allowing reservations, as evidenced by the discussion in the report of clauses that permitted the general authorization of reservations, which the Special Rapporteur rightly did not wish to treat as *a priori* acceptance that would exclude objections. The existence of treaty clauses that explicitly permitted reservations but that also allowed objections would require that draft guideline 4.1.1 be reformulated, since an expressly authorized reservation against which an objection could be formulated could not be deemed to be "established" as the Special Rapporteur used the term. The point was not whether the content of the reservation was sufficiently predetermined by the treaty, as suggested by the Special Rapporteur in paragraph 218 of his fourteenth report, but whether the purpose of the authorization to formulate reservations that had been incorporated in the treaty was to anticipate their acceptance by all the other parties.

33. He wished to make a similar point with regard to reservations to treaties with "limited participation". The most conspicuous difference between draft guideline 4.1.2 and article 20, paragraph 2, of the Vienna Convention, was that the latter's explicit reference to the "object and purpose of the treaty" had not been included in draft guideline 4.1.2. Although the criterion of object and purpose, like that of number, was far from clear-cut, it should not be downplayed by being subsumed in the general condition of permissibility, but rather highlighted. On the other hand, he had no objection to the reference to "other contracting parties", contained in draft guideline 4.1.2, whose purpose was to clarify the requirement of unanimous consent.

34. He was in favour of referring draft guidelines 4.1 to 4.1.2 to the Drafting Committee.

35. Mr. McRAE said that the report showed evidence of the usual meticulous research, but was in some places overly meticulous, resulting in unnecessary confusion. The attempt to generate the concept of an "established reservation" from the *chapeau* to article 21, paragraph 1, of the 1969 Vienna Convention was somewhat problematic.

He did not find the concept of a "reservation established with regard to another party in accordance with articles 19, 20 and 23" to be particularly complicated, nor did he agree with the Special Rapporteur's assessment in paragraph 199 of his fourteenth report that the *chapeau* contained "many uncertainties and imprecisions". The Special Rapporteur himself, in formulating draft guideline 4.1, had incorporated precisely the requirements set out in articles 19, 20 and 23, albeit not in that order. The tortuous history recounted by the Special Rapporteur of how article 21 had been formulated made one expect complexity, yet draft guideline 4.1 itself was actually a simplified and clearer restatement of the *chapeau* of article 21, paragraph 1. He supported it, and that support extended to draft guideline 4.1.1 as well, though he endorsed the Special Rapporteur's request that the Drafting Committee make the third paragraph more readable.

36. He did have a problem, however, with draft guideline 4.1.2, which, rather than focusing on treaties with limited participation, should be about the establishment of a reservation in the case of a treaty whose application in its entirety was an essential condition of the consent of each party to be bound by the treaty. The limited participation referred to in article 20, paragraph 2, was a criterion for determining whether the treaty constituted such a case—not the main object of the provision. Moreover, contrary to draft guideline 4.1.2, no definition of the term "treaty with limited participation" was given in article 20, paragraph 2.

37. Problems relating to the concept of an established reservation were starting to become evident in draft guideline 4.1.3, and he anticipated that those problems would affect several of the draft guidelines that would follow it. The main difficulty had to do with the fact that the word "established" was in article 21, paragraph 1, of the 1969 Vienna Convention, where its purpose was to define which reservations had the effects set out in the article. Yet draft guideline 4.1.3 reflected an attempt to take the concept of an established reservation from article 21 and to extend it back to article 20. Nevertheless, if the matters he and others had raised could be addressed in the Drafting Committee, and if the Drafting Committee could give further consideration to the concept of an established reservation, then he would have no problem with referring those draft guidelines to the Drafting Committee.

38. Mr. FOMBA noted that in this last chapter to his fourteenth report, the Special Rapporteur continued to seek to ascertain as accurately as possible the level of certainty or uncertainty inherent in the regime established by the Vienna Conventions and, if necessary, to make up for any lacunae or shortcomings. Plainly, that was not an easy task. Dilemmas were posed by the very definition of the terms "permissible reservation", "non-permissible reservation", "purported effects", "effects actually achieved", "established reservation", "expressly authorized reservations", "impliedly authorized reservation" and "specified reservation". The Special Rapporteur had already analysed those terms with sufficient clarity.

39. At first sight, the new draft guidelines seemed to be apt and were acceptable, although their wording was possibly amenable to improvement. The third paragraph of

³³ See D. W. Bowett, "Reservations to non-restricted multilateral treaties", *BYBIL 1976-1977*, vol. 48, No. 1 (1978), pp. 67-90.

guideline 4.1.1 (Establishment of a reservation expressly authorized by the treaty), for example, seemed rather convoluted and would certainly benefit from recasting. He had no fundamental objections to the wording of draft guideline 4.1, although it might be possible to find a more felicitous phrase than “formulated in accordance with the form”.

40. He was in favour of sending all the draft guidelines to the Drafting Committee.

41. Sir Michael WOOD thanked the Special Rapporteur for sharing his thinking on how the Commission should proceed in order to comply with States’ demands that it conclude its work on reservations to treaties by the end of the current quinquennium. He fully agreed with the Special Rapporteur on the need to complete the first reading of the Guide to Practice at the current session and to conduct the second reading the following year. States and international organizations must be given a proper opportunity to comment on the first reading draft, since the final product would be of considerable practical importance to them. They should feel that they had been fully involved in the preparation of the Guide. For obvious reasons, they would have only one year, instead of the traditional two years, to examine the text. Such a procedure was exceptional, but unavoidable, if the Commission were to complete its work in a timely manner. It should be acceptable, because many States had already had an opportunity to comment on many of the draft guidelines over the years.

42. He approved of the Special Rapporteur’s basic approach to the legal effects of reservations and objections thereto. He concurred with the basic distinction between permissible and non-permissible reservations and endorsed the view that the relevant provisions of the Vienna Conventions concerned permissible reservations and that consent lay at the heart of the reservations regime. The establishment of reservations was indeed an important notion. It was clearly present in the Vienna Conventions, even if it was not spelled out there in any detail. He was therefore in general agreement with the new draft guidelines proposed by the Special Rapporteur and would be happy to see them all referred to the Drafting Committee.

43. In some parts of his report, the Special Rapporteur had been a little harsh in his criticism of those who had drafted the 1969 Vienna Convention, both within the Commission and at the United Nations Conference on the Law of Treaties. While some last-minute changes introduced at the Conference had not been followed through in an entirely consistent manner, all in all the drafters had done a pretty good job.

44. In order fully to understand the Special Rapporteur’s thinking on some points, it was necessary to refer back to the original French text of the report. That comment should not be seen as criticism of the translators, who did a magnificent job under great time pressure. After all, they were not preparing literary translations of the works of Voltaire, Flaubert or Camus (although he believed that the Special Rapporteur preferred Sartre). Still, when the Commission reviewed the draft commentaries to the draft guidelines, it might need to pay attention not only to the substance of the text, but also to the translations thereof. One example was a reference to the “*Mer d’Iroise*” case

which in English was normally known as the “*English Channel*” case (*Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*). Sufficient time should accordingly be set aside in 2011 to review the commentaries.

45. Mr. PELLET (Special Rapporteur) said that he preferred Voltaire to Sartre and that the Channel was shared by France and the United Kingdom. The official name of the case in question was the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*.

46. Sir Michael had claimed that he had been harsh in his criticism of earlier members of the Commission, whereas in fact the target of his disapproval was the United Nations Conference of the Law of Treaties. Sir Humphrey Waldock had been an exceptional Special Rapporteur who had persuaded the Commission to move away from the outmoded system of unanimity to a more flexible one. He had nothing against the Commission’s draft text of 1966,³⁴ but he did deplore the pressure exerted by the Eastern European countries, for purely ideological and political reasons, that had led to the reversal of the presumption set out in article 20, paragraph 4 (b), concerning entry into force of a treaty for the reserving State. He personally disagreed with that reversal, but one had to live with it. The Conference’s subsequent lack of consistency had resulted in a bizarre final text. He had tried to navigate his way through it, since there should be no tampering with the text produced by the Conference, even though it really was exceedingly awkward.

47. In short, he rejected the criticism of his criticism.

48. Mr. KAMTO, referring to established reservations, a new category of reservation derived from the *chapeau* of article 21, paragraph 1, of the 1969 Vienna Convention, said that the text had probably not been intended to create a new category of reservations. The phrase “established reservation” referred to something much simpler and more limited than what the Commission envisaged: it merely meant a reservation that existed.

49. The purpose of the Guide to Practice was to propose as many elements as possible to help States to deal with reservations in practice. As Mr. Gaja had said, the commentaries would need to be extremely precise so as not to exaggerate the scope of the *chapeau* of article 21, paragraph 1. He actually wondered if a guideline or definition was really needed, especially as practice was extremely rare. The Special Rapporteur seemed to be engaging in an interpretation exercise rather than the identification of a rule stemming from State practice. It was a moot point whether the Guide to Practice should propose rules that did not yet exist as a means of steering practice, or whether it should merely codify existing practice.

50. While he was in favour of referral to the Drafting Committee, because the new draft guidelines did constitute a novel and original approach, he thought that the

³⁴ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 177.

commentary should clearly explain their intended scope and the precise meaning of the terms used and that established reservations should not be regarded as an entirely new category of reservations transcending the intentions behind the Vienna Convention.

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

[Agenda item 1]

51. Mr. DUGARD (Chairperson of the Planning Group) said that the Planning Group would be composed of the following members: Mr. Caflisch, Mr. Candioti, Ms. Escameia, Mr. Gaja, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina, Mr. Vasciannie and Ms. Xue. Other members of the Commission would be welcome to join the Planning Group.

52. Mr. CANDIOTI (Chairperson of the Working Group on the long-term programme of work) said that the Working Group consisted of Mr. Caflisch, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue.

The meeting rose at 12.35 p.m.

3038th MEETING

Wednesday, 5 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, 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.

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

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPOURTEUR³⁵ (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume the debate on draft guidelines 4.1 and 4.1.1 to 4.1.3, contained in the last chapter of the fourteenth report on reservations to treaties (paras. 176–236).

2. Mr. HMOUD commended the Special Rapporteur on his thorough analysis of articles 20 and 21 of the 1969 and 1986 Vienna Conventions and for suggesting guidelines which would either enhance the Vienna regime or fill certain gaps. That was a good approach, as long as the guidelines did not depart from or contradict those articles.

3. The concept of “establishment of a reservation” in draft guideline 4.1 came from article 21 of the Vienna Conventions. Thus, it was not artificial and constituted an appropriate basis for determining whether a reservation produced the desired legal effects. Subordinating the establishment of a reservation to three conditions—permissibility, formulation in accordance with the form and procedures, and consent of the other party—was also in conformity with article 21 and simplified the understanding and application of the Vienna regime.

4. With regard to expressly authorized reservations, draft guideline 4.1 correctly reflected the notion that such a reservation must satisfy the conditions of permissibility and consent. The line of reasoning set out in paragraphs 212 to 219 of the fourteenth report could have been made clearer, but it was right to conclude that only specified reservations with fixed content were *ipso facto* expressly authorized reservations that met the requirements for permissibility and consent. It was not certain, however, that the third paragraph of draft guideline 4.1.1 was necessary, since it merely merged the definition of reservations, already given in another draft guideline, with the requirement of the existence of an express provision. It went without saying that, to be established, such a reservation must be within the boundaries of an express provision.

5. The argument concerning the concept of treaties with “limited participation” was convincing, but there remained the question of the consent of the parties and the need to apply the treaty as a whole between all the parties as a prerequisite for each of the parties to consent to be bound. In any case, the intent of the parties must therefore be taken into account to determine whether a reservation required the consent of all the parties to the treaty in order to be established. However, the term “limited participation” was new to the Vienna Conventions, and the definition for it given in the second paragraph of draft guideline 4.1.2 did not refer to the criterion of number or even the meaning of the term, but rather to the application of the treaty in its entirety between all the parties as a condition for the consent of each of them to be bound. The draft guideline therefore needed to be reformulated; apart from that, it was acceptable on the whole.

6. Draft guideline 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization) correctly reflected the tenor of article 20, paragraph 3. The only suggestion would be to add, at the end of the guideline, the words “[... if the competent organ of the organization has accepted it in conformity with guideline 2.8.7] or is presumed to have accepted it in conformity with guideline 2.8.10”.

7. In closing, he said that he was in favour of referring draft guidelines 4.1 and 4.1.1 to 4.1.3 to the Drafting Committee.

³⁵ See footnote 9 above.

8. The CHAIRPERSON said that the Special Rapporteur would summarize the comments made on the draft guidelines under subsection 4.1 at a later meeting. She invited him to introduce the draft guidelines under subsection 4.2, which were also contained in the fourteenth report.

9. Mr. PELLET (Special Rapporteur) recalled that the draft guidelines under subsection 4.1 had covered the establishment of a reservation, whereas those under subsection 4.2 concerned the effect of a reservation once it had been established, i.e. once its permissibility had been established from the point of view of form and content and at least one State had consented to be bound by it, although the reservation had been established only with regard to the consenting States. The proposed draft guidelines (4.2.1 to 4.2.7) were set out in paragraphs 237 to 290 of the report.

10. The establishment of a reservation produced two categories of effects. It enabled the author of the reservation to become a party to the treaty, and it produced effects on treaty relations which flowed from the very definition of reservations, namely the exclusion or modification of the legal effect of certain provisions of the treaty or of the treaty as a whole under certain particular aspects (article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, reproduced in draft guidelines 1.1 and 1.1.1 of the Guide to Practice).

11. The effects of the first category were thus the following: entry into force of the treaty and status of party for the reserving State. Draft guideline 4.2.1 posed the fundamental principle, which stemmed from article 20, paragraph 4 (*a*) and (*c*), of the Vienna Conventions: “As soon as the reservation is established, its author is considered a contracting State or contracting organization to the treaty” (see paragraph 250 of the fourteenth report). That went without saying. However, the reserving State became a party only in its relations with States that had accepted its reservation, i.e. those with regard to which the reservation had been established; that was a manifestation of something which the Commission, in its commentaries of 1962³⁶ and 1966³⁷ on article 20, had called the “relative” participation in the treaty. That was made clear in draft guideline 4.2.3 (para. 243), which also specified the date of the effective entry into force—a date which did not necessarily coincide with that of consent to the reservation, particularly if the number of accessions or ratifications required for entry into force had not yet been attained. That called for a further explanation, which was provided in draft guideline 4.2.2 (para. 252): if a minimum number of accessions or ratifications was required for the entry into force of the treaty, the reserving State was included in that number once its reservation was established, a circumstance which might thus have an effect on the treaty’s entry into force.

12. Those various draft guidelines should not pose any problem, except in one respect: it emerged from all the draft guidelines on the establishment of reservations that a reservation was established *ratione temporis* if at least

one State had accepted it, either implicitly or expressly, within the time period of 12 months set in article 20, paragraph 5, of the Vienna Conventions. That rule was perfectly clear, but practice varied and in fact usually went in the opposite direction. Depositaries had a tendency to consider that the reserving State should be a party from the day of the expression of its consent to be bound by the treaty with its reservation, without waiting for the time period of 12 months set in article 20 to elapse and without waiting either for the express acceptance of a State, which was very hypothetical—he was not aware of any reservation that had ever been the subject of an express acceptance. That was the practice of the Secretary-General of the United Nations, who justified it by arguing that no State had ever made an objection to an entry into force of a treaty that included reserving States. However, if such an objection were made, from a strictly legal point of view it would have to be said that the treaty was not in force. That was also the practice of another important depositary, the Council of Europe. On the other hand, the Organization of American States and the Food and Agriculture Organization of the United Nations did not accept a reserving State among the States parties until 12 months had elapsed. The question therefore arose as to whether to enshrine predominant practice or to adhere to the letter of the Vienna Conventions. He favoured the latter course, because, as he had stated repeatedly, only very important reasons could justify calling into question a clear rule of the Vienna Conventions. In any case, practice was not sufficiently uniform to be able to conclude that a customary norm to the contrary had abolished the time limit set in article 20. Moreover, if an actual problem were to arise, one State could always step forward and expressly accept the problematic reservation. Thus, draft guidelines would leave matters as they stood.

13. The establishment of a reservation did not only have an effect on the status of the reserving State and its partners. As stated in article 21, paragraph 1 (*a*), it also modified “the provisions of the treaty to which the reservation relates to the extent of the reservation” in the relations between the reserving State and the others. In the current case, the verb “modify” should also be taken to mean “exclude”, in conformity with article 2, paragraph 1 (*d*). It should be noted that a reservation could not modify a provision, but only its effects or the ensuing obligations. Draft guideline 4.2.4 (para. 261 of the fourteenth report), in making that point, enlarged on article 21 but did not contradict it.

14. Draft guidelines 4.2.5 (para. 267) and 4.2.6 (para. 271) sought to specify the effects of an excluding reservation and of a modifying reservation; there was no need to dwell on that. There was still the question of reciprocity because, as Sir Humphrey Waldock had put it, “a reservation always works both ways”.³⁸ That was a reflection of the fundamental principle of consent in the framework of the law of treaties and in particular the regime of reservations. The 1986 Vienna Convention put it in the following manner: “A reservation established with regard to another party ... modifies [the] provisions

³⁶ Yearbook ... 1962, vol. II, document A/5209, pp. 176–181.

³⁷ Yearbook ... 1966, vol. II, document A/6309/Rev.1, pp. 202–208, at pp. 207–208, para. (22).

³⁸ “General course on public international law”, *Collected Courses of the Hague Academy of International Law, 1962–II*, vol. 106, pp. 1–251, at p. 87.

[of the treaty to which the reservation relates] *to the same extent** for that other party in its relations with the reserving State or international organization” (art. 21, para. 1 (b)). Moreover, as Sir Humphrey had also noted, reciprocity in the application of reservations had the advantage of tempering the propensity of States to make too great use of that useful institution, which they must employ with moderation. Confirmation of that could be found in the fact that human rights treaties, in which reciprocity did not apply, were those which were the subject of the greatest number of reservations. Human rights treaties were the typical example of a treaty in which the principle of reciprocity played a limited role, a case provided for in draft guideline 4.2.7, subparagraph (b) (para. 290). In those treaties, individuals, and not the other parties, were endowed with rights and were the beneficiaries of the instrument, and reciprocity of reservations would be contrary to the international protection of human rights. However, it would be sufficient to state that the rule of reciprocity did not apply to such treaties; it was unnecessary to elaborate a special regime. At any rate, that had been his approach, and he continued to bear in mind that, if a provision was not applicable, it simply would not be applied. Draft guideline 4.2.7 provided for two other instances in which there would be no reciprocity. For example, there was the case covered under subparagraph (c), in which the object and purpose of the treaty or the nature of the obligation to which the reservation related excluded any reciprocal application of the reservation. The Drafting Committee might wish to merge that third case with the one in subparagraph (b) but, in the meantime, he had thought it wise to include it to show that the non-application of reciprocity was not limited to the areas of human rights or the environment, but could also arise, for example, in the case of a treaty providing a uniform law. Thus, a State could decide, by means of a reservation, that it would not incorporate a given provision into its domestic law, but that did not mean that the other parties could follow suit. The point was to show that certain treaties other than those relating to human rights were not conducive to reciprocity either. The idea still needed to be formulated appropriately.

15. The case contemplated in subparagraph (a) of draft guideline 4.2.7 was clearly different, because there, the impossibility of a reservation was not due to the nature of the obligation or the nature of the treaty to which the reservation was made, but to the actual wording of the reservation. That situation arose, for example, in the case of reservations purporting to limit the territorial application of a treaty (para. 282 of the report) and which were considered, in certain conditions, to be genuine reservations in draft guideline 1.1.3.

16. In closing, he said that the draft guidelines which he had just introduced came under section 4.2 of the Guide to Practice.

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

[Agenda item 1]

17. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on reservations to treaties would be composed of the following

members: Mr. Fomba, Mr. Gaja, Mr. Hmoud, Mr. Nolte, Mr. Pellet (Special Rapporteur), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, together with Mr. Vasciannie (Rapporteur) and the Chairperson (*ex officio*).

Expulsion of aliens (*continued*)* (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPORTEUR (*continued*)³⁹

18. The CHAIRPERSON invited the Special Rapporteur, Mr. Kamto, to introduce his sixth report on the expulsion of aliens (A/CN.4/625 and Add.1–2).

19. Mr. KAMTO (Special Rapporteur) said that in his fifth report,⁴⁰ he had continued the consideration of questions relating to the protection of the human rights of persons who had been or were being expelled as a limitation on the State's right of expulsion. Following the debate in plenary on the report, the proposed draft articles had been revised, restructured and issued. A new workplan⁴¹ had also been elaborated which provided an overview of various aspects of the topic and highlighted remaining work to be completed. The consideration of the fifth report in the Sixth Committee of the General Assembly had given rise to comments and observations by a number of Governments, which were summarized in the introduction to the sixth report. Some Governments had criticized him for relying primarily on the jurisprudence of regional bodies, such as the European Court of Human Rights and the Inter-American Court of Human Rights, as well as the Human Rights Committee of the United Nations. He had been somewhat surprised by those remarks, and he had noted that States had wanted greater importance to be attached to the study of national legislation. In his view, however, the codification and progressive development of international law were usually based more on international legal instruments and international practice—which was generally illustrated by jurisprudence—than on national legislation. That said, the role of national practice, as reflected in national legislation or even national jurisprudence, was particularly important, and had therefore been taken into account to a large degree in the elaboration of the sixth report.

20. The sixth report followed the overall workplan that he had distributed at the sixty-first session of the Commission and had introduced at the beginning of the current session (see the 3036th meeting above, paragraphs 21–43). He was also adding to the workplan, in particular in Part I of the study, on general rules. Those additional elements concerned prohibited expulsion practices and protection of the rights of persons who had been or were being expelled.

* Resumed from the 3036th meeting.

³⁹ See footnote 19 above.

⁴⁰ See footnote 26 above.

⁴¹ See footnote 24 above.

21. With regard to prohibited expulsion practices, he had reverted briefly to the question of collective expulsion in order to allay certain misgivings expressed by some Commission members. After analysing the relevant provisions of the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, and after examining a number of works of the Institute of International Law, he had come to the conclusion that article 7, paragraph 3, on collective expulsion, was not in contradiction with international humanitarian law; on the contrary. Accordingly, there was no need to elaborate a new draft article on the subject or even to reformulate the paragraph concerned.

22. After that clarification, he then continued the consideration of the remaining aspects of the protection of the human rights of persons who had been or were being expelled, focusing first on disguised expulsion. The term was used in a confused and even incorrect manner by persons who were not legal experts for cases which sometimes concerned ordinary expulsion, for example non-renewal of an alien's residence permit, as noted in paragraph 29 of the report. Admittedly, it was not always easy to distinguish between cases of disguised or indirect expulsion and those involving expulsion in violation of the procedural rules. In actual fact, the term "disguised expulsion" simply covered situations in which a State tolerated, or even supported, acts committed by its citizens in order to force an alien to leave its territory or to provoke the alien's departure. An analysis of such expulsion showed that it was by its nature contrary to international law. First, it violated the rights of persons so expelled and hence the substantive rules pertaining to expulsion, which linked a State's right of expulsion with the obligation to respect the human rights of expelled persons. Second, it violated the relevant procedural rules which gave expelled persons an opportunity to defend their rights. In the light of those considerations, he had proposed draft article A (para. 42 of the report), which read:

"Prohibition of disguised expulsion"

"1. Any form of disguised expulsion of an alien shall be prohibited.

"2. For the purposes of this draft article, disguised expulsion shall mean the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory."

23. It could be said that the draft article presented aspects both of the codification of a new inductive rule and the progressive development of international law. Although the provisions of the draft article were not based formally on existing treaty provisions or on an established rule of customary international law, they derived from two points. First, the practice of disguised expulsion undermined both the obligation to respect the general guarantees offered to aliens, in particular aliens legally present in the host State, and the procedural rules for expelling such

aliens. Second, the practice was widely criticized by civil society in the States in question.

24. The expulsion of an alien might take the form of disguised extradition. The usual procedure was for a State to refuse admission to an individual, and for him or her to be deported to another State that wished to prosecute or punish him or her. Roughly speaking, that would appear most clearly, for example, where the fugitive, a national of State A, entered the territory of State B from State C, but was deported to State D. In his view, a true "disguised extradition" was one in which the vehicle of deportation was used with the prime motive of extradition. The effect was to override the provisions of municipal law that commonly permitted the legality of extradition proceedings to be contested.

25. That notion was recognized to a certain extent in the jurisprudence of the European Court of Human Rights in two cases: in its judgement of 1986 in the case of *Bozano v. France*, in which recognition was explicit, and in its judgement of 2005 in the case of *Öcalan v. Turkey*. It was true that in the latter case the Court had considered that, in and of itself, disguised extradition did not run counter to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention on Human Rights") if it was the result of cooperation between the States involved and if the transfer was based on an arrest warrant issued by the authorities of the country of origin of the person concerned. However, despite that position taken by the Court, the facts seemed to confirm its position in the *Bozano v. France* case. It was highly likely that if the facts of the case had not been related to terrorism cases, the Court would have had no difficulty in confirming the case law set forth in *Bozano v. France*. Relevant national practice, in particular that of the courts in a number of countries, were analysed in paragraphs 62 to 69 of the sixth report. In some cases, those courts had considered the purpose of the expulsion and the intention of the States in order to issue an opinion. In any event, the practice of extradition disguised as expulsion was inconsistent with positive international law. Accordingly, rather than speaking of the codification of a clear customary rule prohibiting the practice of expulsion for extradition purposes, the rule could be established as part of the progressive development of international law.

26. On the basis of that analysis, he proposed draft article 8, entitled "Prohibition of extradition disguised as expulsion", which read: "Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request."

27. The grounds for expulsion were quite varied and were discussed in the report at great length (paras. 73 to 210). Based on the examination of current international conventions and international case law, there were in fact very few established grounds for the expulsion of aliens, the two principal grounds being public order and public security.

28. The question was whether those were the only two grounds for expulsion permitted under international law,

and whether they ruled out all other grounds. To answer that question, it was necessary to examine State practice. The detailed analysis of legislation on expulsion of aliens provided in the study by the Secretariat⁴² showed that various other grounds were invoked by States for the expulsion of aliens. On the basis of the distinction between the grounds established by international law and those resulting from State practice, he had sought first to define the concepts of public order and public security and noted that international jurisprudence was careful to specify its content. Explicitly or implicitly, international courts left that task to national jurisdictions. He had then considered the criteria used to assess public order grounds, relying for that purpose on regional international jurisprudence, notably that of the Court of Justice of the European Communities, several directives of the European Union, and national jurisprudence and doctrine.

29. Drawing on a comparative analysis of legislation on the question, he had then examined other grounds for expulsion, which were quite numerous: he had identified some 15. Establishing an exhaustive list of grounds for expulsion was a daunting task. The question, instead, was whether all those grounds were in conformity with international law. He had found that the late-nineteenth-century authors who had examined the issue of expulsion of aliens, as well as contemporary practice of international courts on the subject, all agreed that the State had considerable latitude in making a determination based on the circumstances. However, the State did not have a free hand. With respect to an act that affected relations between States and the international legal order, international law could not be indifferent to the manner in which the State justified expulsion. It was the reference by which the international validity of the act of expulsion would be determined.

30. Contemporary law allowed for judicial review of decisions concerning such acts. Expulsion did not fall within the scope of what some domestic laws called “governmental acts” which were not subject to any judicial review, because it involved the rules of human rights protection. Similarly, expulsion fell outside the ambit of what international law considered the exclusive jurisdiction of the State, which was not subject to international review. A judge could review the criteria that were used to determine grounds for expulsion, to verify whether they complied not only with the domestic laws of a State, but also with relevant rules of international law. In that connection, public order and public security, as had been seen, were established in domestic laws and were sanctioned in international law as legitimate grounds for the expulsion of aliens. The law of the European Community, in particular its case law, provided some clarifications, and its evaluation criteria could be of great assistance for the purposes of codification and gradual development of rules governing the grounds for expulsion of aliens. The expelling State could invoke any other grounds, provided they did not breach the rules of international law.

31. On the basis of the above analysis, he submitted to the Commission draft article 9, entitled “Grounds for expulsion”, which read:

“1. Grounds must be given for any expulsion decision.

“2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

“3. A State may not expel an alien on a ground that is contrary to international law.

“4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question.”

32. It was clear that the criterion for determining “in good faith and reasonably” appeared expressly and regularly in the international jurisprudence which he had examined and that grounds relating to public order and public security could not be invoked for acts which were not sufficiently serious.

33. With regard to conditions in which the person being expelled was detained, he said that, speaking from a methodological point of view, some national legislation in French-speaking countries spoke of “*rétention*”, rather than “*détention*”, the difference being that “*rétention*” was not a criminal sanction and was not applied in prisons, unlike “*détention*”, which was the consequence of a criminal offence that resulted in placement in a prison facility. That distinction concealed poorly the fact that, in both cases, the person concerned was being subjected to a deprivation of liberty. For that reason, he had used both terms in his report, although he had usually used the French term “*détention*” in a generic sense that also covered “*rétention*”.

34. He had first given an overview of detention conditions that violated the rights of aliens who were being expelled, drawing on information available on detention facilities in a number of countries. It emerged that the situation of the persons concerned was truly disturbing, as shown by the examples cited in paragraphs 214 to 227 of the report.

35. He had then considered national legislation relating to the conditions of enforcement of expulsion decisions and the conditions in which aliens were detained prior to expulsion. In addition to the arbitral practice as it had emerged in the *Ben Tillett* and the *Daniel Dillon* cases, the jurisprudence of the European Court of Human Rights, notably in the *Chahal v. the United Kingdom* case, had clarified in many respects the rules on the conditions in which aliens were detained pending deportation. That case law was reaffirmed by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to General Assembly resolution 43/173 of 9 December 1988. The report also contained a comparative study on national legislation and jurisprudence and on the duration of detention.

36. Draft article B, which in his sixth report was entitled “Obligation to respect the human rights of aliens who

⁴² A/CN.4/565 and Corr.1 (mimeographed; available on the Commission’s website, documents of the fifty-eighth session).

are being expelled or are being detained pending expulsion”, had been amended (see the document distributed at the meeting). In rereading it, he had realized that its title was identical with that of draft article 8 and that its paragraph 1 duplicated article 8, paragraph 1, as well as part of draft article 9. The title of draft article B had thus been reformulated to read: “Obligation to respect the human rights of aliens who are being detained pending expulsion”, and the old paragraph 1 had been deleted. The new paragraph 1 (a) read:

“The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.”

37. Paragraph 1 (b) read:

“The detention of an alien who has been or is being expelled must not be punitive in nature.”

38. Paragraph 1 (b) was clearly explained in the sixth report: the detention was non-punitive. Doctrine and jurisprudence were very clear on that point.

39. Paragraph 2 (a) read:

“The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.”

40. That wording was a result of both the analysis of jurisprudence and the comparative study of national legislation.

41. Paragraph 2 (b) read:

“The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.”

42. The point was that the control of the duration of detention must not be left to the administration.

43. Paragraph 3 (a) read:

“The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.”

44. The aim was to ensure, for the duration of detention, effective protection of a detainee pending expulsion. The provision stemmed from both jurisdiction and a comparison of national legislation. Needless to say, national legislations were not uniform, and he had drawn on the main trends which he had identified.

45. Paragraph 3 (b) read:

“Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.”

46. That provision followed from the preceding provisions of draft article B.

47. In deleting paragraph 1 of the original draft article B, he did not want to lose the benefit of the ideas contained therein; they might well find use in the commentary to draft article 8, which enunciated the general rule of the protection of the human rights of a person who had been or was being expelled.

48. The sixth report completed the first part of the study on general rules, and he would submit another report to the sixty-second session of the Commission on the two remaining parts, namely “Expulsion procedures” and “Legal consequences of expulsion”. He hoped that in 2010 the Commission would complete its consideration of all his reports on the topic and, if it decided to refer the proposed draft articles to the Drafting Committee, that the latter would complete its work either in the current session or at the beginning of the sixty-third session so that the Commission could adopt all the draft articles on first reading in 2011.

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

49. The CHAIRPERSON welcomed Ms. O’Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited her to take the floor.

50. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, by its work and debates, the Commission exemplified the importance which the United Nations attached to international law. It also testified to the need to reconcile the common practice of international relations with conceptual reflections.

51. In its resolution 64/114 of 16 December 2009, the General Assembly had expressed its appreciation to the Commission for the work accomplished at its sixty-first session, in particular for the completion, on first reading, of the draft articles on the topic “Responsibility of international organizations”.⁴³ It had drawn the attention of Governments to the importance for the Commission of having their comments and observations on the topic by 1 January 2011. The General Assembly had also invited Governments to provide information regarding practice in respect of the topic “Expulsion of aliens”. Taking note of the report of the Secretary-General on assistance to special rapporteurs of the Commission submitted at its sixty-fourth session,⁴⁴ the General Assembly had requested him to present at its sixty-fifth session options regarding additional support for the work of special rapporteurs.

52. The promotion of the rule of law at the national and international levels continued to be one of the most topical items on the agenda of the General Assembly. At its sixty-fourth session, the debate in the Sixth Committee had focused on the promotion of the rule of law at the international level, and some delegations had placed emphasis on the central role played by the International Law Commission in that regard. In its resolution 64/116

⁴³ See footnote 1 above.

⁴⁴ See footnote 2 above.

of 16 December 2009, the General Assembly had again reaffirmed its role in encouraging the progressive development of international law and its codification, and invited the Commission once again to continue to comment, in its annual report, on its current role in promoting the rule of law. At the sixty-fifth session of the General Assembly in 2010, the Sixth Committee would continue its consideration of the sub-item entitled “Laws and practices of Member States in implementing international law”.

53. At the sixty-fourth session, the Sixth Committee had considered a new item, entitled “The scope and application of the principle of universal jurisdiction”. While most delegations who had intervened in the debate had affirmed that the principle of universal jurisdiction was enshrined in international law and constituted an important tool in the fight against impunity for serious international crimes, it had also been observed that caution should be exercised in addressing the topic. Delegations had expressed differing views as to the scope of universal jurisdiction and on the question of whether it had become part of customary international law.

54. Some delegations had observed that the principle of universal jurisdiction was related to the topics “Immunity of State officials from foreign criminal jurisdiction” and “Obligation to extradite or prosecute (*aut dedere aut judicare*)”, which were under consideration by the Commission. Some delegations had suggested that the topic be referred to the Commission for further consideration. By resolution 64/117 of 16 December 2009, the General Assembly had invited the Secretary-General to submit a report based on information and observations on the topic received from Member States. The General Assembly had also decided that the Sixth Committee should continue its consideration of the item, which was included in the provisional agenda of the sixty-fifth session, without prejudice to the consideration of related issues in other forums of the United Nations (an implicit reference, in particular, to the work of the Commission).

55. The United Nations had been at the centre of the efforts of the international community to build an international consensus on combating international terrorism. Indeed, the topic “Measures to eliminate international terrorism” was a major item on the agenda of the Sixth Committee. Since 2001, efforts had been exerted to resolve issues standing in the way of concluding a draft comprehensive convention against international terrorism.⁴⁵ Those issues related principally to the exclusionary elements concerning the scope of application of the convention. In 2009, in the context of a working group of the Sixth Committee, and in April 2010 within an *ad hoc* committee on the subject, both chaired by Mr. Perera, member of the Commission, Member States had continued to reflect on the 2007 elements of a package⁴⁶ submitted by the coordinator of the draft comprehensive convention. The elements aimed, first, at further clarifying the distinction between what was covered within the scope of the draft convention and what was

covered by international humanitarian law, in such a way that the integrity of international humanitarian law was not prejudiced. Secondly, the elements aimed at ensuring that no impunity for military forces of a State was intended by any exclusion. Differences continued to prevail, and a working group of the Sixth Committee would again be convened to make further attempts to bridge the gaps existing between delegations.

56. Concerning criminal accountability of United Nations officials and experts on mission, an item that had been on the agenda of the General Assembly since 2006, in 2009 the General Assembly had adopted resolution 64/110 of 16 December 2009, reiterating all the measures envisaged in resolutions 62/63 of 6 December 2007 and 63/119 of 11 December 2008 and also preserving the reporting mechanisms provided for therein. In particular, States were strongly urged to establish jurisdiction over crimes of a serious nature committed by their nationals while serving as United Nations officials or experts on mission. Furthermore, a number of measures were envisaged with a view to enhancing cooperation among States and between States and the United Nations in order to ensure the criminal accountability of United Nations officials and experts on mission. Those measures concerned, *inter alia*, mutual assistance in criminal investigations and criminal or extradition proceedings, including with regard to evidence; the facilitation of the use, in criminal proceedings, of information and material obtained from the United Nations; effective protection of witnesses; and the enhancement of the investigative capacity of the host State. While including the item in the provisional agenda of its sixty-fifth session, the General Assembly had decided that it would continue its consideration of the substantive aspects of the topic during its sixty-seventh session (2012), within the framework of a working group of the Sixth Committee. The possibility of elaborating a legally binding instrument on the matter remained open.

57. Concerning the new administration of justice system, on 1 July 2009 the United Nations Dispute Tribunal and the United Nations Appeals Tribunal had been established, and on 31 December 2009 the United Nations Administrative Tribunal had closed its doors after 60 years. To date, the Dispute Tribunal had issued more than 160 judgements. In its emerging jurisprudence, fundamental questions that had long been settled by the Administrative Tribunal—such as the scope of the Secretary-General’s discretionary authority to appoint and administer staff, the role of judicial review and the relevance of national jurisprudence—were being re-examined. A number of those issues had been raised in appeals before the Appeals Tribunal. The General Assembly was also scheduled to assess the operations of the new administration of justice system during its sixty-fifth session.

58. To conclude that cluster of issues, it should be recalled that the General Assembly had taken note of the document entitled “Introduction and implementation of sanctions imposed by the United Nations”, adopted by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, on the basis of a proposal by the Russian Federation, and that it had decided to annex it to its resolution 64/115 of 16 December 2009.

⁴⁵ See General Assembly resolution 56/88 of 12 December 2001, paragraph 15.

⁴⁶ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 37 (A/62/37)*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, eleventh session (5, 6 and 15 February 2007).

59. The Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, turning to the recent activities of the Office of the Legal Counsel, said that the concept of responsibility to protect was relatively new and, despite its endorsement by the heads of State and Government at the 2005 World Summit⁴⁷ and subsequent reaffirmation by the Security Council in 2006, it was still fragile. In July 2009, the General Assembly had discussed the Secretary-General's report entitled "Implementing the responsibility to protect",⁴⁸ in which most States had endorsed the formulation of the following three-pillar strategy: (a) States were under an obligation to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity; (b) the international community had a responsibility to assist States in that regard and to use all appropriate peaceful means in pursuit of that protective role; and (c) States had a responsibility to respond in a timely and decisive manner when a State was failing to provide protection.

60. On 14 September 2009, the General Assembly had adopted resolution 63/308, in which it had recalled the 2005 World Summit Outcome and decided to continue its consideration of the concept.

61. In the Secretariat, the Special Adviser of the Secretary-General on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect would complete their work to establish an Office on Genocide Prevention and the Responsibility to Protect. This joint Office would provide early warning to the Secretary-General and, through him, to the Security Council and other relevant intergovernmental bodies.⁴⁹

62. Working with interested Member States, the Special Advisers would encourage the President of the General Assembly to schedule an informal, thematic dialogue during the current session of the General Assembly on the early-warning and assessment roles of the Secretariat, intergovernmental bodies, Member States, other United Nations entities and regional and subregional arrangements. A similar dialogue could be convened during the next General Assembly session on regional and subregional approaches to implementing the responsibility to protect.

63. On the question of international criminal tribunals and their residual mechanisms, she recalled that those bodies, which had been established to ensure accountability for genocide, war crimes and crimes against humanity, had made remarkable contributions to national reconciliation processes and to the restoration and maintenance of peace. They had reaffirmed, and continued to reaffirm, the central principle established long ago in Nuremberg: that those who committed, or authorized the commission, of war crimes and other serious violations of international humanitarian law were individually accountable for their crimes and would be brought to justice in accordance with the due process of law.

64. The International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone were completing their work and were preparing to close. However, it was essential that some of their functions continued post-closure. Those included witness protection, sentence enforcement, review of sentences and contempt proceedings. It was generally accepted that those functions would be carried out by small and efficient international residual mechanisms. In coming years, the United Nations and its Member States would seek to set up unprecedented structures in the architecture of international criminal justice. The Office of Legal Affairs had the privilege of being involved in that work.

65. The Security Council Informal Working Group on Tribunals was engaged in discussions on the establishment of a residual mechanism for the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The Office of Legal Affairs served as the secretariat for the Working Group and provided advice on substantive issues. The report of the Secretary-General of May 2009, which had been largely prepared by the Office of Legal Affairs for the attention of the Working Group, had suggested that there be one residual mechanism with two branches, one in Europe for the International Tribunal for the Former Yugoslavia and the other in Africa for the International Criminal Tribunal for Rwanda, and that the residual mechanism have the capacity to try fugitives or refer their cases to competent national jurisdictions, among other things.

66. The Office of Legal Affairs had drafted a statute for the residual mechanism at the request of the Chairperson of the Informal Working Group on Tribunals. The statute and a draft resolution establishing the residual mechanism (prepared by the Office and the Chairperson) were under active negotiation in the Working Group.

67. Inevitably, there were competing political approaches to the issue. A broad approach would favour honouring the purposes for which the Tribunals had been established, as set out in the original Security Council resolutions, namely to bring perpetrators to justice in accordance with fair procedures and to promote peace, security and reconciliation in the affected countries. That approach tended to support the view that the residual mechanism should be a "downsized" tribunal.

68. The competing approach was that the Tribunals had always been meant to be temporary, that they had been established in circumstances in which the countries concerned had been unable or unwilling to prosecute cases themselves, and that 16 or 17 years later, things had evolved, the Tribunals should be closed, and as many of the residual functions as possible should be transferred to the countries concerned rather than to a residual mechanism. According to that approach, the residual mechanism should be a small and efficient new institution, not a downsized continuation of the former Tribunals.

69. Regardless of the approach adopted, one of the main challenges from a legal perspective was to ensure a watertight continuity of jurisdiction from the existing tribunals to the residual mechanism.

⁴⁷ See the 2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139.

⁴⁸ A/63/677, para. 11.

⁴⁹ See the Secretary-General's report on early warning, assessment and the responsibility to protect (A/64/864), paras. 17–18.

70. Unlike the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone was a treaty-based international court that would be closed by agreement between the parties.⁵⁰ Similarly, its residual mechanism would be established by an agreement between the United Nations and the Government of Sierra Leone. There again, the key legal challenge was to ensure continuity of jurisdiction, rights, obligations and the necessary functions from the Special Court to the residual mechanism. The Office of Legal Affairs had drafted the agreement for the establishment of the residual mechanism and a statute, which would be discussed with the Government of Sierra Leone.

71. With regard to the commissions of inquiry set up by the Secretary-General to investigate serious violations of human rights and international humanitarian law, the International Commission against Impunity in Guatemala (CICIG), established by agreement between the United Nations and the Government of Guatemala, had the legal status of a treaty-based organ.⁵¹ The CICIG conducted criminal investigations in cooperation with the Guatemalan Prosecutor and, under Guatemalan law, could join him in the prosecution of those responsible for organized transnational crimes. Its activities were ongoing.

72. At the request of Pakistan, in the summer of 2009 the Secretary-General had set up a commission of inquiry in connection with the assassination of former Prime Minister of Pakistan, Mohartma Benazir Bhutto, on 27 December 2007. Unlike the CICIG, however, the commission of inquiry had no mandate to conduct a criminal investigation within Pakistan. In its report submitted to the Secretary-General on 15 April 2010,⁵² the Commission had concluded that Ms. Bhutto's assassination could have been prevented if adequate security measures had been taken and that responsibility for Ms. Bhutto's security on the day of her assassination had rested with the federal, regional and district authorities of Pakistan. It had concluded further that the investigation into the assassination had been flawed in many ways and that it remained the responsibility of the authorities of Pakistan to carry out a serious, credible criminal investigation to determine who had conceived, ordered and executed the crime, with a view to bringing those responsible to justice. Doing so, the Commission believed, would constitute a major step towards ending impunity for political crimes in Pakistan.

73. In October 2009, the Secretary-General, at the request of members of the Security Council and the Economic Community of West African States (ECOWAS), had established the Commission of Inquiry for Guinea to investigate the events of 28 September 2009 in Conakry,⁵³ where 156 persons had been killed, at least 109 women

had been raped and scores of others had been injured. It was a "traditional" commission of inquiry mandated to determine the facts, qualify the crimes, identify those responsible and make recommendations. Set up several weeks after the events, the Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea had submitted its report before the end of 2009.⁵⁴ In it, the Commission had recommended that the Government of Guinea prosecute those responsible and—as the Commission considered that crimes against humanity had been committed—that the case against the individuals concerned be referred to the International Criminal Court.

74. On 3 December 2009, the President of Guinea, Dadis Camara, had been shot and had been airlifted to Morocco for treatment. Soon thereafter, an interim Head of State had been selected, and a consensus Prime Minister had been appointed from civil society. While the Secretary-General continued to maintain pressure on the Government to bring those responsible to account, the case of Guinea was a reminder, if one was needed, of the complexities of bringing a message of accountability to societies in turmoil. It was also a reminder that calls for accountability and justice, followed by real action, could help to stabilize the situation in a country.

75. For the Office of Legal Affairs, the establishment of commissions of inquiry had raised a number of important issues. They included, in particular, the need for, or propriety of, a mandate from any of the United Nations governing bodies; the authority of the Secretary-General to establish a commission of inquiry in the absence of a mandate; and the drafting of commission-specific terms of reference adapted to the circumstances of each case.

76. During 2008 and 2009, the question as to how the United Nations should respond to unconstitutional changes of Government had arisen in the light of *coups d'état* in Mauritania (August 2008), Guinea (December 2008), Madagascar (March 2009), Honduras (June 2009), Niger (February 2010) and Kyrgyzstan (April 2010). The Secretary-General had taken the view that, to the extent possible, the Organization should adopt a unified and consistent approach to such situations. The Policy Committee of the Secretary-General had recently published papers on Guinea, Madagascar and Niger, prepared by the Secretariat in conjunction with United Nations offices, funds and programmes and approved by the United Nations Senior Management Group.⁵⁵ For the Office of Legal Affairs, "one size does not fit all", and each situation required a unique approach based on the realities on the ground and an assessment of how the United Nations could be most helpful in restoring constitutional order. In providing advice on issues that arose within the context of unconstitutional changes of Government, such as questions of representation and accreditation with intergovernmental bodies and interaction between the United Nations and *de facto* authorities, the Office had drawn attention to a number of points. In the first instance, it had always emphasized that the United Nations never engaged in acts of recognition of

⁵⁰ Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

⁵¹ Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission against Impunity in Guatemala ("CICIG") (New York, 12 December 2006), *ibid.*, vol. 2472, No. 44373, p. 47.

⁵² S/2010/191, para. 259.

⁵³ S/2009/556.

⁵⁴ S/2009/693, annex.

⁵⁵ Documents with distribution limited to the Senior Management Group.

Governments, which was for the Member States of the Organization to do. Thus, should the United Nations interact with *de facto* authorities for purposes of implementing its funds and programmes on the ground or through mediation efforts to restore constitutional order, that did not in any way constitute “recognition” by the United Nations. Such engagement could however, depending on the circumstances, confer in a political sense a certain “legitimacy” on the authority in question.

77. The Office of Legal Affairs also pointed out that questions concerning the accreditation and representation of *de facto* authorities for purposes of their participation in the intergovernmental process were for the General Assembly to decide. As the General Assembly had taken no decision barring the representatives of the *de facto* authorities in Guinea, Madagascar, Mauritania and Niger, their representatives continued to have the right to participate in the work of the United Nations and that of intergovernmental bodies with the same rights and privileges as the representatives of all other Member States.

78. An important exception was Honduras. By its resolution 63/301 of 30 June 2009, the General Assembly had demanded the restoration of the Constitutional Government of President Zelaya, who had been overthrown in a coup, and had called upon States to recognize no other Government. The Office of Legal Affairs had advised that for the duration of President Zelaya’s constitutional term, only those delegates from Honduras who could formally confirm that they were the duly authorized representatives of President Zelaya’s Government could participate in the work of the General Assembly and its subsidiary bodies.

79. The Office of Legal Affairs also stressed that, while *de facto* authorities might have the right to participate in the work of the General Assembly, that did not affect any position that the Secretary-General might wish to take with respect to a *de facto* authority for purposes of implementing mandated activities and his own good offices. The Secretary-General was free to decide whether or not to have high-level contacts with the representatives of a *de facto* authority. A decision could also be taken to interact at a working or official level while avoiding contacts with the political appointees of a *de facto* authority. However, those were political rather than legal questions, where the Department of Political Affairs and the Executive Office of the Secretary-General took the lead.

80. On matters relating to oceans and the law of the sea, in particular the current tasks performed by the Division for Ocean Affairs and the Law of the Sea, she said that the Office of Legal Affairs, through that Division, continued to support the uniform and consistent application of the United Nations Convention on the Law of the Sea, its implementing agreements and other relevant agreements and instruments. It also assisted the General Assembly in its annual review and evaluation of the implementation of the United Nations Convention on the Law of the Sea and of other developments relating to ocean affairs and the law of the sea. During its twenty-fourth session, in 2009, the Commission on the Limits of the Continental Shelf had adopted recommendations regarding the submission made by France in respect of the areas of French Guiana and New Caledonia, bringing the total number of

recommendations adopted by the Commission to nine. So far, the Secretary-General had received 51 submissions to the Commission by coastal States, individually or jointly, pursuant to article 76 of the Convention. In addition, he had received 43 sets of preliminary information. In view of the large number of submissions, the nineteenth Meeting of States Parties to the Convention held in June 2009 had considered the issue of its workload and decided to continue to address the question and funding for members attending the sessions of the Commission, as well as ways and means of expeditiously examining the submissions as a matter of priority. The current term of the members of the Commission ended in June 2012, and a new Commission would be elected by the Meeting of States Parties that same year.

81. The Secretary-General had continued to perform his depositary functions under the Convention with regard to the deposit of charts or lists of geographical coordinates of points, specifying the geodetic datum, in relation to straight baselines and archipelagic baselines as well as the outer limits of the territorial sea, the exclusive economic zone and the continental shelf. Since April 2009, there had been deposits by Cuba, France, Grenada, India, the Philippines, Saudi Arabia and Seychelles. Furthermore, under article 76, paragraph 9, of the United Nations Convention on the Law of the Sea, coastal States were required to deposit with the Secretary-General charts and relevant information permanently describing the outer limits of the continental shelf extending beyond 200 nautical miles. In that case, due publicity was to be given by the Secretary-General. The first deposits of that kind had been made by Mexico in relation to the Western Polygon in the Gulf of Mexico and by Ireland for Porcupine Abyssal Plain, both based on the recommendations of the Commission. The Secretary-General had given due publicity to those deposits by circulating Maritime Zone Notifications. The Division for Ocean Affairs and the Law of the Sea continued to support the work of the General Assembly by monitoring and reporting on developments in oceans and the law of the sea and by backing the work of the processes set up to discuss ocean issues. A recent example was the Ad Hoc Working Group of the Whole of the General Assembly on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects, which had met for the first time in 2009 to recommend a course of action to the General Assembly.

82. With regard to sustainable fisheries, the Division for Ocean Affairs and the Law of the Sea was preparing for the resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, to be convened in late May. The meeting would provide an opportunity for delegations to assess the effectiveness of the Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks, with a view to adopting recommendations to further strengthen the implementation of the Agreement, where necessary. In early February, the Division had serviced the third meeting of the Ad hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological

diversity beyond areas of national jurisdiction. A comprehensive report had been prepared for the meeting. The Working Group had adopted recommendations for consideration by the General Assembly.⁵⁶ Of particular interest was the recommendation that the General Assembly urge States to make progress in the discussion on the relevant legal regime on, and implementation gaps in, the conservation and sustainable use of marine genetic resources in areas beyond national jurisdiction in accordance with international law, and in particular the United Nations Convention on the Law of the Sea, taking into account the views of States on parts VII and XI of the Convention. At its tenth meeting, held in June 2009, the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea had focused its discussions on the implementation of the outcomes of the Informal Consultative Process, including a review of its achievements and shortcomings in its first nine meetings.⁵⁷ The Informal Consultative Process had been recognized as a unique forum for comprehensive discussions on issues related to oceans and the law of the sea. The eleventh meeting of the Informal Consultative Process, in June 2010, would consider the topic "Capacity-building in ocean affairs and the law of the sea, including marine science".⁵⁸

83. One key issue that had been at the centre of international attention and had been addressed by the General Assembly and the Security Council was piracy off the coast of Somalia. The measures that the international community had put into place to combat the problem had demonstrated the strengths of the legal regime established under the United Nations Convention on the Law of the Sea, but also the regime's reliance on States with the capacity and political will to fully implement its provisions. A number of entities within the United Nations and the International Maritime Organization had assisted States in addressing the legal issues that emerged from the apprehension, detention and prosecution of suspected pirates. The Office of Legal Affairs provided the working group on legal issues of the Contact Group on Piracy off the Coast of Somalia with information regarding international tribunals and human rights considerations arising from the repression of piracy. The Office advised States on the uniform and consistent application of the relevant provisions of the United Nations Convention on the Law of the Sea. Pursuant to Security Council resolution 1918 (2010) adopted on 27 April 2010, the Office of Legal Affairs, in cooperation with the United Nations Office on Drugs and Crime, was preparing a report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. In particular, the report would include options for creating special domestic chambers, possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements.

⁵⁶ Letter dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/65/68).

⁵⁷ Letter dated 10 July 2009 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly (A/64/131).

⁵⁸ Letter dated 22 July 2010 from the Co-Chairpersons of the Consultative Process to the President of the General Assembly (A/65/164).

84. The International Trade Law Division served as the substantive secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The mandate of UNCITRAL included the enhancement of international trade and development by the promotion of legal certainty in international commercial transactions, in particular through the promulgation and dissemination of international trade norms and standards. The forty-third session of UNCITRAL would take place in New York from 21 June to 9 July 2010. Three important texts involving various fields of international trade law and reflecting recent developments were expected to be adopted. First, the Commission was expected to adopt a revised version of one of the most successful instruments of a contractual nature in the field of arbitration, the UNCITRAL Arbitration Rules, adopted in 1976⁵⁹ and amended for the first time to take into account developments in arbitration practice over the past years. Second, a supplement to the UNCITRAL Legislative Guide on Secured Transactions adopted in 2007⁶⁰ was expected to be adopted relating to issues related to security rights in intellectual property.⁶¹ Third, in the area of insolvency, the UNCITRAL Legislative Guide on Insolvency Law would be further developed by adding a Part III dealing with the treatment of enterprise groups in insolvency.⁶² UNCITRAL was also currently engaged in the revision of its 1994 Model Law on Procurement of Goods, Construction and Services⁶³ and in the consideration of its possible future work in the areas of e-commerce, security interests, insolvency law and microfinance and its role in promoting the rule of law at national and international levels. In addition to assisting UNCITRAL in fulfilling its legislative mandate, the International Trade Law Division was carrying out work towards the promotion of UNCITRAL legal texts, and ways and means of ensuring their uniform interpretation and application, in particular through technical assistance and cooperation activities, the system of collection and dissemination of case law on UNCITRAL texts and the publication of digests of case law. The Division also assisted UNCITRAL in coordinating activities with relevant international organizations, undertaking a comprehensive review of its working methods and monitoring the implementation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

85. With regard to the dissemination of international law, the Codification Division had continued to expand the United Nations Audiovisual Library of International Law.⁶⁴ Since its launch in October 2008, the Library had been accessed in more than 190 countries and territories around the world. In addition, it had received the 2009

⁵⁹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C, p. 22. For the version revised in 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex I.

⁶⁰ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, Part II; adopted by the General Assembly in its resolution 63/121 of 11 December 2008.

⁶¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. IV, sect. C, p. 41.

⁶² *Ibid.*, chap. V, p. 43. UNCITRAL, *Legislative Guide on Insolvency Law* (United Nations publication, Sales No. E.05.V.10).

⁶³ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1)*, annex I.

⁶⁴ www.un.org/law/avl/.

Website Award of the International Association of Law Libraries. The Codification Division had also continued to prepare *ad hoc* and regular mandated publications. In recent months, the 2006 and 2007 editions of the *Juridical Yearbook* had been issued. The *Juridical Yearbook 2008* was in the final stages of desktop publishing and would be submitted to the Print Section in May 2010; the *Juridical Yearbook 2009* was scheduled to be completed and submitted for printing by the end of 2010. As to the *Reports of International Arbitral Awards*, volume XXVI was now available, and work was in progress on volumes XXIX, XXX and XXXI.

86. As part of efforts to achieve a “greener” United Nations, the Treaty Section had announced the discontinuation of the distribution of paper copies of a number of its publications. The distribution of paper copies of the Depositary Notifications, of which an average of 900 copies had been printed and distributed daily, had been discontinued as of 1 April 2010. All Depositary Notifications were available on the Treaty Section’s website⁶⁵ and could also be obtained electronically by subscription, which involved no fee. States and international organizations had welcomed that measure, to which the increasing number of subscribers testified. The most recent *Multilateral Treaties Deposited with the Secretary-General*, an annual publication, covered the status as of 1 April 2009.⁶⁶ The publication had become so voluminous (consisting of three volumes) that it would no longer be issued in print. It was available on the Treaty Section’s website, where future volumes would continue to be made available. The status of each treaty deposited with the Secretary-General was updated on the website with each new treaty action. On 1 April 2010, the monthly distribution of paper copies of the *Statement of Treaties and International Agreements registered or filed and recorded with the Secretariat* had been brought to an end. The publication, of which 1,150 copies had been printed and distributed in the past, was now sent to Member States and others electronically by free subscription. It was also available on the Treaty Section’s website. As announced in 2009, additional efforts were under way to make the texts of treaties registered with the Secretariat electronically available on the Treaty Section’s website shortly after their registration. While currently treaties were published electronically in their authentic languages, the goal was to publish the translations online in English and French as soon as they were received from the United Nations translation services. That would ensure prompt electronic publication of individual treaties registered with the Secretariat. The Treaty Section was considering ways of maximizing the opportunities provided by new technology to reduce the number of copies of the *United Nations Treaty Series* printed on paper and to make them available on the Treaty Section’s website as early as possible. It was worth recalling that nearly all publications issued by the Office of Legal Affairs were available through HeinOnline,⁶⁷ a well-known Internet source to which many libraries were subscribed.

⁶⁵ <https://treaties.un.org>.

⁶⁶ ST/LEG/SER.E/26 (United Nations publication, Sales No. E.09.V.3).

⁶⁷ <http://home.heinonline.org>.

87. The annual Treaty Event would take place from 21 to 23 and 27 to 28 September during the general debate of the sixty-fifth session of the General Assembly. As in previous years, the Event provided a distinct opportunity for States to participate in the multilateral treaty framework.

88. In closing, she stressed that most, if not all, of the issues which she had addressed had a bearing on the work of the Commission. She would ensure that the results of the debates of the Commission would have the echo that they deserved in the Office of Legal Affairs.

89. The CHAIRPERSON thanked the Legal Counsel and asked Commission members, in view of the limited time remaining, to confine themselves to one or two questions, to which the Legal Counsel could then reply once all questions had been posed.

90. Mr. HASSOUNA, noting that the Commission had shown increased interest in the question of customary law, asked what role, in the view of the Legal Counsel, the United Nations played in the formation of customary law, and in particular the resolutions of the Security Council and the resolutions and decisions of the General Assembly. With regard to the Special Tribunal for Lebanon, which had not been mentioned, he had the impression that the delays in conducting investigations were having an adverse effect on that body’s credibility. He sought her opinion in that regard.

91. Mr. KAMTO, referring to the question of universal jurisdiction as exercised in the *Hissène Habré* case, enquired whether there had been any cooperation between the United Nations and the African Union on combating impunity. He would also like to have an update on the proceedings instituted by the International Criminal Court against the Head of State of Sudan. Concerning the responsibility to protect, pursuant to which States must ensure that crimes were not committed, he asked whether that principle could be applied to cases in which the United Nations had ordered an investigation, such as the *Bhutto* case or the *Hariri* case.

92. Ms. JACOBSSON, noting that it was not the first time that the United Nations had faced unconstitutional changes of Government, wondered whether it had now decided to elaborate policy papers on the subject because of the development of human rights law, the law on the protection of persons and democracy and whether such papers were available.

93. Mr. PELLET expressed appreciation that the Treaty Series website was free of charge, but said that, despite some improvements, the website was hopelessly user-unfriendly and continued to be a real nightmare for all researchers who liked to work fast. He thanked the Legal Counsel for her very complete statement and hoped that at the next session it would be possible to set aside an entire meeting for that traditional encounter so that the exchange of views between the Legal Counsel and the members of the Commission was not reduced to a minimum for lack of time.

94. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, the Legal Counsel) agreed with Mr. Pellet

that it would be useful to devote more time to such dialogues and was prepared to do so at the next session. Replying to Mr. Hassouna, she said that, clearly, there could be no serious, comprehensive review of international customary law without a consideration of the resolutions of the Security Council and the resolutions and decisions of the General Assembly. Recently, she had tended to leave out the Special Tribunal for Lebanon intentionally, not because of its supposed lack of activity, but because it was often conflated with the other tribunals that had been established to deal with war crimes, crimes against humanity and genocide, whereas the Special Tribunal for Lebanon had been set up specifically to investigate the assassination of Rafiq Hariri and others. With respect to the fact that there had been no tangible activity in the criminal prosecution, it was true that there was no indication of an imminent indictment, although very recently there had been signs of action possibly being taken at the end of 2010 or the beginning of 2011. Irrespective of the lack of tangible activity as such, she stressed, on behalf of the Secretary-General, that the Tribunal, by its very existence, had functioned as a catalyst for the rule of law in Lebanon, a circumstance which its detractors should bear in mind. The United Nations and the Secretary-General respected the independence of the Tribunal and avoided questioning the activity of the prosecutor.

95. With regard to the very difficult and delicate issue of universal jurisdiction, in the course of discussions it had become evident that sensitivities concerned, in particular, the issue in relation to international criminal justice, and especially the fact that the international tribunal prosecuted in jurisdictions with no link to the place of the commission of the offence, which of course was the very principle of universal jurisdiction. It would take some time before a consensus was achieved in the General Assembly on how to move forward with the issue. At the moment, the Secretariat was awaiting input from Member States on how they saw their rights and obligations in the area. In respect of the International Criminal Court, the Office of Legal Affairs was regularly consulted on the difficult issue of what relations the Secretary-General should have with heads of State who were being prosecuted by the Court. Clearly, it was important for the Secretariat not to undermine the Court's activities in any way or give the impression that it was doing so. In the case of Sudan, account must be taken of the pursuit of peace and justice, on the one hand, and the recent re-election of the Head of State and the prospect of a referendum in 2011, on the other; clearly, that was a very difficult issue. However, the Secretary-General was personally very sensitive to those questions, and the international community could have no doubt as to the profound respect which he had for international criminal justice and the work of the International Criminal Court. As for the right to protect and the application of that principle to the *Bhutto* case in particular, she was grateful to Mr. Kamto for raising the question, to which she had given some thought. Given that the principle of the responsibility to protect was at the stage of operationalization, it was difficult to communicate on the issue as long as the situations in which the principle applied had not been clearly identified. Although in retrospect the principle of the responsibility to protect might have applied

to the post-election violence in Kenya, she did not think that that was true for the *Bhutto* case, which involved the specific case of the assassination of a former Prime Minister. However, as time went by, if acceptance of the principle of the responsibility to protect progressed in a manner that the Secretariat hoped and was committed to, then the situation of Guinea might become the first case in which the responsibility to protect might be invoked, because the second pillar of the principle was the obligation of States and the international community to assist a State when war crimes, crimes against humanity or genocide were imminent or where there was a risk that they would be committed. The African Union, ECOWAS, regional groups, the Secretariat and other groups concerned had come together and had decided to act. Very quickly, just two weeks after the events, the United Nations had set up a commission of inquiry and, with the help of its partners, had succeeded in restoring a degree of stability, although there had been a high risk that the situation might deteriorate. That said, the Organization was following the situation closely.

96. The policy papers on unconstitutional changes of Government were not available because they served to define the policy of the United Nations and were meant only for officials of the Organization who were working in that area. It was reassuring from a legal perspective that the Legal Counsel took part in those discussions, because it showed that the Secretary-General was convinced that international law must be at the centre of the development of United Nations policy. It was the Secretary-General who had decided that such situations were arising too frequently for the Secretariat not to assess how to respond, for example with regard to accreditation or when the Organization was called upon by States not to recognize a Government, although it was not competent to react. The fact that the Secretariat had a consistent approach could also help ameliorate such situations.

97. The Treaty Section had brought in a consultant to identify problems posed by the use of its website, which the Secretariat would try to improve in the near future.

The meeting rose at 1.15 p.m.

3039th MEETING

Thursday, 6 May 2010, at 10.15 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*) AND DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPORTEUR⁶⁸ (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the expulsion of aliens.

2. Mr. GAJA said that he appreciated the considerable amount of work done by the Special Rapporteur to advance the Commission's consideration of the topic. His sixth report (A/CN.4/625 and Add.1–2) was rich in references to practice and offered much food for thought. While he agreed with many of the Special Rapporteur's statements, he was still concerned about a few methodological issues.

3. He requested clarification of the numbering of the draft articles in the various documents under consideration. For example, according to the new draft workplan,⁶⁹ which the Special Rapporteur had submitted with a view to structuring the draft articles, draft article 8 covered the prohibition of disguised expulsion, whereas the text proposed for that article in paragraph 42 of the sixth report was headed "draft article A". According to the document that contained the revised and restructured draft articles on protection of the human rights of persons who had been or were being expelled, draft article 8 dealt with the general obligation to respect human rights during the expulsion procedure. He was also confused by the fact that the obligation to protect family life formed the subject of draft article 12 in that document, but was covered by draft article 14 in the new draft workplan. It would therefore be useful to have a document that reproduced those draft articles that had been provisionally adopted by the Drafting Committee along with other draft articles proposed by the Special Rapporteur in the sequence that the Special Rapporteur deemed appropriate.

4. He suggested that the draft articles might be reorganized in the following manner: the first part should determine the scope of the draft articles and provide a definition of expulsion; it could include draft article A, on the prohibition of disguised expulsion, since it appeared to deal with one aspect of the definition of expulsion.

5. A second part might set forth the substantive conditions that would have to be met if expulsion were to be lawful under international law. It should cover permissible grounds, the principle of non-discrimination and the expelling State's obligation to consider the risks facing the person to be expelled in the country of destination, and it should strike a balance between a State's right to expel and the alien's right to family life. The Commission should express its views about the requirements of international law; the reference in draft article 9, paragraph 3,

to a "ground that is contrary to international law" (A/CN.4/625, para. 210) was too nebulous in the context of expulsion. The second part of the draft articles could also encompass the additional protection that should be given to refugees and stateless persons.

6. A third part should cover procedural matters, such as the need for compliance with the procedural rules of the expelling State, the need to supply reasons, the issue of remedies, the question of disguised extradition and the need to respect the human rights of the person being expelled, especially with regard to the length and conditions of detention. The third part could also examine the issue of collective expulsion.

7. A fourth part might contain provisions concerning the property of expelled persons, a subject which the Special Rapporteur wished to include. Lastly, a fifth part could identify the obligations of the States of transit and destination.

8. Generally speaking, he sympathized with the Special Rapporteur's wish to enhance the protection that aliens had against expulsion. Expulsion was usually a harsh measure which deprived the aliens subjected to it of their personal relations and source of income, and it would therefore be strange if the Commission did not aim to enhance that protection.

9. If the Commission had been drafting a human rights instrument, it could have envisaged a high level of protection for individuals, and States would have been free to accept or reject such an instrument. A more cautious approach had to be adopted when the Commission was engaged in codifying principles of international law that were supposed to bind States, irrespective of whether they accepted a particular instrument.

10. For example, in a human rights instrument, expulsion could be prohibited when it constituted a disguised extradition—the conclusion drawn by the Special Rapporteur. Yet despite the plentiful reference to practice in the sixth report, and in particular to the judgement of the European Court of Human Rights in *Bozano v. France*, practice only partly supported that conclusion. The European Court had found that France was in breach of article 5 of the European Convention on Human Rights because French policemen had forcibly deported Mr. Bozano to Switzerland, whence he was likely to be extradited to Italy, where he had been sentenced for the murder of a Swiss teenager. Since the French courts had refused extradition to Italy, the Court had emphasized the breach of procedural rules. It would be difficult to contend that, according to the European Court of Human Rights, disguised extradition was categorically prohibited when an alien faced a criminal trial in the State of destination. As the Special Rapporteur noted in paragraph 60 of his sixth report, the same Court had denied the existence of such a prohibition in *Öcalan v. Turkey*. In fact, only one of the judgements mentioned in paragraphs 62 to 69 held that disguised extradition would be inconsistent with international law. Hence to state that disguised extradition was prohibited by international law would be progressive development.

⁶⁸ See footnote 19 above.

⁶⁹ See footnote 24 above.

11. It might be possible to incorporate in a human rights instrument the restrictions on the concept of “public policy” that had been established by the Court of Justice of the European Communities as grounds for expulsion, as the Special Rapporteur suggested in paragraph 116. It should be noted, however, that those restrictions applied only to the expulsion of nationals of member States and did not reflect the policies and practices of member States in relation to nationals of third countries. When expounding a principle of international law, it was necessary to bear in mind the wide range of reasons for expulsion that were admissible in State practice, which were discussed extensively in paragraphs 119 to 206.

12. The forthcoming judgement in *Ahmadou Sadio Diallo* would no doubt provide significant guidance on how far the Commission could go in enhancing the protection against expulsion which international law afforded to aliens. While there was no reason to postpone the consideration of reports on the topic or the work of the Drafting Committee, the Commission would be wise to take the views of the ICJ into account before concluding its first reading of the draft articles.

13. Mr. NOLTE said that he would confine his remarks to the draft articles on protection of the human rights of persons who had been or were being expelled, which were contained in the restructured draft articles. He commended the Special Rapporteur for taking account of members’ comments in his preparation of that text.

14. With regard to draft article 9, on the obligation to respect the dignity of persons who had been or were being expelled, he welcomed the fact that the Special Rapporteur had moved the reference to human dignity into the general part of the draft articles in order to indicate that human dignity was not merely one among several other human rights. However, he was concerned that the formulation of the draft article might be misleading. Human dignity was a general principle from which all human rights flowed; it could not be treated simply as a specific human right. That was a basic notion underpinning international human rights law.

15. The preamble of the Charter of the United Nations spoke in general terms of “the dignity and worth of the human person”, while the preamble to the Universal Declaration of Human Rights⁷⁰ referred to the “inherent dignity ... of all members of the human family”. Moreover, the idea that human dignity was more a source of rights than a right itself was spelled out in the International Covenant on Civil and Political Rights, whose preamble recognized that those rights “derive from the inherent dignity of the human person”. Human dignity was possessed by every human being, and care should be taken not to create the mistaken impression that it meant honour or reflected individual perceptions of pride or dignity. That was why the drafters of international human rights treaties rarely used the term “human dignity” when defining specific rights, and when they did so, they took care to make it clear that what was meant was inherent human dignity. In fact, the only provision of the Covenant which referred explicitly to human dignity was article 10, which

read: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” That article could be used as a model for reformulating draft article 9, which would then read: “All persons who have been or are being expelled shall be treated with humanity and with respect for the inherent dignity of the human person.”

16. His lesser concerns pertained to the subsequent draft articles. For example, he did not fully understand article 10, paragraph 2, and was unsure whether it allowed for the possibility of treating nationals and aliens differently with respect to expulsion, or reflected the fact that there might be legitimate grounds for differentiating between various categories of aliens, such as citizens of States belonging to the European Union and citizens of non-member States. For example, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders provided for special procedures for aliens who were defined as “any person other than a national of a Member State of the European Communities” (art. 1). Readmission agreements might provide other legitimate grounds for treating different groups of aliens differently in the context of expulsion.

17. Turning to draft article 11, he suggested that, in accordance with human rights case law, the text should ensure that the obligation to respect the right to life was not limited to areas where States exercised territorial jurisdiction.

18. Lastly, the phrase “may be provided for” in draft article 12, paragraph 2, was somewhat misleading—what was probably meant was “as authorized by”. In that connection, he shared Mr. Gaja’s concern that the reference to international law was too vague.

19. Mr. SABOIA drew attention to the restructured draft articles and thanked the Special Rapporteur for ensuring that they addressed the concerns expressed in plenary at the previous session.

20. He agreed with the alternative wording of draft article 9 proposed by Mr. Nolte. The concept of dignity was very important in the context of expulsion. Failure to respect the dignity of a person or group of persons did not stem directly from the violation of a specific right but from the subjection of such persons to repeated humiliating treatment which amounted to an offence against their dignity.

21. He suggested that the assurance that the death penalty would not be carried out, mentioned in draft article 14, paragraph 2, should be required also in cases where a person had not yet been sentenced but there was a risk that the death sentence might be imposed. That was the principle applied by the Supreme Court of Brazil when it heard extradition cases.

22. Turning to the Special Rapporteur’s sixth report (A/CN.4/625 and Add.1–2), he congratulated the Special Rapporteur on his thorough research and his concise oral introduction of the report. The methodology suggested

⁷⁰ See footnote 22 above.

by Mr. Gaja would improve the clarity and coherence of work on the topic.

23. As the Special Rapporteur stated in paragraph 41 of his report, disguised expulsion was contrary to international law, since it violated the rights of expelled persons by depriving them of the opportunity to present their defence to a competent authority. Unfortunately, that practice had often been used in “renditions”, which exposed expelled persons to the risk of being sent to places where they might be subjected to torture.

24. Although draft article A contained a good definition of disguised expulsion, a sentence should be added to indicate that the prohibition of disguised expulsion applied also to countries of destination or transit.

25. He supported the Special Rapporteur’s reasoning with regard to disguised extradition and thus supported his proposed draft article 8. Some years earlier, the Supreme Court of Brazil, in its judgement in the *Oviedo* case, in which Paraguay had sought the extradition of a former general accused of a crime, had refused extradition on the grounds that it was politically motivated, and it had expressly prohibited the expulsion of Mr. Oviedo to another country, as that would have constituted disguised extradition.

26. The Special Rapporteur had thoroughly researched the grounds for expulsion and had rightly concluded that the reasons given by States for expulsions were too numerous to list exhaustively. States had wide discretion when expelling aliens. While public order and national security were the most substantial grounds for expulsion, it was important that the grounds for any expulsion be specified. Furthermore, such grounds must not contradict international law and they must be determined in good faith. Proportionality and the conduct of the person being expelled were further vital considerations.

27. The chapter devoted to the conditions of detention of persons awaiting expulsion contained some shocking examples. Unfortunately, such conditions existed, not only in the countries named in the report, but were widespread, and he felt compelled to admit that such conditions existed in his own country. He therefore welcomed the fact that the revised version of draft article B dealt, not only with conditions of detention, but also with the serious problem of prolonged or unlimited detention, and that it established some procedural rules that ought to offer a detained foreigner greater certainty.

28. He was in agreement with referring the restructured draft articles and the draft articles contained in the Special Rapporteur’s sixth report (A/CN.4/625 and Add.1–2) to the Drafting Committee.

29. Mr. DUGARD drew attention to paragraph 42 of the sixth report and said that the term “disguised expulsion” used in draft article A was incorrect; what the Special Rapporteur meant was “informal” or “constructive” expulsion. As was clear from paragraph 37 of the report, the cases to which he referred were instances of constructive expulsion because the expelling State had not disguised the expulsion or adopted a formal measure, but

its conduct had been such that the individual had had no option but to leave the country.

30. Before discussing the formulation of the draft article, he wished to draw attention to the fact that the Declaration of Principles of International Law on Mass Expulsion had been adopted by the International Law Association and not by the International Law Commission, as stated in paragraph 40 of the English version of the report.

31. Although he would support referral of draft article A to the Drafting Committee, he would prefer that the term “constructive expulsion” be used. He was also unsure whether it was correct to speak of the “forcible departure of an alien”, since the alien might not be subjected to any force; what happened in practice was that aliens were compelled to leave as a result of the conduct of the expelling State.

32. The term “disguised extradition” had been used correctly in the report to mean the use of another procedure to achieve the purpose of extradition. In most cases, States resorted to deportation to achieve that purpose. With regard to the legal consequences of expulsion and disguised extradition, he wished to know whether the Special Rapporteur intended to deal with the principle of *male captus, bene detentus*. The courts were divided on the question of whether it was appropriate to exercise jurisdiction over a person who had been improperly extradited as a result of disguised extradition. The English courts had held that it amounted to an abuse of process and that the courts could not exercise jurisdiction, whereas the United States Supreme Court had upheld that principle.

33. He noted that although the Special Rapporteur had referred to cases of public order and public security that might allow for expulsion, he had made no particular reference to cases of suspected involvement in terrorist activities, although in paragraphs 61 and 62 of the sixth report he had suggested that the courts tended to adopt a generous approach towards disguised extradition and expulsions when a person was suspected of terrorist activities. It was an interesting issue that warranted the Commission’s attention during its consideration of the topic.

34. The CHAIRPERSON recalled that the substantive aspects of the draft articles on the protection of the human rights of persons expelled or being expelled had been thoroughly discussed at the sixty-first session and that those articles had been redrafted by the Special Rapporteur in the light of comments made by Commission members in plenary meeting. In order to expedite the proceedings, she suggested that the Commission focus its attention on the referral of those draft articles to the Drafting Committee.

35. Sir Michael WOOD said that he had no problem with referring the restructured draft articles to the Drafting Committee, provided that the Committee would have some degree of flexibility in the matter. Like Mr. Nolte, he considered that there were still some fairly substantive issues to be addressed.

36. The CHAIRPERSON said she took it that the Commission wished to refer to the Drafting Committee revised draft articles 8 to 15 and the additional draft article 16,

which were contained in draft articles restructured in the light of the plenary debate during the first part of the sixty-first session.

37. Mr. GAJA said that he had no objection to referring revised draft articles 8 to 15 to the Drafting Committee. However, since draft article 16 was new and the question of transit States warranted further consideration, he proposed that it be held in abeyance.

38. Ms. JACOBSSON endorsed the comments made by Mr. Gaja and Sir Michael Wood. Moreover, she had understood that the Commission had two additional plenary meetings in which to discuss the draft articles. She certainly had views to express on the restructured draft articles as well as on the sixth report (A/CN.4/625 and Add.1-2). She could therefore only endorse the Chairperson's suggestion with the proviso posited by Sir Michael that the Drafting Committee have some flexibility in the matter.

39. The CHAIRPERSON said that the Drafting Committee would take those factors into account.

40. Mr. HMOUD said that the problem with regard to the numbering of the draft articles cited earlier by Mr. Gaja would have to be rectified: both the restructured draft articles and the sixth report (A/CN.4/625 and Add.1-2) contained draft articles 8 and 9, but they dealt with different subjects.

41. Mr. PETRIČ asked whether it really was necessary to take a decision on the referral of the draft articles to the Drafting Committee at the current meeting. He, too, had been under the impression that there would be two further plenary meetings at which the Commission could consider both the restructured draft articles and the sixth report, and that the first meeting of the Drafting Committee would not take place until the following week.

42. The CHAIRPERSON said that members would indeed have an opportunity to discuss the topic in subsequent plenary meetings. The intent of her suggestion had been merely to gauge the Commission's views on the draft articles, given that they had been discussed extensively during the sixty-first session and redrafted by the Special Rapporteur in the light of comments made at that time. However, if the Commission did not feel ready to refer the draft articles to the Drafting Committee, she would not press the matter.

43. Mr. CANDIOTI said that he could endorse the suggestion to refer the restructured draft articles to the Drafting Committee with the provisos and comments made by other members, in particular by Sir Michael. He understood, however, that some members still wished to express their views on the topic. Perhaps the Commission could make optimum use of the remainder of the morning by discussing the structure of the draft articles, as suggested by Mr. Gaja, either in informal consultations or in the Drafting Committee.

44. Mr. KAMTO (Special Rapporteur) recalled that the restructured draft articles had been submitted to the Commission at the sixty-first session but had not been

considered then owing to his absence during the second part of the session. On the opening day of the current session he had introduced the draft articles and his sixth report separately so as to make it quite clear that they should be considered separately by the Commission (see the 3036th meeting above, paras. 21-43). He had expected that at the present juncture members would make comments or suggestions on the draft articles, along the lines of Mr. Nolte's proposed drafting amendment. However, if the Commission did not feel ready to refer the draft articles to the Drafting Committee because it considered that there were still some substantive issues to be resolved, then it should not do so. Likewise, it should not refer material to the Drafting Committee in the interests of time management; that was not how the Commission should operate. He was willing to be flexible, but he did not wish to spend an inordinate amount of time on the matter. Members must be clear about what they wanted. If they were still not satisfied with the basic thrust of the draft articles, which he had revised in the light of their comments, then they should be given the opportunity to state their views in plenary.

45. Mr. McRAE said that as one of the members who had been quite critical of the original draft articles, he believed that their revision was very important, and he commended the Special Rapporteur on his work. He welcomed the suggestion to refer the restructured draft articles to the Drafting Committee and endorsed Mr. Nolte's proposed amendment to draft article 9. He considered that his own concerns could be dealt with in the Drafting Committee, too.

46. In the interest of expediting the Commission's work, he suggested that members who had not had an opportunity to express their views on the draft articles in plenary meetings of the Commission should be allowed to do so in the Drafting Committee. If it became apparent that the matters raised there were substantive, they could be referred back to the plenary Commission, as had been done in the past. As Chairperson of the Drafting Committee, he did not foresee that such a procedure would pose any problems.

47. Mr. HASSOUNA endorsed Mr. McRae's suggestion.

48. The CHAIRPERSON said that while the Commission seemed to be generally in favour of referring revised draft articles 8 to 15 to the Drafting Committee, she had taken note of the comments made regarding the programme of work for the topic. She therefore suggested that all members wishing to comment on the restructured draft articles have an opportunity to do so in plenary meeting before the draft articles were referred to the Drafting Committee. She further suggested that an informal group be established without further delay, led by Mr. Gaja, to discuss the structure of the draft articles before their referral to the Drafting Committee.

49. Mr. NOLTE said that he could endorse the Chairperson's suggestions on the understanding that all members wishing to comment on the restructured draft articles must do so at the next plenary meeting so that the Drafting Committee could commence its work immediately thereafter.

50. The CHAIRPERSON said she took it that the Commission agreed to her suggested course of action, subject to Mr. Nolte's clarification.

It was so decided.

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

[Agenda item 1]

51. Mr. McRAE (Chairperson of the Study Group on the most-favoured-nation clause) announced that he would chair the Study Group, which would be composed of the same members as during the sixty-first session, as well as any other members wishing to participate, and Mr. Vasciannie, Rapporteur, *ex officio*.

The meeting rose at 11.20 a.m.

3040th MEETING

Friday, 7 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

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

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*) AND DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPPORTEUR⁷¹ (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the agenda item on expulsion of aliens.

2. Mr. PETRIČ said that the draft articles on protection of the human rights of persons who had been or were being expelled, revised and restructured by the Special Rapporteur in the light of the plenary debate during the first part of the sixty-first session, had been greatly improved, and he was in favour of their referral to the Drafting Committee. He nevertheless wished to make a few comments on the text.

⁷¹ See footnote 19 above.

3. Draft article 8 was not problematic. As for draft article 9, he shared the view expressed by Mr. Nolte at the previous meeting, namely that human dignity was the source of all rights; that was why it was essential for that principle to be one of the general rules, as it now was. With regard to draft article 10, in particular the phrase “or other status” at the end of paragraph 1, he drew the Special Rapporteur's attention to the situation of European Union nationals. They enjoyed freedom of movement—a special situation that should be mentioned, if not in the draft article itself, then at least in the commentary. Concerning paragraph 2 of the draft article, it was important to bear in mind the fundamental difference between legal and illegal immigrants, since the procedures applicable to each group could be different.

4. Draft articles 11, 12 and 13 did not raise any particular problems. As for draft article 14, he did not see the need for the third paragraph, since the first paragraph expressly stated that “[n]o one may be expelled”. With regard to draft article 15, he said that the wording of paragraph 2 left something to be desired and should be examined carefully by the Drafting Committee. He had no problems with draft article 16.

5. Turning to the Special Rapporteur's sixth report (A/CN.4/625 and Add.1–2), he said that the diverse and contradictory views expressed by States during the debate in the Sixth Committee were well summarized in the introduction, which showed the difficult nature of the topic. The Commission should take that into account in its work, in particular if, with some draft articles, it envisaged moving from strict codification to the progressive development of international law. Failure to balance the legal aspects of expulsion, the interests of the State carrying out expulsion and those of the person being expelled would be unacceptable for States. They still had the sovereign right to decide who, besides their nationals, could stay in the territory under their sovereignty or jurisdiction and to establish the applicable rules. The limitations placed on their decision basically related to respect for human rights as embodied in international law, their constitutions and domestic legislation.

6. That said, the Commission should also not lose sight of the realities of expulsion. In practice, and in most States, the expulsion of aliens who were legally in their territory was relatively rare and was normally dealt with in keeping with legal rules and procedures and human rights standards. Furthermore, when violations did occur, they were generally taken up by national courts, at least in countries governed by rule of law, and sometimes also by international courts, including regional courts and human rights institutions.

7. On the other hand, many States currently faced serious problems with illegal immigration. As a result, illegal immigrants were expelled frequently and in large numbers, and such expulsions were rarely supervised by the courts: the decision to expel an alien was generally taken by administrative bodies, and sometimes even by the police. The procedures intended to protect the rights of illegal immigrants were often cursory and perfunctory. He wondered whether those important and real differences between the expulsion of aliens who were legally present

in a State and those who were not should not be dealt with in greater depth, in particular in the draft articles on the grounds for expulsion and procedural guarantees.

8. With regard to the draft articles contained in the sixth report (A/CN.4/625 and Add.1–2), he proposed that the words “[a]ny form of” be deleted from draft article A, paragraph 1, before its referral to the Drafting Committee.

9. As for draft article 8 contained in the sixth report, he wondered whether it was really necessary: it seemed to relate more to extradition.

10. The section of the report dealing with the grounds for expulsion (paras. 73–210) posed serious problems. State practice revealed that certain grounds for expulsion were sufficient in the case of illegal immigrants, but far from sufficient for the expulsion of legal residents; the two types of situations should be dealt with separately.

11. Moreover, the concept of public security was very poorly defined. Legal residents could, through their conduct, endanger the security of others—but was that sufficient grounds for their expulsion? In Slovenia, for example, in order for such persons to be expelled, their activities had to endanger the security of the State or society: in other words, they must be involved in terrorist or organized criminal activities. By contrast, the very fact that immigrants were illegally present in a State, had not submitted their application for asylum or refugee status in time or had provided false identity documents, etc., was enough to justify their expulsion.

12. All things considered, it seemed that the grounds for expulsion set forth in draft article 8 were fairly far-reaching in the case of persons who were legally resident and yet, where illegal residents were concerned, they were far too restrictive for the State. In the latter case, it should be left to States themselves to establish the grounds for expulsion, on the understanding that any expulsion decision must always be based on criteria established beforehand and on legal rules, not arbitrary or discretionary grounds. The dignity of the human person and the fundamental rights of persons expelled must be respected in both cases. For all those reasons, he was not in favour of referring draft article 8 to the Drafting Committee.

13. Concerning the conditions of expulsion and detention (paras. 211–276) and the new version of draft article B contained in the document distributed in the meeting,⁷² he said he endorsed the idea that persons awaiting expulsion should not be detained in facilities where convicted prisoners were serving their sentences. He was also of the opinion that detention must neither be punitive nor excessively long. However, in the case of illegal immigrants, placement in detention was necessary in order to establish the facts and should also guarantee the protection of the immigrants concerned. He considered therefore that draft article B required additional discussion before being referred to the Drafting Committee.

14. Ms. JACOBSSON thanked the Special Rapporteur for having restructured the draft articles on protection of

the human rights of persons who had been or were being expelled. The new text showed that the Special Rapporteur had taken into account the comments made during the debate at the previous session. The draft articles could be referred to the Drafting Committee; however, she would like to make a few points.

15. She welcomed the fact that in draft article 8 contained in the restructured draft articles, the expression “fundamental rights” had been replaced by the broader term “human rights”.

16. Concerning draft article 9 in the same document, she recalled that she had expressed doubts at the previous session about the need for a separate article on the obligation to protect human dignity. Without repeating the reasons she had given at that time, she would simply like to recall that since the inviolability of a person’s human dignity underlay the very notion of human rights, it might give the wrong impression to include a reference to the basis for all human rights, namely “human dignity”, in the operative portion of the text, which concerned specific human rights obligations. It was true that draft article 9 was now in a section dealing with general rules, but if a reference was to be made to human dignity, it should be placed in an introductory section.

17. She shared Mr. Nolte’s view that the references to “territory” and “jurisdiction” in new draft article 11 must be clarified by the Drafting Committee.

18. As far as new draft article 14 was concerned, the Special Rapporteur had tried to accommodate some of the views expressed on the death penalty issue in connection with former draft article 9. It was a step in the right direction but, like Mr. Saboia, she would like to see the text of the draft article strengthened.

19. The CHAIRPERSON said she took it that the Commission wished to refer the revised and restructured draft articles 8 to 15 to the Drafting Committee.

It was so decided.

20. Mr. FOMBA commended the Special Rapporteur on the excellent quality of his sixth report (A/CN.4/625 and Add.1–2), which was dense, like his previous reports, and was based on systematic research and analysis of the literature, case law, practice and domestic legislation.

21. In paragraph 3 of the introduction to the sixth report, the Special Rapporteur pointed out that the Sixth Committee had suggested that the Commission should discuss the attitude to be adopted to the topic under consideration, including the structure of the text that was being drafted and the final outcome of its work. Mr. Gaja had made a suggestion concerning the structure of the draft articles that warranted consideration in due course. As far as the approach to the topic was concerned, Mr. Gaja had underlined the need to place emphasis on the principles of international law applicable to the subject—a view which did not seem fundamentally to contradict that of the Special Rapporteur. As to the final outcome of the Commission’s work, it was premature to decide on the matter at that juncture.

⁷² See the 3038th meeting above, paras. 36–46.

22. With respect to the comments and concerns of the Sixth Committee, he shared the views expressed by the Special Rapporteur in paragraphs 15 and 16 of his sixth report.

23. Regarding collective expulsion and the compatibility of draft article 7, paragraph 3, with international humanitarian law, he noted that the Special Rapporteur had given assurances based, on the one hand, on the final version adopted by the Drafting Committee,⁷³ and on the other, on the pertinent conclusion derived from an analysis of the provisions of the Geneva Convention relative to the protection of civilian persons in time of war (Convention IV) .

24. He believed he understood what the Special Rapporteur meant by the terms “disguised” or “indirect” expulsion. The fact that they were used in the literature meant that the terms did exist—but that did not necessarily mean that they were correct. Mr. Dugard thought that the adjective “disguised” was incorrect and that “informal” would be more appropriate. However, he himself felt that the Special Rapporteur was perhaps stretching the meaning of the word “indirect”: in paragraph 31 of his report, he underlined the difficulty of distinguishing between disguised expulsion and expulsion in violation of the procedural rules. The practical examples given in paragraphs 32 to 40 seemed relatively clear and satisfactory. He endorsed the Special Rapporteur’s conclusion that disguised expulsion was by its nature contrary to international law, for the reasons given in paragraph 41.

25. Concerning draft article A (Prohibition of disguised expulsion), he thought that the final phrase in paragraph 2, which read “or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory”, duplicated to some degree the preceding phrase that read “resulting from the actions or omissions of the State”. It could be held that if the State supported something, it was an act, and if it tolerated something, it was a voluntary omission, or passive conduct, unless it was a specific factor that needed to be mentioned in that context.

26. He agreed that extradition disguised as expulsion was a practice that was inconsistent with positive international law, as stated in paragraph 70.

27. He was quite willing to follow the Special Rapporteur’s approach to draft article 8 (Prohibition of extradition disguised as expulsion) as being not for codification, but for the progressive development of international law. His initial impression was that the wording of the draft article went in the right direction.

28. While public order and public security were relatively well established, apart from the problem of their specific content under international law, it must be recognized that, in practice, there were far more grounds for expulsion. In paragraphs 73 to 210 of the sixth report, the Special Rapporteur provided the Commission with extensive and very enlightening information on the subject, and in paragraph 84, he quite rightly stressed the need

to develop some criteria for assessing the invocation of those grounds in the light of international law.

29. He agreed with the Special Rapporteur’s conclusion regarding the criteria for assessing public order and public security grounds, as set forth in paragraph 118 (a) and (b). As far as the other grounds for expulsion were concerned, he endorsed the comment made in paragraph 119 and shared the view expressed in paragraph 178 that the “cultural” ground was contrary to international law.

30. With regard to draft article 9 (Grounds for expulsion), he noted that paragraph 1 laid down a strict obligation, and that was a good thing. In paragraph 2, the words “in particular” and “in accordance with the law” were especially important: the Special Rapporteur had demonstrated the relationship between international law and domestic legislation clearly enough. Paragraph 3 was also important. Regarding paragraph 4, he said that the attempt to define the criteria for determining the ground for expulsion seemed to be on the right track, insofar as the essential relevant factors were taken into account.

31. On the subject of conditions of detention of a person being expelled, he endorsed the comments on the use of the French terms “*détention*” and “*rétention*”. Although the numerous examples cited in paragraphs 214 to 227 of the sixth report were quite appalling, he supported the point made in paragraph 237. The verbatim quotation of the 19 principles considered relevant among the 39 principles for the protection of all persons under any form of detention or imprisonment listed in General Assembly resolution 43/173 of 9 December 1988 was extremely helpful.

32. He noted with interest the quotation in paragraph 246 referring to recent antiterrorist legislation allowing for the detention of migrants on the basis of vague, unspecified allegations of threats to national security. Also extremely useful was the reference, in paragraph 251, to Recommendation 1547 (2002) of the Parliamentary Assembly of the Council of Europe entitled “Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity”.

33. The legal bases for draft article B (Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion) were abundantly and firmly established, as indicated in paragraph 276 of the report. As currently worded, all the paragraphs contained in the provision seemed appropriate, in that they attempted to reflect the general trends emerging on the subject.

34. In conclusion, he said he was in favour of referring all the draft articles proposed in the sixth report to the Drafting Committee.

35. Mr. McRAE, referring to disguised expulsion, said that he had no objection regarding the substance, although he agreed with Mr. Dugard that the adjective “disguised” might not be appropriate. The reason for prohibiting disguised expulsion was to ensure that a State was not able to do indirectly what it could not do directly. If what was meant by “disguised expulsion” was defined clearly, then perhaps the name would not be so important; however, the definition of disguised expulsion currently contained in

⁷³ See the Commission’s discussion of draft articles 1 to 7 in *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

paragraph 2 of draft article A was not sufficiently clear. The forcible departure of an alien resulting from the actions of a State could equally well be a properly regulated expulsion. The reference to acts or omissions should be qualified to make it quite clear that it did not include direct expulsion.

36. As far as disguised extradition was concerned, while he understood the merit in preventing States from circumventing their extradition laws, the practice mentioned by the Special Rapporteur made it very difficult to argue that there was any customary international law to that effect. As other members had pointed out, and as the Special Rapporteur had recognized, it was clearly an area for the progressive development of international law. He had no objection to that, in principle, but he wondered whether the purpose of prohibiting disguised extradition was to protect the integrity of the extradition regime or to protect individuals who risked being expelled. In the former case, was the issue really relevant to the topic? In the latter case, what was the extent of the protection in question?

37. As currently worded, draft article 8 (Prohibition of extradition disguised as expulsion) contained in the sixth report was too broad. An alien could not be expelled to a State requesting extradition, but if a person could be legitimately expelled—in other words, expelled without any rules on the expulsion of aliens being violated—then why should that person not be sent to a country that might extradite him or her? In order to provide some protection, it was necessary to ensure that a State whose extradition laws did not allow for extradition could not use expulsion as an indirect means of surrendering a person to the State requesting extradition or to a State that intended to extradite that person. The scope of draft article 8 should therefore be made more precise and narrowed.

38. Regarding the grounds for expulsion set forth by the Special Rapporteur, he said that public order and public security were recognized grounds, but apparently there could be others, since draft article 9, paragraph 2, contained the words “in particular”, and paragraph 3 suggested that any ground recognized by international law would be accepted.

39. That raised questions about the nature of the codification exercise under way. One approach would be to indicate all prohibitions of expulsion and to establish procedural guarantees, without framing draft articles on the grounds for expulsion, and leave it to States to decide on the matter themselves within the confines set by the prohibitions. The other approach would be to draw up a definitive list and prohibit all expulsions not covered by the list. The Special Rapporteur had stopped halfway between the two.

40. In his detailed analysis of practice, the Special Rapporteur pointed out that many of the grounds that States had used for expulsion in the past could be subsumed under the category of public order and public security. Given the broad ambit of those terms, it did not seem necessary to specify other grounds. The ground of “suspicion of terrorism” mentioned by Mr. Dugard could certainly fit in under the protection of public order and public security. Furthermore, the Special Rapporteur had not shown that any customary rule of international law had developed to support such other possible grounds.

41. He therefore considered that, in view of the appropriate safeguards set forth in the draft articles relating to the protection of the human rights of persons who had been or were being expelled and the procedural guarantees of due process to which such persons were entitled, limiting the grounds for expulsion to public order and public security would strike a fair balance between the legitimate interests of States and the proper protection of individuals. However, the concepts of public order and public security needed to be better defined, as shown by paragraph 118 of the sixth report. For that reason, and taking into account Mr. Petrič's comment on the distinction between legal and illegal aliens, he believed that draft article 9 required further consideration before it could be referred to the Drafting Committee.

42. Concerning conditions of detention, while he recognized that it was appropriate to provide general protection, he wondered whether the detail of the draft articles did not go beyond the scope of the topic. It seemed excessive, for example, to go as far as to stipulate a separate place of detention. It was one thing to place an obligation on States to recognize that a person subject to expulsion was not a person convicted of an offence resulting in deprivation of liberty, but it was another thing to want to decide for States how they should fulfil that obligation.

43. In conclusion, he suggested that some amendments be made to the draft articles to make them less restrictive before their referral to the Drafting Committee.

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

[Agenda item 1]

44. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of expulsion of aliens would be composed of the following members: Mr. Caflisch, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue and Mr. Vasciannie (Rapporteur), *ex officio*.

The meeting rose at 11.05 a.m.

3041st MEETING

Monday, 10 May 2010, at 3 p.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, 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.

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the sixth report on expulsion of aliens.

2. Mr. PELLET said that he had read with interest the sixth report on the expulsion of aliens (A/CN.4/625 and Add.1–2), even though he still had reservations on the topic, which he thought was suitable for negotiation, not for progressive development, and still less for codification. He had a number of small queries and critical remarks to make on some aspects of the sixth report.

3. First, as noted in paragraph 13, some delegations on the Sixth Committee had raised doubts as to the existence, in the context of expulsion, of an absolute prohibition of discrimination based on nationality. He shared those doubts: by its very nature, expulsion was always based on nationality. Only non-nationals could be expelled or subjected to double punishment, a measure that raised grave issues of morality and human rights. The report highlighted that essential link between expulsion and nationality. The problem was not one of State practice, as was made clear in paragraphs 128 *et seq.* Discrimination among different groups of aliens according to their nationality was permissible if there was a basis for it in legislation. That was certainly the case with the expulsion of aliens from the European Union, but he was not always convinced by the Special Rapporteur's approach to the matter. It was true that the forcible return of European citizens from certain States was shocking, or "striking", as the Special Rapporteur put it more diplomatically in paragraph 36 of his report. Yet in paragraph 104, after having explained that, under European Community law, States were not free to define public order in accordance with their own practices, the Special Rapporteur suggested that the opposite might be true under international law. It was fairly simplistic, however, to say that because things worked one way under European Community law, they should work the opposite way under international law. The question should instead be whether the European Community system could be transposed to the international level. The solutions under European Community law for failure to fulfil administrative formalities, for example, could not be transposed to international law. It was hard to understand why the Special Rapporteur devoted so much attention to that question, merely to conclude that Europeans could not be expelled from the European Union on grounds of non-compliance with administrative formalities.

4. By and large, he supported the report's general approach, that of firmly defending human rights without falling into the trap of "human-rightism". The Special Rapporteur had not confined himself to generalities, but had provided very specific examples of ill-treatment of persons being expelled, without hesitating to name the States responsible for such acts, principally in Africa and Europe. He was not entirely sure that the Asian States

were irreproachable in such matters, but he presumed it was a problem of access to sources rather than of an actual distinction in that regard. On the subject of sources, it was regrettable that certain references to cases involving France were taken from English-language sources, even when there were readily accessible French-language sources such as the European Court of Human Rights website for the judgement in the *Bozano v. France* case. In other instances, the footnotes were much too long or crammed with a bewildering web of cross-references.

5. He welcomed the statement made in paragraph 214 of the report that the cases cited with regard to the questionable or even criminal treatment of detainees had been chosen without any intention of stigmatizing a given country. Nevertheless, some members of the Commission seemed to take personally any reference to the situation in their country. He had no qualms about drawing attention to the fact that the conduct of France in matters of expulsion had been strongly criticized by the Council of Europe, but that did not mean that France had a poor human rights record.

6. While he endorsed the general tone of the report, he did not share some of the Special Rapporteur's views: sometimes he was too categorical, at other times, too lax. An example of the former was the bald assertion that the practice of extradition disguised as expulsion was inconsistent with international law (para. 70). It all depended on the circumstances, and it was not the case if two conditions were met: the rules governing expulsion were observed and the expulsion that amounted to extradition was actually a legitimate case of expulsion. It should be made clear at the end of draft article 8 (Prohibition of extradition disguised as expulsion) that extradition disguised as expulsion was prohibited only when expulsion *per se* was not justified. The opening phrase of the draft article, "Without prejudice to the standard extradition procedure", also required some clarification. The first sentence of paragraph 139 was too general and seemed to imply that being sentenced to imprisonment was always grounds for expulsion. The Commission should be wary of making a rule to that effect or of including such wording in the commentary to the draft article.

7. He agreed with the conclusions drawn by the Special Rapporteur in the section on the grounds for expulsion (paras. 73–210), particularly the reference to striking a fair balance between protecting public order and the interests of the individual (para. 118). He would go even further by asserting that, in a democratic State, respect for human rights was a constituent element of public order—the two balanced one another out. Perhaps paragraph 118 could be reworded along those lines, if it was to be included in the commentary.

8. The Special Rapporteur appeared to be splitting hairs as far as the grounds for expulsion were concerned. Having drawn on the excellent study by the Secretariat published in 2006,⁷⁴ he should have striven to provide not only an analysis, but also a synthesis, of the information available. For example, he stated in paragraph 76 of the report that the question was whether public order and public security were the only two grounds for expulsion

⁷⁴ A/CN.4/565 and Corr.1 (see footnote 42 above).

permitted under international law. Was that really the question, or was it whether the other grounds mentioned in the report were constituent parts of the grounds of public order and public security? He questioned the statement in paragraph 170 that the grounds for expulsion of begging-vagrancy and debauchery-disorderliness raised no particular problem: in fact, they raised major problems. It was difficult to know whether to be amused or appalled at some of the grounds used to justify expulsion in some States, including the presentation of “ideologically false documents” in Argentina (para. 175) and the astonishing “cultural” grounds in certain Gulf States (para. 177), not to mention the bizarre list of conditions that until fairly recently had excluded admission to the United States (para. 151).

9. He wondered whether it was necessary to draw a distinction between illegal entry and breach of conditions for admission, as the Special Rapporteur had gone to great trouble to do. On the other hand, he was glad that the numerous but very similar grounds listed in the report had not been incorporated in draft article 9 (Grounds for expulsion). In paragraph 2 of the draft article, he queried the words “in particular”, which might cause the grounds for expulsion to be misconstrued: the text should refer exclusively to public order and public security, other grounds being acceptable only in conjunction with threats to public order and public security.

10. In general, he endorsed the rationale behind draft article B on the obligation to respect the human rights of aliens who were being expelled or were being detained pending expulsion. In that connection, he noted that the pleadings of Guinea, delivered very recently during public hearings before the ICJ, on the merits of the *Ahmadou Sadio Diallo* case, provided useful insights into conditions of expulsion and extradition disguised as expulsion.

11. It was regrettable that, for the revised text of draft article B, paragraph 1 had been deleted (see the 3038th meeting above, paras. 36–46). It should be reinstated and amended to refer to “general international law” instead of “international human rights law”, since the former subsumed the latter. Paragraphs 2 (a) and (b) should not form part of the same paragraph: paragraph 2 (b) should be inserted between the former paragraph 1 and paragraph 2 (a) and should be reworded to read: “The detention of an alien who is being expelled shall not be punitive in nature.”

12. He disagreed with the statement in paragraph 96 of the report that the jurisprudence of the ICJ provided little assistance in defining the notion of public security. There was ample jurisprudence from the Court, including its 2003 judgment in the *Oil Platforms* case, its 1989 judgment in the *ELSI* case and its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua*. Even if those judgments did not define the notion of public security with specific reference to expulsion, they were still useful for defining the limits within which this notion could be invoked.

13. In addition to the information provided in the report concerning HIV/AIDS (paras. 152 *et seq.*), he pointed out that the World Tourism Organization had condemned the

expulsion from or the prohibition of admission to a State of persons living with HIV/AIDS.⁷⁵

14. In paragraphs 104, 107 and 207, the Special Rapporteur referred to “discretionary power”—a concept familiar under French administrative law yet surprisingly unfamiliar to common-law practitioners, who often confused it with arbitrary power. He drew attention to Judgement No. 191 of the International Labour Organization Administrative Tribunal in the case concerning *Ballo v. United Nations Educational, Scientific and Cultural Organization* (UNESCO), according to which discretionary power must not be confused with arbitrary power and must be exercised lawfully and under the supervision of a court. The main difference between the two concepts was that decisions taken based on discretionary power were subject to the scrutiny of the courts only when a clear error of assessment was involved. Such decisions were mentioned in the footnote to paragraph 101 of the sixth report.

15. With those clarifications and comments, he expressed support for the sixth report and the referral of all the draft articles proposed therein to the Drafting Committee.

16. Mr. HASSOUNA said that the previous year’s debate in the Sixth Committee on the Commission’s report on the work of its sixty-first session⁷⁶ had shown that some States were worried about the complexity of the subject and the vagueness of certain legal principles, such as non-discrimination in the context of expulsion and the right to dignity, while others feared that difficulties would be involved in establishing general rules on the subject (A/CN.4/620 and Add.1, paras. 27, 36 and 38). Such views reflected the sensitive nature of a subject that raised substantive issues touching on national sovereignty and national security. Those concerns had become even stronger since the Commission had embarked on the formulation of rules, amounting to the progressive development of international law. The complexity and sensitivity of the subject should not, however, preclude the formulation of rules, provided the views and concerns of member States were taken into account.

17. The question posed in the sixth report with regard to chapter 3 (Prohibited expulsion practices) of the draft articles was whether “disguised expulsion” was a legal term or a mere descriptive notion used by some organizations or members of certain professions (paras. 29–42). Its essence was clear: it meant expulsion without a formal act, indirect expulsion, a measure that was increasingly being used by developed countries as a means of controlling immigration in order to combat unemployment. Legal regulation of that situation was warranted, and draft article A on the prohibition of disguised expulsion purported to do so. While he agreed with the substance of that article, he thought that paragraph 2 should

⁷⁵ See, *inter alia*, the Declaration on the facilitation of tourist travel, annex to resolution 578 (XVIII), adopted by the General Assembly of the World Tourism Organization in October 2009, and the report of the World Tourism Organization on the implementation of the Global Code of Ethics for Tourism (A/65/275).

⁷⁶ *Yearbook ... 2009*, vol. II (Part Two), chap. VI, sect. B, pp. 129 *et seq.*

be reformulated to state that disguised expulsion was an action or omission of a State that provoked the departure of an alien.

18. Treaty law and international law said little about the illegality of extradition disguised as expulsion, whereas various national courts and the European Court of Human Rights had condemned such practices, which were also inconsistent with the International Covenant on Civil and Political Rights. Hence the need for the rule embodied in draft article 8 on the prohibition of extradition disguised as expulsion. Although that article made it plain that it was “[w]ithout prejudice to the standard extradition procedure”, the Commission could alleviate the concerns of some States by giving greater emphasis to the legal, authentic regime of extradition, as opposed to disguised measures.

19. The accepted rule regarding grounds for expulsion was that expulsion must be for a good reason that must be substantiated by the expelling State. While there were two principal grounds for expulsion, public order and public security, they were evolving concepts without a defined content. In many cases, governments had avoided establishing a definition of national security in order to maintain their power of discretion and freedom of action. Strong guarantees were therefore needed in order to protect the human rights of aliens in the context of expulsion. Expelling States should not have absolute power of discretion when they assessed threats to national security: a fair balance should be struck between the protection of public order and the interests and the rights of individuals. Proof of the threat must be offered and provision should be made for judicial review. Any steps taken must be based exclusively on the personal conduct of the individual, not on general preventive considerations, and must be reconciled with the fundamental principle of the free movement of persons embodied in European Community law. That principle should also apply to the movement of persons in free trade zones and common markets in Africa, Asia and Latin America. He supported the Special Rapporteur’s analysis and the principles set forth in paragraph 118 of the report.

20. Turning to other grounds for expulsion, he observed that the report referred to the concern of certain Arab Gulf States with regard to an “identity threat” posed by the presence of a large number of foreign workers in their territories. Even if such a concern were real, it should not be used as grounds for expulsion, since that would violate the fundamental principle of non-discrimination enshrined in international and regional conventions, including the Arab Charter on Human Rights.⁷⁷ The calls in a number of developed Western countries for protective policies and legal measures owing to the presence of foreign immigrants with a different religious and cultural background likewise posed a threat to human rights and violated the principle of non-discrimination.

21. While the report pointed out that some grounds for expulsion, such as prostitution or ill-health, had become obsolete in contemporary international practice, it failed to mention a number of other grounds. The conclusion must

be drawn that it was impossible to establish an exhaustive list of permissible grounds or to formulate a general rule encompassing all prohibited grounds. He agreed with the substance of draft article 9 but thought that the terms “good faith” and “reasonably” used in paragraph 4 were subjective elements and that the whole draft article should be reformulated to read:

“1. A decision by a State to expel an alien must rest on legitimate grounds.

“2. A State may expel an alien on the grounds of public order or public security or any other ground in accordance with international law.

“3. Any ground for expulsion must be determined according to the law and by taking into account the seriousness of the person’s threat, actual conduct and all other circumstances.”

22. The inhumane detention conditions described in section E of the report were unfortunately to be found in a very large number of developed and developing countries (paras. 214–227). Civil society was a vital source of information about those conditions. As far as conditions of enforcement of expulsion were concerned (paras. 228–236), priority must always be given to humane treatment and preserving the dignity of individuals. While detention pending expulsion was not unlawful, the conditions of detention of aliens being expelled (paras. 237–260) should comply with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, contained in the annex to General Assembly resolution 43/173. Many of those principles, which guaranteed humane treatment and respect for the dignity of detained aliens, should be incorporated into national legislation and adopted in State practice.

23. Although Mr. Hassouna agreed with the substance of draft article B, he proposed some drafting amendments. In paragraph 2 (a), the phrase “in an appropriate place other than a facility” should be replaced with “in appropriate premises other than those”. In paragraph 3 (a), the words “expulsion decision to be carried out” should be altered to read “period of time reasonably necessary for the expulsion process to be terminated” and the phrase “All detention of excessive duration” should read “Any detention of excessive duration”.

24. He recommended referral of the draft articles to the Drafting Committee.

25. Mr. WISNUMURTI said that he had no problem with the general approach adopted in the draft articles, which emphasized the importance of protecting the human rights of persons who were being expelled, as long as that did not undermine the right of an expelling State to deal with a situation arising from the undesired presence of a particular alien in its territory.

26. While expulsion required a formal act of a State, “disguised expulsion” or *de facto* or indirect expulsion could be brought about through the conduct of a State, such as the non-renewal of an alien’s visa or the groundless invalidation of a legal residence permit. A government

⁷⁷ See footnote 23 above.

might also adopt “incentive” measures aimed at compelling aliens to return to their country of origin without their having any choice in the matter. Those steps were inconsistent with international law. He could therefore see the validity of draft article A, paragraph 1, but he had some difficulty with the second part of paragraph 2, which took progressive development a bit too far: it would be difficult to ascertain objectively whether a State “supports” or “tolerates” the acts in question.

27. Turning to extradition disguised as expulsion, he said that since the notion of “disguised extradition” had a long history stretching back to the mid-nineteenth century, there was no point in disputing its use in the Commission’s work or in dwelling too much on the perceived distinction between “disguised expulsion” and “*de facto* extradition”. The usual motive behind “disguised extradition” was to circumvent formal procedures under municipal law which might be protracted and result in a court decision that did not satisfy the requesting State’s interests in achieving the rapid surrender of an alien, or the requested State’s interests in having an undesirable alien removed from its territory.

28. Despite the Special Rapporteur’s statement that international case law was in “short supply”, he had managed to cite some important cases, notably *Bozano v. France*, where the European Court of Human Rights had found that extradition disguised as expulsion was not lawful. On the other hand, in *Öcalan v. Turkey*, the same Court had expressed the view that disguised extradition did not run counter to the European Convention on Human Rights if it was the result of cooperation between the States involved and if the transfer was based on an arrest warrant issued by the authorities of the country of origin of the person concerned. The Special Rapporteur speculated that, had the latter case not been related to terrorism, the Court would have had no difficulty in confirming the case law set forth in *Bozano v. France*; nevertheless, he personally would have expected to see the principles embodied in the Court’s decision on *Öcalan v. Turkey* reflected in draft article 8. Allowing flexibility through cooperation between the States involved, if the higher interests of those States were imperative, would certainly facilitate the process of surrendering an alien, which would otherwise be hampered by the procedural wrangling that normally preceded a formal decision on extradition.

29. Instead, the Special Rapporteur had chosen to rely heavily on the *Bozano v. France* decision and had proposed a draft article 8 that constituted progressive development of international law. He could agree to the draft article’s referral to the Drafting Committee, insofar as the prohibition of extradition disguised as expulsion purported to protect aliens from prosecution by the requesting State or a third State without proper extradition procedures.

30. Requiring the expelling State to give the grounds for expulsion helped to preclude arbitrary decisions by such States and was an obligation established in international law. Nevertheless, a balance must be achieved between the interests of the alien and the need of the expelling State to protect its national interests. Drawing up a list of grounds for expulsion would unduly limit the discretionary power

of an expelling State. Draft article 9 managed to some extent to strike the right balance.

31. Its paragraph 1 reflected the obligation under international law that he had just mentioned. The wording of paragraph 2 was reasonable in that it attached particular importance to two grounds for expulsion, namely public order and public security, while allowing the possibility of relying on others. The references to the law and to international law in paragraphs 2 and 3 set the parameters for the discretionary power of the expelling State in dealing with the alien concerned. Paragraph 4 laid down some additional conditions which an expulsion decision had to meet. Draft article 9 could therefore be sent to the Drafting Committee.

32. Draft article B, as revised (see the 3038th meeting above, paras. 36–46), was important in that it sought to protect the human rights of an alien pending expulsion but, as Mr. McRae had said, its sweeping yet detailed provisions came close to micromanagement. He shared Mr. Petrič’s opinion that it was not ripe for referral to the Drafting Committee.

33. Mr. PERERA said that in paragraph 48 of his sixth report, the Special Rapporteur noted the lack of any explicit statement in treaty law that extradition disguised as expulsion was illegal and pointed out that international case law was somewhat limited, although national courts offered precedents. Considerable attention was devoted to the very different conclusions reached by the European Court of Human Rights in the *Bozano v. France* and *Öcalan v. Turkey* cases. Against that background, rather than endeavouring to codify a customary rule prohibiting the practice of expulsion for extradition purposes, the Special Rapporteur had sought to establish a rule that would be part of the progressive development of international law.

34. Several important developments in the extradition regime should be borne in mind in respect of possible abuse of the extradition process through recourse to disguised extradition.

35. First, the value of inter-State cooperation in bringing to justice the perpetrators of serious international crimes must be recognized, as the European Court of Human Rights had done in *Öcalan v. Turkey*, while also underlining due process requirements.

36. Secondly, it was necessary to give some consideration to the growing use, particularly among States sharing common legal systems, traditions and values, of simplified extradition procedures which departed from well-established substantive requirements under the traditional extradition regime. The simplification of extradition procedures was illustrated by the following new developments: the requirement that an extradition request must be supported by sufficient evidence to establish a *prima facie* case in the requesting State had been removed, and instead, extradition was effected on the basis of a warrant issued by a foreign court; the requirement of treaty-based extradition had been relaxed in favour of *ad hoc* extradition; multilateral conventions could be used as the basis of extradition in the absence of an extradition treaty; extradition could be requested

for all serious crimes incurring certain penalties, and not solely when they were on a list of extraditable offences; and specific serious offences could be treated as non-political for extradition purposes. The purpose of the move towards simplified extradition procedures was to enhance State-to-State cooperation against serious international crime.

37. The dividing line between lawful expulsion and extradition had become much narrower, at least when it came to combating serious international crime or denying safe haven to fugitive offenders charged with such crimes. In the light of those developments, the problem with draft article 8 was that it was drafted in very broad language and those nuances might be blurred. Mr. McRae had, however, raised a more fundamental issue by querying the appropriateness of including in draft articles on expulsion of aliens a provision designed to preserve the integrity of the extradition regime—a question that deserved close examination. The deletion of draft article 8 would not affect the coherence and integrity of the text as a whole.

38. Turning to the section of the report on grounds for expulsion (paras. 73–210), Mr. Perera observed that the logical starting point for considering the grounds for expulsion was that that matter fell into the domain of State sovereignty and that they retained a substantial degree of latitude, subject to due process and respect for the rights and interests of the affected individual. He concurred with Mr. Petrič that another aspect to which attention must be paid when determining grounds for expulsion was the distinction between persons lawfully present and persons unlawfully present.

39. The Special Rapporteur had rightly concluded from his examination of international conventions and case law that there were very few established grounds for the expulsion of aliens apart from public order and public security. Any study of the exact content of those grounds was fraught with considerable difficulty because, in the final analysis, the question of what constituted a threat to public order and public security was eminently within the domain of State sovereignty and had to be decided by the State concerned in the light of all the circumstances of each individual case. As pertinently noted in paragraph 80 of the report, none of the key conventions on human rights or related fields which used the terms “public order” and “public security”, or similar terms, attempted to define the precise content of those concepts.

40. Particular sensitivities were involved in the invocation of the grounds of public security. A State would determine the existence of a threat to public security by reference to its overriding national interest and the particular circumstances surrounding each case. The reference in paragraph 96 to the findings of the Court of Justice of the European Union that “[p]ublic security” must be defined in a flexible way in order to meet changing circumstances” and that the “concept of public security does not have a single and specific meaning” underlined those sensitivities (*Svenska Journalistförbundet* case).

41. Although the report raised the question whether public order and public security were the only grounds for expulsion permitted under international law, to the

exclusion of all the other grounds that might be invoked by States, that was not an issue into which the Commission should delve. Since each of the grounds invoked must be justified by objective criteria and comply with international law, he subscribed to the view expressed by earlier speakers that, for the purposes of the draft articles, the only permissible grounds for expulsion should be those established by international law, namely those of public order and public security.

42. The section of the report on the conditions in which persons being expelled were detained (paras. 211–276) moved into uncertain terrain essentially governed by a variety of national laws, practices and circumstances. That again was an area where the sovereign discretion of States needed to be taken into account. While the broad obligation to respect the human rights of aliens who were being expelled or were detained pending expulsion could be reflected in the proposed draft article, any tendency to be excessively prescriptive must be avoided. The proposed provisions in draft article B, paragraph 3 (a) and (b), on duration of detention and the extension thereof did tend in that direction.

43. In conclusion, he said that the critical challenge when formulating draft articles on expulsion of aliens was to achieve the delicate balance between regarding the expulsion of aliens as an integral attribute of the sovereign prerogative of States and ensuring respect for the human rights of the aliens to be expelled. Preserving that balance became even more difficult in the context of grounds for expulsion and detention conditions.

44. Draft articles 9 and B therefore required close scrutiny in the Drafting Committee, to which they should be referred.

45. Mr. HMOUD said that Mr. Perera had just raised an important policy matter of relevance to counter-terrorism efforts. There was currently no established procedure for cooperation between States on the extradition of suspected terrorists, and the European Court of Human Rights was not consistent in its rulings on such matters. The guarantees set out in the international conventions on combating terrorism were quite elaborate and were binding upon States that were parties to them. In addition, there was a voluminous body of national legislation and multi-lateral treaties dealing with extradition. In draft article 8, which needed to be reworded, the main point was that the established extradition procedures had to be respected and States must not attempt to circumvent them, for that would undermine the existing legal regime.

46. Mr. VASCIANNIE said that in his analysis of the report, he was guided by the general view that customary international law allowed each State the right to determine the circumstances in which it might expel aliens from its territory. However, that right could be limited by treaty relations into which the State had entered, for example within the European scheme, or by restrictions derived from generally accepted human rights rules.

47. In the section on collective expulsion (paras. 19–28), the Special Rapporteur had given careful consideration to whether paragraph 3 of draft article 7 (Prohibition of

collective expulsion)⁷⁸ was consistent with the rules of international humanitarian law, and had concluded that it was. He himself concurred with that conclusion.

48. Mr. Dugard had suggested that what the Special Rapporteur described as “disguised expulsion” might be more properly called “constructive” or “indirect” expulsion. A reading of the case law showed that some courts used the term “constructive” expulsion, an example being the United States District Court decision in the *Xuncax et al. v. Gramajo* case, which had addressed the question of whether such expulsion amounted to inhuman or degrading treatment. However, the term “disguised” expulsion highlighted efforts by States to hide their wish to expel certain individuals, and had a slight connotation of criticism. It might, therefore, be appropriate to retain that term, as opposed to the more neutral “constructive” expulsion.

49. Draft article A, on the prohibition of disguised expulsion, stated that “[a]ny form of disguised expulsion of an alien shall be prohibited.” Why should disguised expulsion be in all instances unlawful? Perhaps because, by definition, it failed to meet the procedural and substantive requirements that had to be fulfilled before expulsion could lawfully take place—namely, an appearance before a judicial or administrative tribunal. It would be preferable, however, to include in the draft articles a provision setting out such requirements, rather than one on disguised expulsion. As the Special Rapporteur acknowledged in paragraph 43 of his report, draft article A represented the progressive development of international law and might therefore not necessarily be acceptable to States. All the more reason for a draft article like the one he himself had just described, which was more likely to be accepted as a statement of *lex lata*, based on State practice.

50. On extradition disguised as expulsion, the Special Rapporteur proposed a rule derived from the *Bozano v. France* decision as a “trend indicator”. However, that decision was based on the specific arrangements contemplated in article 5 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, and as such was but one approach that could be taken. If the rule was to be accepted, as progressive development of the law, its value on policy grounds had to be demonstrated, and he was not sure that this argument had been convincingly made.

51. For example, in the absence of an extradition request, State A might expel an alien to State B, as long as the relevant preconditions were met. But if an extradition request was made and the relevant preconditions were still met, why should State A be barred from expelling the individual? One response might be that the extradition request changed the situation, in that the potential expellee would be vulnerable to trial or sentencing in State B. However, that should not be a bar to expulsion, for three reasons.

52. First, expulsion in those circumstances facilitated international cooperation in dealing with criminal

activities, as shown in the *Öcalan v. Turkey* case; secondly, it existed as an independent basis for removing the individual from the jurisdiction of the expelling State; and thirdly, there was a trend towards relaxation of extradition requirements, as Mr. Perera had pointed out.

53. He would therefore prefer to turn the rule in draft article 8 around, so that an alien might be expelled when the prerequisites for expulsion were met, even if he or she was the subject of an extradition request. Notably, the International Covenant on Civil and Political Rights did not prohibit expulsion when it amounted to extradition.

54. He agreed with the proposal in draft article 9, paragraph 1, that grounds should be given for any expulsion decision, and with the idea in paragraph 2 that a State could expel an alien on grounds of public order and public security. However, the Special Rapporteur should clarify whether the grounds of public order and public security were to be those defined by the expelling State or those stipulated in international law. State practice, as reviewed by the Special Rapporteur, suggested that it was the former that now prevailed. Paragraph 2 also failed to indicate whether grounds for expulsion other than public order and public security were to be permitted. Other grounds listed by the Special Rapporteur might be included, for example, conviction of a serious crime, illegal entry, failure to fulfil important administrative requirements and public health considerations. The grounds of morality and culture should be excluded as part of an effort to help States gradually to develop their national laws in a progressive direction. He generally supported the formulation in paragraph 4, especially the criteria of seriousness of the facts and contemporary nature of the threat.

55. He endorsed the points made by the Special Rapporteur on the revised version of draft article B, which was helpful as a means of setting out minimum conditions of treatment to be met by States if they were to be in conformity with international law. The draft article was not unduly intrusive; rather, it was in line with the fairly detailed approach to minimum conditions of human rights protection set out in articles 9 and 10 of the International Covenant on Civil and Political Rights. Technical changes would need to be introduced in the draft article, but he supported its referral to the Drafting Committee.

56. Ms. JACOBSSON said she welcomed the fact that the Special Rapporteur had returned to the subject of collective expulsion under international humanitarian law, or the laws of warfare, so as to address the concerns laid out by the Drafting Committee in relation to draft article 7.

57. She had no problem with the term “disguised” expulsion but thought its definition must be distinguished from the definition of expulsion in article 2 (a),⁷⁹ provisionally adopted in 2007: the two seemed to overlap. On draft article A, she agreed with Mr. Petrič that the phrase “Any form of” was redundant.

58. The question arose in connection with draft article 8 as to whether a separate article addressing one of the possible situations of disguised expulsion was needed,

⁷⁸ See *Yearbook ... 2007*, vol. II (Part Two), p. 63, para. 199; for the discussion of this draft article by the Commission, *ibid.*, pp. 66–67, paras. 238–243.

⁷⁹ *Ibid.*, p. 68, para. 258, footnote 327.

or whether draft article A sufficed to regulate such expulsion. Another question was whether there was a clear and identifiable trend in the cases cited by the Special Rapporteur. Probably not: hence the Special Rapporteur's suggestion in paragraph 72 of his report that the rule could be established as part of progressive development. Not entirely sure what the purpose of such progressive development was, she was reluctant to support the draft article's referral to the Drafting Committee. The comments by Mr. Hmoud and Mr. Perera on extradition regimes underscored the problem of having a separate article on disguised expulsion in relation to extradition.

59. On draft article 9, she welcomed the intention to set out the grounds for expulsion and clarify their scope in a separate article, and she agreed with others that a distinction must be made between persons lawfully and unlawfully in the territory of a country. The formulation of the draft article needed further discussion in the Drafting Committee.

60. As to draft article B, she welcomed the attempt to set out detailed regulations on the obligation to respect the human rights of aliens detained pending expulsion.

61. With the possible exception of draft article 8, she supported the referral of the new draft articles to the Drafting Committee.

62. Sir Michael WOOD recalled that during the Sixth Committee's debate in 2009, some delegations had expressed reservations about whether it was appropriate to codify the expulsion of aliens. Attention had been drawn to the difficulties inherent in establishing general rules on that subject (A/CN.4/620 and Add.1, para. 27). Some delegations considered that the proposed draft articles were too general or were not supported by sufficient practice in customary law. The need to distinguish between the situations of legal and illegal aliens had been mentioned. Those points should be taken into account as the Commission moved forward with its work.

63. In his latest report, the Special Rapporteur proposed four new articles, for the most part *de lege ferenda*. As Mr. Petrič had pointed out, the expulsion of aliens was a very sensitive field, raising grave practical and political problems for States, and proposals for progressive development in that area should be made with caution.

64. The Special Rapporteur seemed to accept that much of the relevant practice, case law and doctrine was far from conclusive in terms of identifying rules of positive international law. That was especially true of virtually all of the European Union legislation and case law cited. Pronouncements dating back to the nineteenth and early twentieth century were of limited value: in that historical period, issues relating to aliens and the relevant laws and practices had been very different.

65. In addition to extensive citations from case law and national legislation, the Special Rapporteur referred, especially for facts, to numerous reports from newspapers, non-governmental organizations (NGOs) and parliamentarians, and he relied extensively on articles by individual authors. Many of those writings were quite outdated and might be of dubious fairness or accuracy.

For example, in the section on disguised extradition based on incentives, the reaction of the Governments concerned to the criticisms addressed to them was not recounted. Serious abuses had undoubtedly occurred in many cases, but newspaper reports or views expressed by particular politicians, NGOs or authors should not always be taken at face value. In short, he was not convinced that the materials relied upon in the sixth report, thought-provoking though they were, necessarily justified all the conclusions reached by the Special Rapporteur, by way either of *lex lata* or *lex ferenda*.

66. With regard to draft article A, he agreed with those who had questioned the term and even the concept of disguised expulsion and who had suggested that the provision belonged, if anywhere, in the definitions section. What was really being addressed was the scope of the term "expulsion" for the purposes of the draft articles. The Commission should be seeking, not to lay down a prohibitory rule for some new and separate class of State act known as "disguised expulsion", but rather to ensure that the scope of the draft articles covered some of the factual situations described by that term.

67. He also agreed with other speakers that draft article 8 more properly belonged to extradition law and practice rather than to the expulsion of aliens. Important differences persisted in case law between different countries, and it seemed doubtful whether national courts or States regarded the issue primarily as one governed by international law. The reasons given in case law were essentially domestic and constitutional. The Special Rapporteur placed great emphasis on the *Bozano v. France* judgement of the European Court of Human Rights, but as Mr. Gaja had explained, that decision had very limited significance for the Commission's purposes: it dealt with the application of article 5 of the European Convention on Human Rights, which concerned grounds for detention, and not with extradition or expulsion. On the other hand, the *Öcalan v. Turkey* case of the same Court had specifically involved disguised extradition.

68. Turning to draft article 9, he said that, unlike Mr. Pellet, he was not at all certain that, as a matter of general international law, the main grounds for expulsion were public order and public security, however broadly those terms were interpreted. Mr. Vasciannie had made a good point about the need to clarify whether those grounds were as defined under international or national law. If it was the latter, were they to be interpreted by the judiciary, or principally by the executive? The implication in paragraph 3 was that any grounds were allowed, provided that they were not contrary to international law. The provision on grounds needed to be read in conjunction with draft article 3, according to which a State had the right to expel an alien from its territory. He did not see the need to draw up a list, whether exhaustive or illustrative, intended to limit the grounds on which a State could expel an alien. Guidance could hardly be derived from European Union law, which was based on the principle of free movement of European Union citizens, something unknown in general international law; nor could it be found in the grounds on which a State could expel a refugee who was lawfully in its territory. He shared the concerns about draft article 9 expressed by other speakers and wondered whether it was necessary.

69. In the revised version of draft article B (see the 3038th meeting above, paras. 36–46), the first paragraph had been deleted, and rightly so, since it dealt with the general obligation to respect human rights, which was covered elsewhere. The new text focused on persons detained pending expulsion and on three specific matters: place of detention, duration of detention and review of detention. Concerning the new paragraph 1, he said that to stipulate that detention must be carried out in a place other than a facility in which sentenced persons were detained, was to be unduly prescriptive. What mattered, surely, was that the human rights of all detained persons were respected and that conditions of detention were humane. Circumstances varied greatly from State to State, both in the number of illegal aliens who arrived at their borders and in the resources available to them at any particular place or time. The need for all persons undergoing expulsion to be treated at all stages of the process in accordance with international human rights law should be stated clearly.

70. Mr. Pellet seemed to have misunderstood his common-law colleagues, who were perfectly familiar with the notion of discretionary powers. Common-law systems had judicial review, which sounded very similar to the French system.

71. He could agree to the referral of draft article A to the Drafting Committee, on the understanding that it would be examined as part of the provisions on definitions. Draft article 8 should not be sent to the Drafting Committee, since its subject matter was extradition, which did not fit in with the current topic. He had no objection to sending draft article 9, paragraph 1, to the Drafting Committee, because it dealt with an important procedural matter, namely the need to give the reasons for which a person was being expelled, but he had doubts about other parts of the text. In draft article B, paragraph 1 was unnecessary, but paragraphs 2 and 3 might have a place in the draft articles.

72. Mr. KAMTO (Special Rapporteur) said that the plenary had now come to the end of its debate on the topic, but unfortunately, there had been little discussion of certain substantive issues on which he would have liked to have had guidance. Whether to refer a particular draft article to the Drafting Committee was a substantive matter that should be decided on in plenary, not in the Drafting Committee.

73. The CHAIRPERSON said it seemed to her that most speakers had agreed to refer the draft articles to the Drafting Committee, provided their views were taken into account during the drafting exercise. She had heard very few strong objections to such a course of action.

74. Mr. PELLET said that he had had the same impression. He shared the Special Rapporteur's concern, however, about not knowing what was a fundamental issue for the Commission and what was a drafting problem: as a Special Rapporteur himself, he was against the referral of texts to the Drafting Committee until he had a general idea of what direction its work should take. However, it was up to the Special Rapporteur to decide that members of the Commission had taken divergent positions on a particular point and that the plenary must give the Drafting

Committee instructions. He should indicate which points he believed had not been sufficiently clarified.

75. Mr. KAMTO (Special Rapporteur) said that several speakers had questioned whether draft article 8 was appropriate. It was predicated on the assumption that respect for the rules and procedures of extradition ensured the best possible protection of the rights of the person who was to be expelled, particularly when the expulsion would be to a State that did not have an extradition treaty with the State in which the person was located. He agreed with those who had argued that the current wording was too general and that there was no reason, when the criteria and conditions for expulsion were met, for a State to decide not to expel someone simply because it did not want the person to be extradited. If there was agreement on that matter, it might be addressed as a drafting issue. Mr. Wisnumurti had been right to observe that while draft article 8 had been derived from an analysis of the *Öcalan v. Turkey* case, it did not adequately reflect the principles embodied in that case. It might, indeed, be construed as introducing a categorical prohibition of expulsion, which was not at all the intention.

76. The Commission might adopt the view that draft article 8 merely posed drafting problems that could be overcome by making the language more restrictive so as not to suggest a categorical prohibition of expulsion in the context of extradition, if the conditions for expulsion were met. On the other hand, if it had only general doubts about draft article 8, it would be difficult to make progress in the Drafting Committee.

77. The CHAIRPERSON said that as she saw it, extradition was the link between two separate regimes—the regime on expulsion of aliens and the regime on mutual judicial assistance. Draft article 8 should be further examined in the light of all the arguments: it could be referred to the Drafting Committee for further consideration.

78. Sir Michael WOOD said that he had fundamental difficulties with draft article 8, because he did not see it as reflecting a rule of international law.

79. Mr. GAJA said that, in order to take into account some of the criticism voiced, the Special Rapporteur could perhaps draft a revised version of draft article 8, which could then be referred to the Drafting Committee.

80. Mr. PELLET endorsed that course of action but pointed out that much of the work had already been done by Mr. Vasciannie in his proposal, which he urged the Special Rapporteur to follow closely in recasting draft article 8.

81. Mr. KAMTO (Special Rapporteur) said that he would attempt to produce new wording, taking into account the comments that the current text was too general and included a prohibition that was too broad and was inconsistent with reality and the rules of international law. Lastly, he pointed out that the Commission had expressly instructed him not to take up the issue of terrorism, which had been invoked earlier in the meeting.

The meeting rose at 6 p.m.

3042nd MEETING

Tuesday, 11 May 2010, at 10 a.m.

Chairperson: Ms. Hanqin XUE

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

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

[Agenda item 3]

FOURTEENTH⁸⁰ (*continued*)* AND FIFTEENTH
REPORTS OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the members of the Commission to resume the debate on the agenda item on reservations to treaties.

2. Mr. PELLET (Special Rapporteur), resuming the debate on draft guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 in his fourteenth report, thanked those members, unfortunately few in number, who had taken the floor on this part of his fourteenth report. As to those members who had not spoken, he interpreted their silence as approval. If that was the case, the referral of the draft guidelines to the Drafting Committee should not pose a problem, since all speakers had favoured doing so.

3. That said, he had taken due note that that agreement had been accompanied, at least for one speaker, by a condition: that the debate on the existence of a specific category of reservations, namely established reservations, remain open.

4. He was very committed to the idea that it was for the Commission, meeting in plenary, to take decisions on questions of principle (both for his topic and for the others) and that the Drafting Committee should restrict itself to questions of drafting or purely technical matters (which already constituted a considerable amount of work). In the current case, however, he did not think that any problem of principle had really been raised during the discussions, even if the speaker to whom he had alluded had somewhat exaggerated the differences between them.

5. Leaving the debate open, he wished to make a number of remarks, especially since several speakers had expressed serious concern about what they had called the “concept” of “established reservations”.

6. To start with, he was not convinced that “established reservation” was a concept. In his opinion, it was above all a convenient expression, the advantage of which was that it avoided a long paraphrase: it designated a permissible reservation, from the point of view of both form and substance, which had been the subject of at least one acceptance. The idea of an “established reservation” was not of his own making: article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions referred to the consequences of the “establishment” of a reservation pursuant to articles 19, 20 and 23 by specifying that a “reservation established with regard to another party in accordance with articles 19, 20 and 23” (and the effects followed). He noted that the most sceptical of the participants in the debate on the relevance of the notion of established reservation had admitted that it was not sufficient for a reservation to be permissible for it to produce effects: it must also have been the subject of an acceptance. For that reason as well, he did not believe, contrary to what had been said by another speaker, that this was an artificial problem which would create unnecessary confusion. He was relieved to hear that a number of members had made comments along those lines.

7. However, although a majority in the Drafting Committee concurred with the four members who had expressed doubts about, and even some hostility towards, a systematic use of the expression “established reservation”, he thought that the wording could be modified by placing emphasis on the acceptance of a permissible reservation. In any case, he endorsed the comments by two other speakers (who favoured the idea that a reservation must be “established” in order to produce effects), namely that a distinction should be made between permissible and non-permissible reservations and that in any event the acceptance of a reservation—the express or tacit consent to the reservation—played an essential role.

8. That led him to reassure one speaker who was worried about whether the establishment of a reservation was to be seen in absolute or in relative terms. His reply to that question was clear: if a reservation was only established if it was accepted and if acceptance was individual (except, perhaps, if one was to consider the exceptions introduced by the first three paragraphs of article 20 of the Vienna Conventions), then normally it could only concern a relative concept (or relative effects).

9. The second point which had been the subject of a rather firm objection by speakers had to do with the reference to treaties “with limited participation” in the title and body of draft guideline 4.1.2. He entirely accepted the criticism; the phrase was deceptive in that it was only a very partial reflection, in both spirit and substance, of the underlying intention of article 20, paragraph 2, of the Vienna Conventions. Thus, he was in complete agreement with speakers who had argued that what was important was not the limited participation, but the intention of the negotiators to preserve in full the integrity of the treaty. He freely admitted that he had been carried away by the tortuous history of the provision, but if all the members of the Commission did not object, he would not venture to propose another formulation, that being the task of the Drafting Committee and one which, he had no doubt, it would discharge satisfactorily.

* Resumed from the 3038th meeting.

⁸⁰ See footnote 9 above.

10. He also agreed that an effort should be made to reintroduce the notion of the object and purpose of the treaty in the second paragraph of draft guideline 4.1.2. Perhaps the whole first part of article 20, paragraph 2, of the Vienna Conventions could be used. However, he continued to believe that the idea of the object and purpose of the treaty was puzzling, and he recalled that the Commission had tried to define it in draft guidelines 3.1.5 and following, but he was not certain that those laudable efforts had made it any clearer.

11. As noted during the debates, draft guideline 4.1.1, on expressly authorized reservations, could not be read separately from the guidelines on specified reservations. Just because a treaty authorized reservations to some of its provisions did not mean that any reservation to those provisions was authorized. The *English Channel* case had rectified that somewhat simplistic view, and the Commission had endorsed the position of the ICJ in guidelines 3.1.2 and, above all, 3.1.4, which ruled out the idea that the authorization to formulate reservations allowed any reservation to be formulated. As to the wording of draft guideline 4.1.1, he had indicated in his introduction that he would accept in advance any simplification that the Drafting Committee might suggest; he recalled that at least one speaker had termed the wording "convoluted".

12. He had taken due note of the recommendation to base the commentary to draft guideline 4.1.1 to a greater extent on the 1982 advisory opinion of the Inter-American Court of Human Rights on *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (arts. 74 and 75); that would also be useful for the commentary to draft guideline 4.2.7.

13. On draft guideline 4.1.3, some speakers had criticized the fact that he had mixed elements from article 20 and article 21 of the Vienna Conventions. That was probably true, but it was also the case for draft guideline 4.1.2, among others, and was justified by the structure of the Guide to Practice and the distinction which it drew (in conformity with a long-standing decision of the Commission) between the permissibility of reservations (third part of the Guide) and their effects (fourth part).

14. He regretted that the native English speakers in the Commission did not consider the English translation of his fourteenth report to be satisfactory; he had not had the time to review it. If they were prepared to address the problem, the corrections could appear in a corrigendum.

15. Mr. GAJA agreed with the Special Rapporteur that article 20, paragraph 4, of the 1969 and 1986 Vienna Conventions required the acceptance of the reservation by at least one contracting State for the reserving State to become a contracting State and thus a party to the treaty. Some depositaries, including the Secretary-General of the United Nations, advanced the date of the entry into force of the treaty with regard to the reserving State for pragmatic reasons. It was unlikely, as the Special Rapporteur had noted, that all the other contracting parties would formulate an objection to the reservation and would also oppose the entry into force of the treaty for the reserving State. However, that practice could not stem from the 1969 Vienna Convention, to which the Commission

must remain faithful, as the Special Rapporteur had recalled in paragraph 249 of his fourteenth report.

16. In his view, it should be mentioned, at least in the commentary, that pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, an objection to a reservation on the part of a contracting State could play the same role as its acceptance that the reserving State become a contracting State and, where applicable, a party to the treaty. That would hold true, to employ the text of the provision, "unless a contrary intention is definitely expressed by the objecting State". That situation might seem paradoxical: if there was neither acceptance nor objection, it was necessary to wait for 12 months to elapse as set out in article 20, paragraph 5; otherwise, the treaty entered into force for the reserving State immediately.

17. In draft guideline 4.2.4, the Special Rapporteur departed from article 21, paragraph 1 (a), of the Vienna Conventions, but only in order to follow the definition of reservation contained in article 2, paragraph 1. He thus rightly envisaged that a reservation did not modify the provisions of a treaty, but rather the legal effects of those provisions. The Special Rapporteur was right to proceed in that fashion, particularly since he remained faithful to the Convention. However, the title of the draft guideline (Content of treaty relations) gave the impression that the subject was covered in full therein, whereas in reality it was developed in draft guidelines 4.2.5, 4.2.6 and 4.2.7. Perhaps another title should be found.

18. On the whole, he agreed with the Special Rapporteur's opinion, but he wished to make two remarks regarding the draft guidelines.

19. First, when a reservation concerned a modification of the legal effects of the provision of a treaty, a reserving State might simply replace its obligation with a different one, as the Special Rapporteur put it. That was clearly the case for the reservation of Finland⁸¹ referred to in paragraph 269 of the fourteenth report: Finland wanted to use symbols instead of road signs, but did not claim that other States parties to the Convention on road signs and signals must adopt similar measures. However, another possibility should also be contemplated, namely when a reserving State wanted to change the application of provisions of a treaty in such a way that States which accepted the reservation also had to replace their obligations by other obligations in their treaty relations with that State. One such example was the reservation formulated by the Union of Soviet Socialist Republics on article 9 of the Convention on the High Seas in order to broaden the immunity of government vessels. The reservation had read: "The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships."⁸² Clearly, that reservation had aimed to establish a treaty regime which would have committed all States accepting the reservation to confer unlimited immunity on all government vessels

⁸¹ *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. XI.B.20.

⁸² *Ibid.*, chap. XXI.2.

in their relations with the reserving State. In Mr. Gaja's view, the text of the draft guidelines should reflect those two possibilities with regard to the effects of reservations aimed at modifying the legal effects of a provision of a treaty.

20. Secondly, on reservations to human rights treaties or other treaties for which reciprocity did not appear to apply, the text of draft guideline 4.2.7 did not clearly reflect the legal situation resulting from a reservation to such treaties. Treaty relations between a reserving State and other States parties were affected by a reservation, since the reserving State could not invoke a provision of the treaty within the limits of the reservation. Similarly, within the same limits, other States did not have obligations *vis-à-vis* the reserving State. It was true that the content of the obligations of the other States parties was not modified, because they were bound with regard to the non-reserving States, but could it be said that the content of treaty relations with the reserving State was not modified by the reservation?

21. On a last point, he said that the questions which he had raised concerning the use of the expression "established reservation" could be addressed by the Drafting Committee.

22. Mr. FOMBA said that the approach adopted by the Special Rapporteur in paragraph 238 of his fourteenth report to define and set out the consequences of the establishment of a reservation was logical and consistent.

23. Draft guideline 4.2.3, whose wording he endorsed, did in fact contain a lacuna with regard to the issue of the date on which the author of the reservation might be considered to have joined the group of contracting States or contracting international organizations. In paragraph 244 of the report, the criticism of Sir Humphrey Waldock was well founded. In paragraph 249, the position taken by the Special Rapporteur in favour of the Vienna regime, despite the existence of practice to the contrary, was acceptable in the absence of any good reason to change it.

24. With regard to draft guideline 4.2.1, the proposal made in paragraph 250 to express the idea contained in article 20, paragraph 4 (c), of the Vienna Conventions was useful in that it respected the Vienna regime, at least in part, and it avoided the confusion in depositary practice. The wording of the draft guideline was acceptable.

25. The justification for draft guideline 4.2.2 given in paragraph 252 was clear and persuasive, and the wording was equally clear and acceptable. Concerning the question of the modification of provisions of the treaty or their legal effects, he concurred with the Special Rapporteur's conclusion in paragraph 258 that a reservation, as an instrument external to the treaty, could not modify a provision of that treaty, but rather its application or effect.

26. On draft guideline 4.2.4, he agreed for the most part with the remarks in paragraphs 259 to 261. The wording did not call for any particular comment, except that the use of the sole word "modifies" appeared to raise the question of whether it was to be taken "strictly" or "broadly", since the Special Rapporteur seemed to have enlarged its

meaning to include "excluding reservations". Admittedly, there was no longer any reason to be concerned about that, because the specific question of exclusion and modification was covered later in draft guidelines 4.2.5 and 4.2.6. The Special Rapporteur rightly noted that the distinction between "modifying effect" and "excluding effect" was not always easy to draw. The illustration which the Special Rapporteur had provided was instructive and his conclusion was pertinent.

27. As to the point made by the Special Rapporteur in paragraph 265 to the effect that, logically, the other States or international organizations with regard to which the reservation was established had, through their acceptance, waived their right to demand performance of the obligation (even if it was of a customary nature) stemming from the treaty provision in question, that interpretation was correct from a logical point of view, but the fact remained that in any case, a customary rule continued to be of general application.

28. With regard to draft guideline 4.2.5, the concern to specify the effect of exclusion produced by the reservations covered under draft guideline 4.2.4 seemed legitimate. The wording of the three paragraphs of draft guideline 4.2.5 did not call for any particular observations.

29. Concerning draft guideline 4.2.6, he agreed with the analysis of the mechanism of the modifying effect in paragraph 270. The first two paragraphs did not pose any particular problem, and the third was particularly relevant in that it reflected well the logical dialectical link between obligation and right. He agreed for the most part with the remarks made on the principle of reciprocity, notably in paragraphs 280, 281 and 285. The reference in paragraph 289 to the model clause on reciprocity of the effects of reservations, proposed in the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe adopted by the Committee of Ministers of the Council of Europe in 1980 was useful.

30. The explanation given by the Special Rapporteur in paragraph 290 for draft guideline 4.2.7 was acceptable. The wording of the draft guideline would provide a better indication of the scope of article 21 of the Vienna Conventions: after the general rule was enunciated, the draft guideline specified the main exceptions. On the whole, the wording of subparagraphs (a), (b) and (c) did not call for any particular comment, although he wondered whether, from a logical point of view, there was not a link between subparagraphs (c) and (a).

31. In closing, he said that he was in favour of referring draft guidelines 4.2.1 to 4.2.7 to the Drafting Committee.

32. Mr. McRAE (Chairperson of the Drafting Committee) said that the expression "established reservation" in the first sentence of article 21, paragraph 1, of the Vienna Conventions was used as a linking device to indicate that reservations had certain effects. However, his concern was that it then became applicable to article 20 and article 21. Although that did not really introduce a new concept, it certainly caused some confusion in the interpretation of the provisions of the Vienna Conventions, a confusion which was evident in the draft guidelines on the

effects of an established reservation. Draft guideline 4.2.1 specified that the author of a reservation was considered a contracting State as soon as the reservation was established, but article 20, paragraph 4, provided that a reserving State was a party when a reservation was accepted. In other words, under article 20, paragraph 4, the constituent act was acceptance, whereas under the draft guideline, the constituent act was establishment. Thus, the concept of establishment, which had only a linking function in article 21, paragraph 1, acquired a constituent function under article 20. The same problem arose in draft guidelines 4.2.2 and 4.2.3, in which the constituent act was establishment, and not acceptance as under article 20, hence the confusion in the reading of the guidelines in the light of article 20. On the other hand, the subsequent draft guidelines did not raise that difficulty, because they dealt with effects, and the concept of establishment played the same role there as in article 21, paragraph 1, namely to indicate the reservations to which the effects of article 21, paragraph 1, were applicable. He fully understood why the Special Rapporteur had used the idea of establishment in a broader sense than under the Vienna Conventions, the point being to make it explicit that a reservation that had a constituent effect under article 20, paragraph 4, must be permissible and must meet the requirements as to form and procedure—what was referred to in article 21, paragraph 1, as a “reservation established with regard to another party in accordance with articles 19, 20 and 23”. He was concerned that this might inevitably create a new separate concept of “established” reservation. In his view, it would be preferable to retain the word “acceptance” in article 20, paragraph 4, and to explain in the commentary that article 20 contemplated that, to be accepted, a reservation must be permissible and must follow the correct forms and procedure. That problem could perhaps be resolved in the Drafting Committee.

33. He also wished to make three minor remarks on the other draft guidelines. Concerning draft guideline 4.2.5, he wondered whether the last two paragraphs were really necessary. As stated in the first paragraph, a reservation that excluded the legal effect of a treaty provision rendered that provision inapplicable between the parties; was it necessary to expand on that any further? The two following paragraphs simply indicated that “inapplicable” meant “inapplicable”. If something had legal effects, there was some benefit in spelling it out, but in the current case, if the provision of the treaty was inapplicable, then the subsequent paragraphs appeared to be repetitious. On the practice of the Secretary-General, who accepted as a party a State that had accompanied its instrument of accession with a reservation before any other State had accepted that reservation, the Special Rapporteur’s comment that this practice was contrary to the Vienna Conventions was certainly true in terms of the provisions of those instruments, but it was an open question whether that meant that such practice was incorrect or should be criticized, because that viewpoint presupposed that it was up to the depositary to interpret the Convention, whereas it might be argued that it was up to the parties to do so. It did not seem that the parties to the Convention had objected to the practice of the Secretary-General. It might be useful for Mr. Nolte, as suggested by the Special Rapporteur, to give his opinion on the question before the Commission took a decision. Lastly, in paragraphs 268 and 269, the Special

Rapporteur had given examples of reservations in which, in his view, the authors rejected an obligation under the treaty and replaced it with a different one. Those examples, in particular the one cited in paragraph 269, were not very convincing. It might be asked whether Finland had really undertaken a new obligation through that reservation or whether it was simply stating its practice in respect of road signs, without committing itself not to change that practice in the future. Given that Mr. Gaja seemed to agree with the Special Rapporteur on that point, he was prepared to recognize that some aspect had perhaps escaped him, but he wondered whether the example given really showed that a State had undertaken a new obligation or whether it simply indicated its practice. However, he did not have any difficulty with the proposition set out in 4.2.6 concerning the modification of the legal effect of a treaty provision. As he saw it, the draft guidelines as a whole should be referred to the Drafting Committee.

34. Sir Michael WOOD said that he was in agreement with the substance of draft guidelines 4.2.1 to 4.2.7 and had no objection to their being referred to the Drafting Committee, with the exception of the draft guideline reflecting article 20, paragraph 4 (c), of the Vienna Conventions, which dealt with the date on which the reserving State’s consent to be bound took effect. Given the absence of any practice of “express acceptance” of reservations, that subparagraph, if applied to the letter, would lead in almost every case to a 12-month delay before the reserving State’s consent to be bound became effective. The Special Rapporteur had pointed out that some depositaries, in particular the Secretary-General, did not apply that provision, a practice which States had not challenged. It was, however, important to have a clear rule in view of the potential consequences, including in litigation. The Commission could decide to follow the Special Rapporteur, who said that the practice of the Secretary-General was “entirely open to criticism” (para. 246) and that the rule expressed in article 20, paragraph 4 (c), of the Vienna Conventions “has not lost its authority” (para. 249), and thus maintain the rule. Throughout the exercise, the Commission had rightly judged it essential to respect the regime of the Vienna Conventions. However, that might call into question years of practice, which had been described as pragmatic, and cast doubt on actions taken by depositaries and others under numerous treaties, with unforeseen consequences. The other possibility would be for the Commission to be bold and to follow what seemed to be established practice or even a subsequent practice in the application of the Vienna Conventions which establishes the agreement of the parties regarding their interpretation, or perhaps even a modification of the treaty by subsequent practice. He had an open mind regarding both possibilities, although he preferred the second, which would be to accept what seemed to be the practice not only of the depositaries, but of all States. In any event, the issue needed to be explained fully in the commentary, and it would be useful for the Commission to seek the views of States and organizations between the first and second readings.

35. On the other hand, he had considerable reservations about the analysis in paragraphs 285 to 288 concerning the nature of a State’s rights and obligations under human rights treaties, and he encouraged the Special Rapporteur

to reflect further on that question before presenting the Commission with a draft commentary. In particular, the Special Rapporteur should reconsider the apparent endorsement in paragraph 285 of passages from the controversial General Comment No. 24 of the Human Rights Committee.⁸³ He did not believe that it was generally accepted that human rights instruments formed a special category for the purposes of the regime of reservations, or even, as the Special Rapporteur indicated in paragraphs 286 and 287, that they were part of a wider category of treaties “that do not lend themselves to reciprocity”. Nor was it generally accepted that the account given in the General Comment was satisfactory. It was not the postulate on which the ICJ had based its advisory opinion of 1951 on *Reservations to the Convention on Genocide*, nor was it the approach of other bodies, such as the European Court of Human Rights, which had held in *Ireland v. the United Kingdom* that the European Convention on Human Rights “comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral understandings, objective obligations” [p. 90]. In practice, the substantive provisions of human rights instruments did create a “network of mutual, bilateral obligations”. That was clear, for example, in the inter-State dispute settlement provisions which they often contained, and in practice States reacted to reservations to human rights instruments in the same way as in the case of other treaties. The Special Rapporteur probably agreed that, at the very least, the wording of draft guideline 4.2.7, subparagraph (b), needed to be carefully considered.

36. The Drafting Committee should perhaps also address the question of the use of the new term “contracting party”, which was both unnecessary and ambiguous. The Vienna Conventions were consistent in their use of the terms “contracting State” and “contracting organization” to mean a State or international organization that had consented to be bound by a treaty, whether or not the treaty had entered into force. They used the term “party” to mean a State or international organization which had consented to be bound by a treaty and for which the treaty was in force. They did not use the term “contracting party”. It was important to use the terms found in the Vienna Conventions in the same meaning throughout the draft guidelines and commentaries, as had already been done in draft guideline 4.2.1.

37. Mr. PELLET (Special Rapporteur) said that he did not want the draft guidelines to be referred to the Drafting Committee before the Commission had expressed its opinion in plenary on whether the practice of the Secretary-General had modified the Vienna Conventions.⁸⁴ For his part, he was prepared to admit that it had in fact done so, but not that it had allowed the Vienna Conventions, whose wording was crystal clear, to be interpreted differently. The practice of the Secretary-General went in the other direction for good reasons, and no one had objected, but in his view, that was a complete departure from the

meaning of the Vienna Conventions, which were unambiguous, whereas practice was not. Although the practice of the Secretary-General was important, other bodies that were depositaries of many treaties, notably the Food and Agriculture Organization of the United Nations, waited one year before a treaty entered into force. Consequently, although he remained open to the position that was the opposite of his own, he urged those speakers who would take the floor after him to give their opinion on the question. If a clear majority emerged, the Drafting Committee would follow it, and if not, he would ask for a vote and would abstain.

38. The CHAIRPERSON said that, in her opinion, the point was not to choose between two possibilities, but simply to describe the situation, taking into consideration both the terms of the Vienna Conventions and subsequent State practice.

39. Mr. DUGARD, noting that the Special Rapporteur had emerged as a “*droits-de-l’homme*” in paragraphs 285 to 287 of his report, said that he agreed that human rights instruments required special treatment. Sir Michael had argued that they were not different from other treaties because they provided for inter-State dispute mechanisms, but everyone knew that, with the exception of the European Convention on Human Rights, concerning which there had been a small number of inter-State disputes, the inter-State dispute procedures under international human rights conventions had never been invoked. It would be going too far to infer from the mere existence of those procedures that international human rights instruments could not be qualified as non-reciprocal.

40. Mr. GAJA said that 20 years earlier, he had written that the practice of depositaries was pointing to a new rule of general international law. Perhaps the commentary could indicate that, although the practice deviated from the Vienna Conventions, it might have some substance in general international law because of the attitude that States had taken in reaction to that of the depositaries. On the other hand, it could not be said that subsequent practice was to some extent relevant for interpreting the Vienna Conventions, which were very clear on this point and did not need to be interpreted in the light of practice. Moreover, practice in the area of reservations deviated from the Vienna Conventions in many other aspects. It might therefore be time for the Commission to take practice into consideration and perhaps identify a new rule of general international law. As he saw it, the Special Rapporteur’s view should be followed, and something should perhaps be said to justify the Secretary-General’s practice from a different perspective, one that moved away from the Vienna Conventions.

41. Sir Michael WOOD said that there had to be a clear rule, because one could not say that the Secretary-General was acting in conformity with international law but that he was not acting in conformity with the Vienna Conventions. He had an open mind on what the rule should be, but he did think that the Commission should explain the two possibilities in detail in the commentary and seek the views of States at the end of the first reading to see whether they expressed a preference for one reading or another of the draft guidelines. On the point raised by

⁸³ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

⁸⁴ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (United Nations publication, Sales No. E/F.94.V.15), document ST/LEG/7/Rev.1, pp. 54–55, paras. 184–187.

Mr. Dugard, he had not been suggesting, of course, that human rights instruments were bilateral treaties only. In reality, inter-State mechanisms (although perhaps not so much in dispute settlement mechanisms) were invoked bilaterally all the time in diplomatic correspondence, in which States reminded each other of their obligations. Moreover, the dispute settlement mechanisms under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under the International Convention on the Elimination of All Forms of Racial Discrimination had been invoked in two cases currently before the ICJ.⁸⁵ He hoped that, when he drafted the commentary, the Special Rapporteur would not unreservedly endorse General Comment No. 24 of the Human Rights Committee.

42. Mr. SABOIA said that, like Mr. Gaja, he thought that the draft guideline should follow the letter of the Vienna Conventions, and the commentary should reflect the practice of some depositaries which seemed to be emerging. He also agreed with Mr. Dugard with regard to human rights instruments and the non-application of the principle of reciprocity. Notwithstanding Sir Michael's comments, the fact that States reminded each other of their obligations was not sufficient to establish the principle of reciprocity for human rights instruments in the same way as for other treaties.

43. Mr. KAMTO recalled that the Commission had rightly decided to take a dogmatic position on the Vienna Conventions, in particular when their provisions were clear. One might ask how subsequent practice, which was not common to all depositaries, could lead to the modification of an established rule. More generally, the question arose as to the methodology of codification work. Should the Commission, on the basis of a few elements of practice, ask States whether they had a preference? As he saw it, the Commission should instead reaffirm the rules of the Vienna regime and indicate in the commentary that contrary practice existed, but remained insufficient.

44. Mr. NOLTE said that he had a few comments on draft guidelines 4.2.3 to 4.2.7. The Special Rapporteur had evoked the practice of depositaries that deviated from the provisions of article 20, paragraph 4 (c), of the Vienna Conventions, which required the acceptance of a reservation by at least one other State for the State which had formulated the reservation to become a party to the treaty. The Commission should look at the significance and the intention of such practice. His impression was that the motivation behind the practice of the depositaries and its acceptance by States was not to deviate from the Vienna Conventions, but rather to apply them less strictly so as not to pass judgement on the substantive effects of reservations. While that was sound, it perhaps went too far, because waiting for acceptance was not tantamount to making such a judgement. Thus, it could not be concluded that subsequent practice implied an informal modification of the Vienna regime. On the other hand, important practice existed and could not be ignored. Sir Michael had rightly stressed that there could not be two rules, one

stemming from international law and the other from the Vienna Conventions, because that would lead to different dates of entry into force for the same treaty. The wisest solution would probably be for the Commission to focus its attention solely on practice and to ask States whether they wished to make it a rule.

45. Turning to the effects of a reservation on the content of treaty relations (draft guideline 4.2.4), he said that the problem was more one of terminology than of substance. As article 21, paragraph 1 (a), suggested, a reservation could not modify the *text* of a provision, but he wondered whether the best way to make that clear was to say that a reservation modified "the legal effects". That expression was ambiguous, and it would therefore be preferable to speak of "obligations", as recommended by Professor Imbert⁸⁶ and as the Special Rapporteur had done in draft guideline 2.6.2. Draft guideline 4.2.4 would then read: "A reservation ... modifies ... *the obligations* arising out of the provisions of the treaty to which the reservation relates, to the extent of the reservation."

46. With regard to excluding reservations and modifying reservations, he wondered whether it was necessary to formulate two separate draft guidelines (4.2.5 and 4.2.6). As pointed out by the Special Rapporteur, the difference between those two categories was not necessarily clear in all cases, and the same reservation could have both an excluding and a modifying effect. The risk was that in practice, by trying to place the reservation in one category or the other, one might overlook complex effects or even use the category of excluding reservations to deny the more indirect modifying effects which reservations had on treaty obligations as a whole. Consequently, if the distinction was maintained, a safeguard clause should be included to remind the parties concerned of the additional modifying effect which excluding reservations might have.

47. Finally, on draft guideline 4.2.7, the Special Rapporteur had been right to pose as general rule the reciprocal application of the effects of reservations, but the exceptions that he had proposed were perhaps stated too categorically. Of course, a reciprocal application of a reservation might not be possible because of the nature or content of the reservation (subpara. (a)), but it must always be verified whether a reciprocal application was really impossible. For example, the reservation formulated by Canada⁸⁷ to the Convention on psychotropic substances, in order to allow the consumption of peyote for religious purposes, was not specific to Canada. The United States Supreme Court had rendered a similar decision, and members of such groups might wish to continue practising their religious ceremonies after emigrating to other countries.

48. The most important exceptions to the principle of reciprocity were those set out in subparagraphs (b) and (c) of draft guideline 4.2.7, namely when the treaty obligation to which the reservation related was not owed

⁸⁵ *Questions relating to the Obligation to Prosecute or Extradite and Application of the International Convention on the Elimination of All Forms of Racial Discrimination.*

⁸⁶ P.-H. Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, Paris, Pedone, 1978, p. 15.

⁸⁷ *Multilateral Treaties ...* (see footnote 81 above), chap. VI.16.

individually to the author of the reservation or when the object and purpose of the treaty or the nature of the obligation concerned excluded any reciprocal application of the reservation, as was the case for human rights treaties or treaties protecting common goods. A more flexible formulation might be necessary. It was conceivable that certain treaty obligations were owed both to all the parties to the treaty or to individuals *and* individually to certain other States. In such cases, it was necessary to assess which aspect had priority, not only in the light of the nature of the treaty provision concerned, but also bearing in mind, to quote the Special Rapporteur, the “regulatory and even ... deterrent role” which the principle of reciprocity played (para. 277 of the fourteenth report). For example, if a human rights treaty contained procedural guarantees in case of expulsion, and one State formulated a permissible reservation by virtue of which those guarantees did not apply for citizens of certain States, would it really be appropriate to exclude the reciprocal effect of such a reservation by referring to the undeniable fact that the procedural guarantees were not owed “individually to the author of the reservation”? In such instances, the “regulatory or even deterrent role” of the principle of reciprocity might be useful and even necessary for the attainment of the collective good pursued by the treaty. It was clear that the applicability of the principle of reciprocity in such cases, and in particular in the human rights context, must be explored very carefully and could only be recognized exceptionally, but it should not be excluded as categorically as had been done in General Comment No. 24 of the Human Rights Committee.

49. In closing, he said that in his opinion, draft guideline 4.2.3 to 4.2.7 could be referred to the Drafting Committee.

50. The CHAIRPERSON said that the Commission would continue the general debate on the draft guidelines in subsection 4.2 of the Guide to Practice contained in the fourteenth report at its next plenary meeting. She invited the Special Rapporteur to introduce his fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2).

51. Mr. PELLET recalled that the fifteenth report was the continuation of the fourteenth report, even though it had a different symbol. At the previous session, the Commission had considered the first two parts of the fourteenth report,⁸⁸ on the procedure for the formulation of interpretative declarations and the permissibility of reservations. At the current session, it had examined the last part, namely draft guideline 4.1, on conditions for the establishment of a reservation, and had referred draft guidelines 4.1 to 4.1.3 to the Drafting Committee, and subsection 4.2, on effects of an established reservation; draft guidelines 4.2.1 to 4.2.7 were still under consideration. He proposed beginning with draft guideline 4.3 and subsection 4.4 of the Guide to Practice presented in the fourteenth report⁸⁹ in order to conclude that part of

the topic and then to move on to the sixteenth report (A/CN.4/626 and Add.1), which dealt with succession of States in relation to reservations.

52. Draft guideline 4.3 concerned the effects of an objection to a valid reservation. That was a central question to which States attached great importance and which was the subject of carefully ambiguous treatment in the Vienna Conventions. As the ICJ had stated in its advisory opinion of 1951 on *Reservations to the Convention on Genocide*, “no State can be bound by a reservation to which it has not consented” [p. 26]. Only the acceptance of a reservation enabled it to have effects: that was what he had called the “establishment” of a reservation, although the Drafting Committee might decide not to retain that very convenient expression, to which some members of the Commission were opposed. A reservation excluded some of a treaty’s provisions or modified their application without prior negotiation (apart from the case of so-called negotiated reservations, which did not need to be accepted, because they were included in the treaty itself). Clearly, it would be contrary to the spirit of consensus for it to be possible for one party to be bound against its will by modifications wished by the author of a reservation. It followed from that principle that the other party could object to such modifications. However, as it was not possible both to accept and object, it was only possible to object to a reservation if it was not “established” or if the State which claimed to object had not already accepted it. That was reaffirmed in draft guideline 4.3 (para. 5 [para. 295]⁹⁰). It went without saying that if the Drafting Committee did not retain the words “established” and “establishment” for draft guidelines 4.1 and 4.2, it would be necessary to bring those draft guidelines into line with draft guideline 4.3.

53. Draft guideline 4.3 posed the principle of the inapplicability of a reservation to which an objection had been made. However, that was not the only consequence of the objection. With the famous reversal of presumption which a number of States, notably the Union of Soviet Socialist Republics,⁹¹ had demanded at the Vienna Conference, it would become impossible, according to a number of eminent jurists, to distinguish between the effects of an objection to a reservation and the effects of the acceptance of a reservation, provided an objection with maximum effect was not concerned (see footnote 34 [489]). He did not agree with that view at all. In particular, contrary to acceptance, objection did not result *ipso facto* in the entry into force of the treaty between the reserving State and the objecting State, and that was a major difference. Although an objection did not preclude such entry into force (unless, as stated in article 20, paragraph 4 (b), of the Vienna Conventions, a contrary intention was expressed by the author of the objection), it did not result in entry into force either. A wording along those lines was proposed in draft guideline 4.3.1 (para. 24 [314]).

⁸⁸ See *Yearbook ... 2009*, vol. II (Part Two), chap. V, sect. B, pp. 79–83, paras. 56–82.

⁸⁹ In the mimeographed version of the fifteenth report, the numbering of paragraphs and footnotes continues from the Special Rapporteur’s fourteenth report, reproduced in *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2. The paragraphs and footnotes were renumbered in *Yearbook ... 2010*, vol. II (Part One).

⁹⁰ The numbers in square brackets refer to the numbering in the mimeographed version of the fifteenth report of the Special Rapporteur, available on the Commission’s website.

⁹¹ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), document A/CONF.39/L.3, pp. 265–266.

54. Once it was accepted that the objection was neutral with regard to the entry into force of the treaty as between the reserving State and the objecting State, the objection depended on an outside element: the establishment of the reservation, i.e. both its acceptance, by at least one State, as a valid reservation, and a meeting of the conditions for entry into force of the treaty itself. That was the principle posed in draft guideline 4.3.2 (para. 26 [316]). However, there were two exceptions. First, when the entry into force *vis-à-vis* the reserving State required unanimous acceptance of the reservation: that case, already envisaged in draft guidelines 4.1.2 and 4.2.1, was evoked again in draft guideline 4.3.3 (para. 28 [318]), but from the perspective of the effects of the objection on the entry into force of the treaty, or rather the absence of such effects.

55. Secondly, article 20, paragraph 4 (b), of the Vienna Conventions left no doubt that a State could unilaterally produce the effect of exclusion with its objection. That was made crystal clear, *a contrario*, at the end of subparagraph (b), which read: “[a]n objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State.”

56. That was the text which he proposed to use in draft guideline 4.3.4 (para. 18 [308]), entitled “Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect”, and which read:

“An objection by a contracting State or by a contracting international organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, unless a contrary intention has been definitely expressed by the objecting State or organization [in accordance with guideline 2.6.8].”

57. In paragraph 20 [310] of the report, he discussed whether it would be useful to refer to draft guideline 2.6.8, which the Commission had already adopted,⁹² on the procedure for a definite expression of that intention. He was not sure whether the phrase in square brackets should be included in the draft guideline; it would be up to the Drafting Committee to decide.

58. While not wishing to return to the history of the reversal of presumption obtained at the Vienna Conference (paras. 9–16 [299–306]), he said that he had always considered such reversal of the traditional position, according to which a treaty did not enter into force between the two States concerned, rather odd, but he had been very careful not to question it. In any event, draft guidelines 4.3 to 4.3.4 were fully in line with the letter and spirit of the Vienna Conventions and merely added what he considered to be a few useful clarifications.

59. Nevertheless, the situation was somewhat bizarre. State A had formulated a reservation to which State B

objected, and thus there were two contrary wishes with regard to the applicability of a part of the treaty, and yet the treaty entered into force “minus the reservation”. Those seemingly neutral words “the treaty minus the reservation” could cover very different scenarios, and the partisans of the absolute freedom to formulate reservations had defended, until the very end, the notion that in such cases an objection had the same effects as an acceptance of the reservation. The proposition which had ultimately been adopted by the Vienna Conference had reaffirmed that an objection was an objection and not an acceptance. It was that idea which was set out in article 21, paragraph 3, of the Vienna Conventions, which read: “When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”

60. Draft guideline 4.3.5 (para. 56 [346]) reproduced the text of article 21, paragraph 3, of the 1986 Vienna Convention. However, it contained a small addition, because it specified that an objection could aim to prevent the application not only of “provisions [but also] parts of provisions to which the reservation relates”. The scope of that provision had been made more explicit in the 1977 decision of the Permanent Court of Arbitration in the *English Channel* case, which stated that:

the combined effect of the French reservations and their rejection by the United Kingdom is neither to render article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent. [para. 61]

61. That did not really solve the problems. Rules of law often had to be kept somewhat general, and it was up to the beneficiary of the norms, and perhaps the judge, to use common sense in their application.

62. That said, it was quite possible to attempt to clarify matters a little, and that was what he had set out to do in draft guidelines 4.3.6 and 4.3.7 (paras. 57–64 [347–354]), which were based on a distinction between excluding reservations and modifying reservations. That distinction appeared in article 2, paragraph 1 (d), of the 1986 Vienna Convention, where “reservation” was defined as a unilateral statement designed “to exclude or to modify the legal effect of certain provisions of the treaty in their application to th[e] reserving] State”.

63. In the case of objections to excluding reservations, the provision in question was not applicable between the States concerned, namely the reserving State and the objecting State, and it was fair to say that, concretely and in that regard, but in that regard only, the objection to such a reservation produced the same effects as its acceptance. Regardless of whether the reservation was accepted or whether it was the subject of an objection, the application of the provision to which it referred was excluded between the two States, and relations between them must be governed either by an earlier treaty or by a customary rule.

⁹² For the text and the commentary to this draft guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 85–87.

64. On the other hand, when a reservation had a modifying effect, there could be no question of applying either the treaty obligation to which the author of the reservation had not consented or the modified obligation sought by the author of the reservation, because the author of the objection did not want that modification. Thus, in accordance with the principle of consensus, neither position could be accepted. An objection to a modifying reservation and an objection to an excluding reservation had the same result because both cases meant a return to the applicable law that had been in force before the entry into force of the treaty and which continued to be in force. However, in the case of a reservation with a modifying effect, the author of the reservation did not obtain what he or she wanted, because the modification that he or she sought to make to his or her treaty obligations did not produce any effect. It was those differences that draft guidelines 4.3.6 and 4.3.7 tried to reflect.

65. The two “subseries” of guidelines which he had just introduced concerned the effects of reservations as expressly envisaged by article 21, paragraph 3, together with article 20, paragraph 4 (b), of the Vienna Conventions. At issue were what could be called, respectively, the minimum effects of the objection, i.e. the exclusion of the application of the reservation to the extent provided by the latter, and the maximum effect of the objection, namely the express and clearly worded refusal by the objecting State of the entry into force of the treaty as a whole between it and the reserving State. In practice, however, it had been observed that some States had attempted to produce two other types of effects with their objections. That was not unacceptable as such. After all, both reservations and objections were defined by the effects which the authors of those unilateral declarations sought to have them produce. However, having an objective and attaining it were two different matters. There again, those practices (or aspirations) must be examined in the light of the basic principle of consensus with a view to determining whether to include them in the Guide to Practice. To that end, a firm distinction must be drawn between objections “with intermediate effect” and objections “with maximum effect”.

66. At the previous session, he had proposed a draft guideline defining reservations “with intermediate effect”, namely draft guideline 3.4.2.⁹³ The draft guideline had been referred to the Drafting Committee (which meant that the plenary had accepted the idea), which had adopted a draft guideline along those lines that could be approved soon by the Commission in plenary.

67. However, although the principle of objections with intermediate effect was accepted, it still had to decide within what limits they could produce their effects. In his view, the Commission should be guided in that regard by the principle of consensus, as expressed in particular by the ICJ in its advisory opinion of 1951 on *Reservations to the Convention on Genocide*, and which article 19 of the Vienna Conventions, on reservations, reflected in its subparagraph (c). The most relevant passage of the advisory opinion read: “It must clearly be assumed that the contracting States are desirous of preserving intact at least

what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application” [p. 27].

68. The assessment of “what is essential to the object of the Convention” was inevitably subjective and in some cases even relative. It was at that point that the notion of consensual balance came into play, which could cover a group of obligations considered as being interdependent of each other and whose inclusion as a package in the treaty had made it possible to reach an overall compromise, which the treaty confirmed. Clearly, that “package” of *jus cogens* and the competence of the ICJ (articles 53 and 66 of the Vienna Conventions) was the best reflection of the notion of treaty balance, and it was in that connection that the best, and even the sole, example was found of objections with intermediate effect, whose purpose (which in his view would not be unacceptable) was precisely to preserve that consensual balance. It was not unacceptable because, after all, the aim was merely to preserve the mutual consent of the two States or groups of States in question, provided that the object and purpose of the treaty were not undermined.

69. It was that balance which draft guideline 4.3.8, entitled “Non-application of provisions other than those to which the reservation relates”, sought to achieve. It read: “In the case where a contracting State or a contracting organization which has raised an objection to a valid reservation has expressed the intention, any provision of the treaty to which the reservation does not refer directly but which has a sufficiently close link with the provision or provisions to which the reservation refers is not applicable in treaty relations between the author of the reservation and the author of the objection, provided the non-application of this provision does not undermine the object and purpose of the treaty” (para. 72 [362]).

70. The case of objections with “super-maximum” effect was infinitely more questionable and uncertain. At issue were objections through which their authors sought to completely neutralize the reservation by claiming that the reserving State was bound by the treaty as a whole despite the reservation. Objections with “super-maximum” effect were often formulated by Nordic States and were almost always justified by the fact that the reservation in question was not valid because it was incompatible with the object and purpose of the treaty.

71. He did not contest at all that, in many cases, a reservation that was the subject of such objections did in fact seem to be contrary to the object and purpose of the treaty and thus was not valid. One example of that situation was afforded by the objection by Sweden to the reservation made by El Salvador⁹⁴ to the Convention on the Rights of Persons with Disabilities (para. 75 [365]). However, that was not the problem. The problem was that even if the reservation was valid, an objection with “super-maximum” effect would in any case be contrary to the very principles of consensus. However, the problem could be resolved very easily: since no State could force another State to be bound against its will, objections with “super-maximum”

⁹³ See *Yearbook ... 2009*, vol. II (Part Two), chapter V, p. 83, para. 82, footnote 372.

⁹⁴ *Multilateral Treaties ...* (see footnote 81 above), chap. IV.15.

effect could not have the desired effect, because that would be tantamount to imposing on the reserving State a provision to whose application it had not consented.

72. He did not wish to pass a moral or political judgement on all that. He simply asserted that, legally, an objection could not produce a “super-maximum” effect; otherwise, the entire structure of the law of reservations would crumble. That was why he strongly urged the Commission to adopt draft guideline 4.3.9, entitled “Right of the author of a valid reservation not to be bound by the treaty without the benefit of its reservation”, which read: “The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation” (para. 77 [367]).

73. Although that firm stance only concerned objections to valid reservations, the problem also arose in the same terms with regard to objections to non-valid reservations in the sense that, in any case, the objecting State could not force the reserving State to be bound by the treaty as a whole despite its reservation, whether valid or not. However, it needed to be stressed that, since the reservation itself was not valid, its author was not justified in demanding to benefit from it.

The meeting rose at 1 p.m.

3043rd MEETING

Wednesday, 12 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

FOURTEENTH⁹⁵ AND FIFTEENTH REPORTS OF
THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET (Special Rapporteur), continuing his introduction of the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2), drew attention to draft guidelines 4.4.1 to 4.4.3, on the effects of a reservation

and extraconventional obligations, an area that was much less problematic than the subjects introduced at the previous meeting.

2. As he had pointed out in paragraph 82 [372]⁹⁶ of the report, several judges of the ICJ had stressed in a joint dissenting opinion on *Nuclear Tests* that:

in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations. [p. 350]

That principle was very important because its aim was to ensure that a State could not use a reservation to a particular treaty to evade its obligations under another treaty or under general international law. The scope of that principle naturally encompassed acceptance of and objections to reservations.

3. Draft guidelines 4.4.1 and 4.4.2, set out in paragraphs 84 [374] and 90 [380] respectively, expressed that principle as it applied to pre-existing treaties and customary norms. As the ICJ had clearly recalled in the 1984 judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the adoption and entry into force of a treaty rule did not have the effect of causing pre-existing customary law to disappear. If the treaty provision was in conformity with a customary norm, it merely reaffirmed that norm; if it was contrary to a customary norm, the provision was applicable as a special norm, but the custom remained as *lex generalis*. Thus, a State could not evade the application of a customary norm by formulating a reservation to a treaty provision that enunciated that norm. That point was made in paragraph 2 of draft guideline 3.1.8, which had been adopted in 2007 and which read:

A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.⁹⁷

He admitted that he had been wrong to propose that paragraph 2 of draft guideline 3.1.8 be placed in the third part of the Guide to Practice, which was devoted to the validity of reservations: it would be preferable to remove the paragraph from draft guideline 3.1.8 and make it draft guideline 4.4.2.

4. He saw no reason not to adopt an equivalent draft guideline covering reservations to a treaty provision enunciating a *jus cogens* norm, and he proposed that the Commission adopt a draft guideline 4.4.3, set out in paragraph 94 [384], which was drafted in a similar manner and concerned a reservation to a treaty provision reflecting a peremptory norm of international law.

5. In closing, he asked the Commission to consider whether it wished to refer draft guidelines 4.3 to 4.3.9,

⁹⁵ See footnote 9 above.

⁹⁶ See footnotes 89 and 90 above.

⁹⁷ *Yearbook ... 2007*, vol. II (Part Two), p. 42.

4.4.1 and 4.4.3 to the Drafting Committee and to shift paragraph 2 of draft guideline 3.1.8 from the third to the fourth part of the Guide to Practice.

6. The CHAIRPERSON invited the Commission to resume its consideration of draft guidelines 4.2 to 4.2.7 reproduced in the fourteenth report of the Special Rapporteur.

7. Mr. NOLTE recalled that at the previous meeting consideration had been given to the question of whether article 20, paragraph 4 (c), of the 1969 Vienna Convention should be reaffirmed or whether practice contrary to it had been established. He noted that it was the practice of both the Council of Europe and the Swiss Confederation as depositaries to accept and regard declarations of accession as immediately effective rather than wait for the 12-month period specified in article 20, paragraph 5, of the Vienna Convention to elapse. He was not certain what conclusion to draw from that practice, but he believed it was significant.

8. Accordingly, the Commission should either reaffirm a clear rule of the 1969 Vienna Convention, which meant that the entry into force of many treaties would then be called into question because the depositaries had given a different date of entry into force than the one prescribed in article 20, paragraph 5, and thus reaffirmation would not necessarily clarify the situation but would make it more uncertain; or it should recognize that a rule of the Vienna Convention had been modified by uncontested practice. His personal preference would be to follow Sir Michael's suggestion and find some way of asking States and depositaries to clarify their practice.

9. Mr. DUGARD maintained that the guidelines should not be modified to take account of the Secretary-General's practice, which, as he understood it, was largely a rule of convenience. The Secretary-General had not declared it to be a rule of principle, and there was no suggestion that he intended to introduce a practice that was in conflict with article 20, paragraph 4 (c). He therefore agreed with the Special Rapporteur in respect of draft guideline 4.2.1.

10. On the subject of draft guideline 4.2.5, the Special Rapporteur was correct in saying that it was difficult to distinguish between excluding reservations and modifying reservations, but he had nevertheless succeeded in explaining the difference by citing examples of excluding reservations in paragraphs 263 to 265 and of modifying reservations in paragraphs 268 and 269 of his fourteenth report. Although he agreed with the Special Rapporteur that draft guidelines 4.2.5 and 4.2.6 were necessary, he was not certain that it was necessary to include paragraphs 2 and 3 in either provision: in both cases paragraph 1 clearly elaborated the principle, while the subsequent paragraphs merely detracted from that clarity.

11. He had already commented briefly the previous day on the subject of reservations to human rights treaties and the principle of reciprocity, but he wished to amplify his earlier remarks. Unfortunately, General Comment No. 24 of the Human Rights Committee⁹⁸ had become something

of a red flag to many States, which saw it as an attempt to curb their sovereign right and in particular to allow a human rights body to monitor their reservations. Admittedly, some aspects of General Comment No. 24, such as the issue of severability, were controversial, but that did not detract from the validity of much of the text. The passage quoted in paragraph 285 of the fourteenth report was eminently sensible and correct, as was the Special Rapporteur's comment. Clearly, in most cases human rights treaties did not establish reciprocal obligations but simply provided rules for the benefit of persons within the jurisdiction of the individual States parties. The principle of inter-State reciprocity had no place where most human rights treaty provisions were concerned. In recent years, attempts had been made to invoke the dispute-settlement procedures set out in human rights conventions, but it was interesting to note that States continued to refrain from invoking inter-State procedures that would give jurisdiction to monitoring bodies in connection with inter-State disputes. The general dispute-settlement provision must be seen as an exception to the rules set out in most human rights treaties.

12. In principle, then, the Special Rapporteur's statement must be accepted in the sense that human rights treaties did not impose reciprocal obligations. One could imagine the chaos that would result if the interpretation proposed by the Special Rapporteur were not followed. He therefore approved of draft guideline 4.2.7: it might seem a bit repetitive, but it was important to spell out the various issues in detail.

13. He was pleased that the Special Rapporteur had made no attempt to provide a guideline for the point discussed in paragraph 288. For a reserving State to call on a non-reserving State to honour obligations that it had provided for in its reservations would be hypocritical, and he did not think it necessary to address that situation in a guideline.

14. In conclusion, he favoured referring the draft guidelines proposed in the report to the Drafting Committee.

15. Mr. KAMTO said that draft guideline 4.2.1 (Status of the author of an established reservation) could be viewed as an attempt to facilitate the implementation of article 20, paragraph 4 (c), of the 1969 and 1986 Vienna Conventions. While he could understand the concerns of Commission members who had suggested that States be consulted as to whether precedence should be given to the practice of the Secretary-General of the United Nations in his capacity as the depositary of multilateral treaties⁹⁹ or, conversely, whether the provisions of article 20, paragraph 4 (c), should prevail, he shared the views expressed by the Special Rapporteur in his report regarding both the analysis and formulation of draft guideline 4.2.1. The problem with consulting States was that if they favoured giving precedence to the Secretary-General's practice or to practice in general, the Commission would have to decide how to respond. If it drafted a guideline embodying the practice, it would be proposing a change that contradicted—and did so surreptitiously, by means of a guideline—a clearly established provision of a nearly universal instrument that was widely

⁹⁸ See footnote 83 above.

⁹⁹ See footnote 84 above.

regarded as being declaratory of customary law. He was not convinced that the Commission should take such a step or even suggest such a possibility to States, and for that reason he was uncomfortable with the proposal to consult States on the matter.

16. While it was true that a tendency to “sanctify” practice had emerged in the past few years, the danger of according more weight to practice than to a clear and explicit provision of a treaty having the stature of the 1969 Vienna Convention, which was sometimes referred to as the “treaty of treaties”, was that the Commission might be opening the door to abuse. It had to be sure when codifying “practice” that it was dealing with more than the practice of only a few States. It was one thing to codify a practice that reflected a general trend in international law, but quite another to give precedence to a practice that opposed an established rule of international law, and he cautioned members to bear in mind the principle of *ex injuria jus non oritur*. Although there were those who considered actions of large, powerful States that violated the rules of international law to constitute practice that could be embodied in law, it was not the role of the Commission or of jurists to adopt such an approach. Rather, their role was to point out whenever necessary that an established rule existed and that any conduct departing from the rule constituted a violation, not a contrary practice. While contrary practice did, of course, exist, it was necessary to determine its extent and to limit its scope considerably.

17. He was in favour of referring all the draft guidelines to the Drafting Committee.

18. Mr. HMOUD said that draft guidelines 4.2 to 4.2.7 reflected the rules of the 1969 and 1986 Vienna Conventions and provided a sound basis for the concept of the effects of established reservations. The establishment of a reservation had the effect of modifying or excluding the legal effect of one or more provisions of a treaty if the reservation was accepted by at least one other contracting party, met the requirements for permissibility and was formulated in accordance with the form and procedures specified for the purpose. At the same time, the establishment of a reservation had the effect of making the author of the reservation a contracting party to the treaty, again provided that those three requirements were met. For example, in the case where a reservation was found by a dispute-settlement body to be incompatible with the object and purpose of the treaty to which it related, such a reservation would, according to the Guide to Practice, fail to meet the criteria for an established reservation, and consequently no treaty relationship would be established for the author of the reservation.

19. While the proposition that the establishment of a reservation necessarily produced the effect of making the author of the reservation a contracting State or contracting international organization *vis-à-vis* the treaty and was in accordance with articles 19, 20, 21 and 23 of the Vienna Conventions, it did not necessarily follow that the reverse was true. An unestablished reservation, by virtue of its inconsistency with the object and purpose of a treaty, might or might not result in the constitution of a treaty relationship for the author of the reservation. As the Vienna Conventions

did not address that question, the Guide to Practice should clearly indicate whether an author of a reservation could be a party to a treaty even if the reservation had been declared null and void. The answer to that question might well be negative, but that would have serious practical consequences for the application of the treaty from the time the impermissible reservation was formulated to the time it was determined to be null and void. In short, he agreed with the concept that an established reservation produced legal effects, including in relation to the treaty’s entry into force; however, a decision had to be made on the effects of unestablished reservations, especially with regard to the question of entry into force.

20. Regarding the departure by some depositaries from the rule set out in article 20, paragraph 4 (c), namely that an act expressing a State’s consent to be bound by a treaty and containing a reservation was effective as soon as at least one other contracting State had accepted the reservation, he pointed out that the Secretary-General of the United Nations had provided solid justification for the practice of the Secretariat, described in paragraph 246 of the fourteenth report, including the fact that no objection had ever been received from any State concerning the entry into force of a treaty that included States making reservations. The Secretary-General had also stated that the preclusion of the entry into force of a treaty for a reserving State might conceivably require that all other contracting States definitely express their intention that their objection preclude the entry into force of the treaty as between them and the objecting State. The Commission thus needed to decide whether it should amend the requirement for acceptance of a reservation by one other contracting State or contracting international organization in order for the treaty to enter into force for the reserving State, or whether more than one rule should coexist.

21. In his view, there should be only one rule. In the unlikely event that all contracting States objected to a reservation before the 12-month period specified in article 20, paragraph 5, had elapsed, there was no reason to assume that all the negative consequences such a scenario might have for treaty relations, such as a change in the date of entry into force, would not arise. Such an exceptional scenario warranted an exceptional outcome, even though the Secretary-General had noted that such a situation had never occurred as long as he had served as a depositary. There was no justification for contradicting the 1969 and 1986 Vienna Conventions with regard to the consent requirement, which was a pillar of treaty relations. Moreover, no practice existed which had amended that requirement. What did exist was a presumption that it was highly improbable that a reservation would be rejected by all the contracting States or organizations of a treaty. On that basis, then, he considered draft guidelines 4.2.1 to 4.2.3 to be acceptable.

22. With regard to the modifying or excluding effects of established reservations, he agreed with the Special Rapporteur that it was more precise to describe them as modifying or excluding the legal effects of treaty provisions rather than the treaty provisions themselves, although that distinction had few practical consequences for the author of the reservation in its relationship with the other contracting States or international organizations.

23. Draft guideline 4.2.4 (Content of treaty relations), which reproduced article 21, paragraph 1 (a), of the Vienna Conventions, was acceptable as it currently stood. However, he saw no reason that the guideline should not also mention the excluding effect contained in paragraph 3 of that article, as such effects were included in the definition of a reservation in article 2, paragraph 1 (d), of the Vienna Conventions.

24. With regard to draft guideline 4.2.5 (Exclusion of the legal effect of a treaty provision), he questioned whether the second and third paragraphs were necessary. It went without saying that when a treaty provision was inapplicable between the author of the reservation and another contracting party, the author of the reservation was not bound by the provision, and the other contracting party could not claim the right contained in the relevant provision in the context of its treaty relations with the author of the reservation.

25. Although he agreed with the content of draft guideline 4.2.6 (Modification of the legal effect of a treaty provision), he suggested that the phrase “required to comply” in the second paragraph be replaced by the words “bound by”. He further suggested that the phrase “the right under” in the third paragraph should be replaced with the words “implementation of”.

26. Concerning the reciprocal nature of reservations, he agreed with the general premise that the party with regard to which a reservation had been established was exempt from the obligation to apply the provision or provisions covered by the reservation in its relations with the author of the reservation. Nevertheless, he shared the concerns expressed by other Commission members regarding the emphasis placed on General Comment No. 24 of the Human Rights Committee. The Committee’s opinion that the reciprocity principle was not applicable to reservations to human rights treaties stemmed from its doubts concerning the permissibility of such reservations. A human rights treaty remained a contractual relationship, and the obligations flowing from it were always towards the other parties, irrespective of whether its content might benefit individuals or entities other than the contracting parties. Therefore, the principle of reciprocal obligations should be preserved. If an obligation was owed under general international law, then neither the reserving State nor the other contracting parties should be relieved from that obligation.

27. Subparagraph (b) of draft guideline 4.2.7 (Reciprocal application of the effects of an established reservation) appeared to exclude reciprocity when the treaty obligation in question was owed to more than just the author of the reservation. If that was the case, then the draft guideline might be applied to a wide range of treaties other than human rights treaties, such as trade treaties in which the beneficiary was an individual as opposed to a State. Such may not have been its intended effect. Accordingly, he suggested that subparagraph (b) should be given further consideration. He had no problem with the other two exceptions contained in subparagraphs (a) and (c).

28. In paragraph 288 of his fourteenth report, the Special Rapporteur indicated that where an exception to the

principle of reciprocity applied, the reserving State could not require the other contracting States to comply with the obligations in respect of which the reservation had been made, even if the State or international organization accepting the reservation was required to discharge them. He agreed with that proposal and suggested the inclusion of language to that effect in draft guideline 4.2.7.

29. Lastly, he agreed that draft guidelines 4.2.1 to 4.2.7 should be referred to the Drafting Committee.

30. Mr. PETRIČ said that the discrepancy between the practice of the Secretary-General as treaty depositary and article 20, paragraph 4 (c), of the 1969 Vienna Convention posed a serious problem. It was true that the Vienna Convention was 41 years old; however, it was also true that the practice of the Secretary-General, the Council of Europe, the Swiss Confederation and several other treaty depositaries had never been contested. As a permanent, general and undisputed practice, it could be said to constitute an *opinio juris*. If the Commission opposed that practice, it might in effect be saying that treaties were eternal and could never be changed (except by a formal amendment), irrespective of the behaviour of States, which, ultimately, was the crucial factor in international law. Such an approach would defeat the purpose of the Commission’s work on the topic of treaties over time.

31. While there was no doubt that the Vienna Convention was an important instrument, the Commission could not simply ignore practice. Given that the problem could have significant consequences, the Commission should follow the suggestion of Sir Michael and consult States and international organizations between the first and second readings of the draft guidelines.

32. He was in favour of referring the draft guidelines to the Drafting Committee.

33. The CHAIRPERSON, speaking in her capacity as a member of the Commission, said that the cluster of draft guidelines 4.2 to 4.2.7 was in line with the 1969 Vienna Convention and with general international practice. The Special Rapporteur’s analysis of the draft guidelines was clear and convincing, and she was in favour of referring them to the Drafting Committee for further editorial improvement.

34. She wished to respond to the Special Rapporteur’s request to Commission members to state their views as to how the Commission should deal with the discrepancy between article 20, paragraph 4 (c), of the 1969 Vienna Convention and the treaty practice of depositaries, in particular the United Nations, which was a major depositary of multilateral conventions. To begin with, she did not find the current practice of the Secretary-General of the United Nations as a depositary to be problematic, nor did it deviate from the terms of the Convention. The practice of international organizations as treaty depositaries had been in existence for a long time and actually predated the Convention. Sir Humphrey Waldock had been right in stating that the point was not purely one of drafting; rather, it was a matter of substance. Yet one might well ask why the Commission had not addressed or corrected that practice when drafting the 1969 Vienna Convention, why that practice

had persisted even after the Convention had entered into force and why no State had ever seriously challenged it. Other questions that the Commission should address were whether existing practice worked to the detriment of the treaty system or, conversely, to its advantage and, if the Commission chose to submit the question to States, what kind of answer it expected to receive from them. After having reflected on those questions, she wished to share some of her thoughts on the matter.

35. According to article 16 of the Vienna Convention, submission by a State of its instrument of ratification, acceptance, approval or accession to the depositary signified consent to be bound by the treaty. Even if the depositary chose to remain neutral on the question of reservations, it would definitely facilitate the ratification process of a treaty if the depositary included the State that was the author of a reservation among the parties to the treaty rather than excluding it from the group of parties which had expressed their consent to be bound. If the reservation was deemed impermissible under the terms of a treaty, it would be incumbent upon the other States parties to raise objections and reject the entry into force of the treaty between them. Until that moment, the author State remained bound by virtue of its consent. Thus a general policy consideration lay behind the depositary's practice, which was designed to encourage more States to accede to the treaty.

36. The wording of article 20, paragraph 4 (c), of the Vienna Convention indicated that a State that was the author of a reservation would not be considered to be bound effectively unless at least one State party expressed its acceptance of the reservation. From the standpoint of contractual relations, that was logical. Insofar as the treaty relations between contracting States were concerned, the date of effect should be the date when the minds of the States met. Both in theory and in practice, then, the depositary's action did not affect or change the actual contractual relationship between the States parties concerned, nor did it affect the principle of consent. As it was rare for a State to express acceptance of a reservation or reject the entry into force of a treaty between itself and the author of the reservation, the presumption appeared to support the depositary's practice.

37. She agreed with Mr. Gaja that it would be wiser for the Commission to deal with the matter in the commentary than to solicit States' views on it, since the practice of the depositary did not seem to conflict with or deviate from the Vienna Convention. The gap between the two allowed for positive flexibility and was unlikely to give rise to controversy between States.

38. Mr. HASSOUNA said that the inconsistency between article 20, paragraph 4 (c), of the Vienna Convention and the practice of the Secretary-General probably stemmed from policy considerations. He shared the concerns expressed about the possibility that Member States, if asked to comment on their practice, might express opinions that contradicted the rule enshrined in the Vienna Convention. It might therefore be wiser to deal with the situation regarding practice in the commentary and to uphold the rule established in the Vienna Convention.

39. That issue underscored the importance of the topic of treaties over time, as it illustrated the manner in which subsequent practice could affect the interpretation of treaties.

40. Mr. DUGARD asked the Special Rapporteur whether there were any other cases in which a conflict between the provisions of the Vienna Convention and State practice had arisen and where he had deferred to the practice of States or of senior officials.

41. Mr. VASCIANNIE said that the Commission should base its guidelines on the terms of the Vienna Convention. Then, in the commentary, it could note the possible discrepancy in practice and the fact that the discrepancy might have legal implications. It would be unwise to refer the matter to States for their opinion, as that would only make the marathon even longer.

42. Mr. SINGH said that the Secretary-General had been consistent in his practice and had clearly explained the reasons for it. Objections to reservations and opposition to a treaty's entry into force owing to such objections were matters for States parties or States that were entitled to become parties to the treaty. They were not something on which the Secretary-General could exercise his judgement. The Secretary-General's position was consistent with articles 76 and 77 of the Vienna Convention, which set out the functions of depositaries. Those functions were to inform the other parties to the treaty, or any States entitled to become parties thereto, of the instruments of signature and ratification and of any reservations. Those functions did not include passing judgement on any reservations.

43. Ms. JACOBSSON said that the Commission's guideline regarding the date on which the author of a reservation became a contracting party should be based on the provisions of the Vienna Convention, and the Secretary-General's practice should be elucidated in the commentary. That would obviate the problems that might arise if the Commission attempted to develop a new or special regime. She was disinclined to seek States' views on the matter, as that would hold up the Commission's work.

44. Mr. PELLET (Special Rapporteur) said that it was essential that the Commission as a whole should decide how to handle the problem he had faced. He thought that he ought to be able to propose a solution which preserved the text of the Vienna Convention without expressing clear disapproval of the Secretary-General's practice.

45. In response to Mr. Dugard, he said that to date there had been only a few situations in which there had been doubt as to whether practice was consistent with the Vienna Convention. The first case concerned late reservations, and there the Commission had accepted practice that constituted development of the provisions of the Vienna Convention so as not to stand in the way of progress. Another case was objections with a "super-maximum" effect. In his view, the latter clearly contradicted the letter and the spirit of the Vienna Conventions. The Commission would be confronted with that issue when it debated draft guideline 4.3, and he hoped that practice in that area would not be embodied in the guidelines, as it should not be encouraged.

46. Mr. KAMTO asked why draft guideline 4.3.4 was discussed before draft guidelines 4.3.1, 4.3.2 and 4.3.3 in the Special Rapporteur's fifteenth report (A/CN.4/624 and Add.1–2). In addition, he believed that the heading of section (c) above paragraph 74 [364] of the report should read “Case of objections intended to produce a ‘super-maximum’ effect” rather than “Case of objections with ‘super-maximum’ effect”, since the effect in question was not automatic. The objecting State did have an aim, but whether that aim was achieved depended on the subsequent reaction of the other party. Like the Special Rapporteur, he doubted that objections with a “super-maximum” effect were consistent with the Vienna Convention.

47. Turning to the draft guidelines themselves, he said that he did not fully grasp the difference between guidelines 4.3.1 and 4.3.4. Draft guideline 4.3.1 was entitled “Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of the reservation”, whereas the title of draft guideline 4.3.4 referred to the non-entry into force of the treaty. The only real difference in the content of the draft guidelines was that the last phrase of draft guideline 4.3.4 spelled out the proviso “unless a contrary intention has been definitely expressed by the objecting State or organization”. He wondered whether the two provisions should not be combined, since they both referred to cases where the aim of the objection was to prevent the entry into force of a treaty.

48. In draft guideline 4.3 the final phrase “unless the reservation has been established with regard to that State or international organization” seemed to mean “unless the reservation has already been accepted by that State or international organization”. If that was the intended meaning, the phrase was redundant, since draft guideline 2.8.12 read “Acceptance of a reservation cannot be withdrawn or amended”. The final phrase in draft guideline 4.3 should therefore be reconsidered and possibly deleted.

49. Drawing attention to the French version of draft guideline 4.4.3, he suggested that the words “*ne porte pas atteinte au*” (does not affect) should be replaced with “*n’a aucun effet sur*” (has no effect on), because that wording more clearly conveyed the idea that the reservation did not modify the provisions of a treaty, but rather the application of those provisions—in the case at hand, a treaty provision reflecting a peremptory norm of general international law.

50. He was in favour of referring draft guidelines 4.3 to 4.4.3 to the Drafting Committee.

51. Mr. PELLET (Special Rapporteur) said that he had discussed draft guideline 4.3.4 first in the fifteenth report because that guideline dealt with objections having a maximum effect, and his position *vis-à-vis* such objections was easy to explain. It had thus seemed logical to begin with those objections and then to highlight how the effect of simple objections differed. Pedagogical considerations had thus taken precedence over Cartesian logic. In the Guide to Practice, the general rule should naturally precede the special rule.

The meeting rose at 11.40 a.m.

3044th MEETING

Friday, 14 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

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

Expulsion of aliens (*continued*)^{*} (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)^{*}

1. The CHAIRPERSON invited the Commission members to resume the debate on the agenda item on expulsion of aliens.

2. Mr. NOLTE said that, although the Special Rapporteur's sixth report was rich and stimulating, he had doubts about some aspects of it. Generally speaking, the Special Rapporteur's very broad perspective of the topic took in a wide range of sources, some of which were more than a century old, and referred to specific situations in many different places. Given the factual and legal complexity of the topic, the adoption of such an approach, albeit desirable from a strictly methodological viewpoint, would make it difficult, or almost impossible, to avoid being taxed with selectivity. For example, in paragraph 215, Germany was the first country to be mentioned in the section on “Examples of detention conditions that violate the rights of aliens who are being expelled”. That paragraph did not describe detention conditions in Germany after 1945, but referred to a note from a minister at the end of the nineteenth century in which the minister had proposed the setting up of an internment camp for unauthorized immigrants. The Special Rapporteur then associated those “internment ideas” with the Nazi regime and suggested that the legal texts underpinning them had remained in force long after the establishment of the Federal Republic. Although he did not wish to comment in detail on that paragraph, he personally found it selective and emphasized that in national or international discourse it was essential to ensure that any references to past Nazi crimes and their linkage to other periods or countries were appropriate. The Special Rapporteur's references to other, mostly African or European, countries, were often based on sources whose reliability he could not assess. While the treatment of aliens certainly posed serious problems in some places, if the Commission's role was to evaluate evidence of such practices, it would have to conduct a thorough investigation—and if it embarked on such an investigation, it would also have to study the history of

^{*} Resumed from the 3041st meeting.

immigration, policy grounds and many other issues. Since it would be difficult to cover all the factual, social and political aspects of the subject, the Commission should confine its approach to the safe ground of *lex lata* which, of course, included the human rights of aliens subject to expulsion. It should likewise pay due heed to the opinions expressed by States in the Sixth Committee.

3. More specifically, he agreed with other speakers that draft article A on the prohibition of disguised expulsion should not lead the Commission to consider a new ground of prohibited expulsion, but should prompt it to make an attempt at defining expulsion appropriately in the light of the issue which the Special Rapporteur had addressed in that context. He was sceptical whether the Commission would be able to deal successfully with the question of incentive measures to encourage aliens to leave a country, or to define under what circumstances the offering of such incentives inevitably became a component of illegal forcible expulsion. As far as draft article 8 (Prohibition of extradition disguised as expulsion) was concerned, he endorsed the opinions expressed by Mr. Gaja and Sir Michael, who had explained why the issue of extradition should not be dealt with there. Like some other speakers, he had serious doubts about draft article 9 (Grounds for expulsion). Mr. Petrič had rightly emphasized that the distinction between legal and illegal aliens was very important in that context and he had personally not understood the Special Rapporteur's explanation at the previous meeting of why that distinction would be important only with respect to the expulsion procedure. In his opinion, States might well have valid reasons to expel illegal migrants which had nothing to do with their personal conduct. Perhaps it was worth echoing what some members had already said, namely that the case law of the European Court of Justice relating to the free movement of persons did not offer a suitable basis for identifying universal rules, because it rested on a different premise. While he concurred with the Special Rapporteur that a State's right to expel must not be exercised in an arbitrary manner, the impression should not be created that grounds for expulsion should preferably be confined to public order and public security. In short, like other speakers, he was not in favour of sending draft article 9, in particular paragraphs 2 and 4 thereof, to the Drafting Committee.

4. As far as draft article B was concerned, he agreed with the general idea that it was vital to protect human rights, but paragraph 2 (a) should not address, or strictly regulate, the question of the place where an alien was detained pending expulsion. It was necessary to bear in mind the possibilities open to States and the different ways of ensuring that detention did not acquire, or did not seem to acquire, a punitive character. For that reason, the Commission should limit itself to the provisions of paragraph 2 (b) and the nature of the place of detention should be dealt with more flexibly in the commentary by giving examples. In conclusion, he suggested that draft article A be referred to the Drafting Committee on the understanding that the purpose of that draft article was to provide a definition and not to create a new prohibition of expulsion separate from the others. He was not in favour of sending draft articles 8 and 9 to the Drafting Committee. That was particularly true of draft article 9, paragraphs 2 and 4, about which he had serious concerns. He found much of

the substance of draft article B acceptable in principle, apart from paragraph 2 (a) but, like Sir Michael, he wondered whether its wording should be as detailed as that proposed by the Special Rapporteur.

5. Mr. HMOUD said that the sources and material presented in the Special Rapporteur's sixth report on expulsion of aliens shed light on the various issues involved, but also revealed their complexity and the divergence of State practice in that field. With regard to disguised expulsion, as several speakers had already noted, the term "disguised" might not be sufficiently precise and it encompassed expulsion practices that did not necessarily have common elements. It would be more appropriate to call some of the examples given in the report "indirect" or "*de facto*" expulsion. It might therefore be wise to reconsider the term used in draft article A. Furthermore, while the non-renewal of a residence permit might be described as indirect expulsion, other examples, such as incentives to encourage aliens to leave the country, were not always a means of expulsion. Everything depended on the circumstances of each case and on the purpose of the measures taken. It was clear from reading paragraphs 39 to 41 and 43 of the sixth report that the basis in international law for banning disguised expulsion was, at best, weak. In draft article A, the Commission could therefore start from the premise that, if the purpose of an act by a State was to initiate an expulsion procedure, that act must be treated as expulsion for the purpose of the draft articles, irrespective of the form it took.

6. International law did provide a basis for holding that the practice of extradition disguised as expulsion was prohibited but, for the reasons stated earlier by other members, draft article 8, as it stood, was problematical. Greater stress should therefore be placed on the purpose of the act and that draft article should stipulate that a State must not circumvent its obligations under domestic and international law with regard to extradition by expelling a person in order to achieve that aim. The draft article should therefore require an examination of the purpose of the expulsion and whether it was being used as a means to carry out unlawful extradition. That purpose test was based on decisions delivered by national and international courts and on jurisprudence on the matter. Furthermore, the draft article would then fall within the scope of the topic under consideration, for it would prohibit a form of expulsion carried out for reasons other than those stated and it would not deal with, or regulate, extradition, which was obviously a different subject.

7. The report extensively covered State practice and national and international courts' rulings on the grounds for expulsion. It thus showed that some grounds were given greater recognition than others and that State practice varied significantly. Nevertheless, the draft articles should endeavour to regulate those grounds and to set limitations on and conditions for them. Both literature and precedent suggested that a distinction should be made between aliens legally present in the territory of the expelling State and illegal aliens. The illegal presence of an alien in the territory of the State was a sufficient ground for the State to expel that person, as long as the expulsion procedure provided the requisite guarantees of the individual's rights under national and international law.

The second issue was whether the Commission should enumerate the lawful grounds for expulsion in the draft article. The report made it plain that that would be a difficult exercise because views diverged on the recognized grounds for expulsion. While public order and public security were widely accepted grounds and might be highlighted in draft article 9, other grounds existed independently, overlapped with public security and public order, or had different terminology and content, depending on States' legislation. It would therefore be prudent to require that those grounds must not contradict international law. The conditions set out in the draft article were obviously drawn from jurisprudence concerning public order and public security, but it was uncertain whether they constituted a criterion for examining all the grounds for expulsion and whether they established defensible limitations on the grounds used by States. A State should nonetheless act in good faith, weigh the grounds for expulsion against the rights of the individual to be expelled and respect due process of law.

8. With regard to the conditions of pre-expulsion detention, the report clearly showed that the test which should be applied was that of whether the detention process was carried out in a humane manner which respected the dignity and human rights of the person concerned and was in accordance with minimum international standards of detention. If the Commission adopted a draft article stipulating that the person being expelled must be treated humanely and with respect for their dignity and their human rights, draft article B, as amended by the Special Rapporteur, was acceptable. It set out generally recognized standards for the protection of detainees and did not place an unreasonable or undue burden on the State in question. He recommended that the draft articles contained in the sixth report be referred to the Drafting Committee and hoped that his comments on them would be taken into consideration.

9. Mr. VÁZQUEZ-BERMÚDEZ said that the sixth report on the expulsion of aliens would enable the Commission to make substantial progress in its work on the subject, for it contained a thorough analysis of case law, national legislation, practice, jurisprudence and applicable international standards.

10. The Special Rapporteur revisited draft article 7 on the prohibition of collective expulsion, which had been provisionally approved by the Drafting Committee, in order to demonstrate that there was no incompatibility between paragraph 3 of that draft article and international humanitarian law. His analysis was correct. He then proposed draft article A on the prohibition of "disguised" expulsion, which he defined as "the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory". However, in the light of draft article 2, which had likewise been provisionally approved by the Drafting Committee, it had to be found that "disguised" expulsion was no more than expulsion pure and simple. It was, however, useful to explain in a separate article that any act or omission attributable to the State which was aimed at obliging an alien to leave the country was unlawful in

the absence of a decision taken by the competent legal or administrative authority in compliance with the applicable procedural and substantive guarantees.

11. Draft article 8 referred to a situation where a person was subject to both an expulsion decision and an extradition request. The initial version proposed by the Special Rapporteur was unconvincing because an extradition request should not in itself prevent expulsion in conformity with the requisite conditions and international law. But other factors might need to be taken into account, for example whether expulsion would expose the person concerned to criminal proceedings in which his or her fundamental rights were likely to be breached. The amended version of draft article 8¹⁰⁰, entitled "Expulsion in connection with extradition", constituted a firmer basis for the Drafting Committee.

12. Draft article 9 on grounds for expulsion was a vital provision and the exhaustive analysis which had been provided by the Special Rapporteur when he presented his proposal was particularly welcome, since expulsion was a measure which had substantial consequences for the person concerned and it therefore had to rest on grounds which were not arbitrary or contrary to international law. In its resolution 30/81, adopted in the *Carlos Stetter* case, the Inter-American Commission on Human Rights emphasized that a State must provide sound reasons for any expulsion decision and not content itself with vague accusations that the person concerned was a "foreign undesirable" or that he had "violated the laws of the country", without stipulating which laws and in what context. While, as the Special Rapporteur had explained, it would certainly be difficult to draw up an exhaustive list of acceptable grounds for expulsion, an indicative list would be helpful.

13. Draft article B, as amended, was also appropriate, because it was essential to spell out the minimum standards for the treatment and detention of persons being expelled by which a State must abide.

14. In conclusion, he was of the opinion that the draft articles could be referred to the Drafting Committee for the incorporation of the comments made.

15. Mr. KAMTO (Special Rapporteur) emphasized that the debate should be based on the amended version of draft article 8, which took account of members' comments.

16. The CHAIRPERSON, speaking as a member of the Commission, said that the sixth report addressed three extremely important aspects of expulsion: prohibited practices, grounds for expulsion and detention conditions. The Special Rapporteur began with an examination of disguised expulsion. Relying on numerous examples, he drew attention to the fact that, although a State had the sovereign right

¹⁰⁰ The amended version of draft article 8 reads as follows:

"Expulsion in connection with extradition"

"Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article]." (Session document ILC(LXII)/EA/CRP.2; distribution limited to the members of the Commission.)

to expel an alien from its territory, that right was not unlimited or unconfined under international law. Draft article A did not, however, adequately distinguish between what was permissible and what was prohibited by international law. The term “forcible departure” seemed to exclude the possibility that lawful expulsion might also be compulsory and accompanied by enforcement measures under certain circumstances. The term “actions and omissions of the State” might require complex interpretation. Furthermore, individual acts that provoked the involuntary departure of an alien should likewise be regarded as omissions on the part of the State, and the latter should offer appropriate remedies to redress such a situation, or intervene actively, depending on the circumstances. It would therefore be preferable to speak of acts “not in conformity with the relevant laws and legal procedure”.

17. In the event of disguised extradition, the legal implications were more complex, as it involved the much wider field of mutual judicial assistance, which was not confined to extradition. Many other legitimate measures of judicial cooperation, such as the transfer of prisoners or the handing over of fugitives, did not require the consent of the person concerned. The new version of draft article 8, which made no reference to consent, was welcome. As in draft article A, it was, however, necessary to make it clear what acts were prohibited by international law when a State was trying to remove an alien from its territory as part of international cooperation in combating terrorism.

18. The Special Rapporteur had made a thorough examination of State practice and legislation with regard to grounds for expulsion, the subject of draft article 9. A State could rely on various grounds in order to expel an alien. The most frequently used ground was a threat to public order and public security, but some practices had become obsolete and others tended to be regional. In any event, a distinction should be drawn between an alien holding a residence permit and an alien who was unlawfully present in the territory of a State. Expulsion as a criminal penalty was lawful and many countries had recourse to it; the problem was that the procedure was not always accompanied by the requisite guarantees. The Special Rapporteur had rightly drawn attention to the fact that begging, vagrancy, debauchery and disorderliness should not constitute grounds for expulsion; if they were very serious in nature they might be qualified as a breach of public order. As for economic grounds, it was hard to see what professional restrictions on foreign nationals had to do with expulsion. A State could reserve the exercise of certain professions for its nationals and refuse to grant visas to foreign nationals who wished to work in such protected sectors, but if an alien who had found a job in that sector then had his or her lawful residence permit taken away, that should be regarded as disguised expulsion.

19. Draft article B on detention conditions was very important. The examples given amply demonstrated that it was necessary to remind States of their obligation to respect the dignity and human rights of detained aliens. The draft article seemed to refer mainly to cases of illegal immigration. That should be explained in the commentary.

20. In conclusion, she was of the opinion that the four draft articles could be sent to the Drafting Committee

so that it might improve their wording. Speaking as the Chairperson, she announced that the Commission would pursue its debate on the expulsion of aliens during the second part of the session.

The meeting rose at 10.50 a.m.

3045th MEETING

Monday, 17 May 2010, at 3.10 p.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPORTEUR¹⁰¹ (*concluded*)*

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the draft guidelines relating to the effects of an established reservation (4.2.1 to 4.2.7) contained in the fourteenth report of the Special Rapporteur.

2. Mr. PELLET (Special Rapporteur) said that while the draft guidelines had elicited some interesting comments, there had been no objections to their referral to the Drafting Committee. Nevertheless, it was important to decide what guidance the Drafting Committee should be given on the wording of draft guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty). As he had observed in paragraphs 246 to 248 of his fourteenth report, the practice of the Secretary-General of the United Nations and other depositaries seemed to conflict with article 20, paragraphs 4 (c) and 5, of the 1969 and 1986 Vienna Conventions. Further research done by Mr. Nolte had confirmed that the prevailing practice seemed to be for the immediate inclusion of a reserving State when the treaty required acceptance by a minimum number of States or international organizations for its entry into force.

3. Many Commission members had expressed their views on whether it was advisable to confirm that practice in the Guide to Practice or to abide by the clear but

* Resumed from the 3043rd meeting.

¹⁰¹ See footnote 9 above.

contrary rule established in the 1969 and 1986 Vienna Conventions. With the possible exception of Mr. McRae, there had been no expressions of support for the former solution. The debate had focused on two options: to defer any decision until States had been consulted on the matter or to reaffirm the rule enunciated in the Vienna Conventions, even if that meant attempting to reconcile practice with the rule.

4. There had been little support for the first option, which had been proposed by Sir Michael. In brief, members had wondered what the Commission stood to gain by consulting States; the problem was not one that could be resolved by compiling a few statistics. Moreover, he was not certain that it would be good practice to consult States at the present juncture—midway through the development process. The members of the Commission were independent experts and, as such, must assume their responsibilities. Member States were called upon to provide input on the Commission's draft texts, and their comments would be duly taken into account; at any rate, they had the final word on the subject.

5. Furthermore, as Mr. Kamto and several other members had emphasized, the Commission needed conclusive reasons for taking action that was contrary to the 1969 and 1986 Vienna Conventions. Mr. Hmoud and Ms. Xue had rightly observed that the absence of any objection to the Secretary-General's practice could be taken either as endorsing such practice or, conversely, as upholding the rule enunciated in the two Conventions. It was important to allow for the possible future application of that rule in the exceptional situation where the inclusion of a reserving State or international organization to ensure the entry into force of a treaty might pose a problem. However, as he had explained in paragraph 249 of his fourteenth report, such an obstacle could easily be overcome if one other contracting State accepted the reservation in question.

6. In addition, while the practice of the Secretary-General and other depositaries might seem to conflict with the 1969 and 1986 Vienna Conventions, the Secretary-General was very anxious that it should not be interpreted thus, as was borne out by the extracts from the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*¹⁰² reproduced in paragraph 246 of the fourteenth report.

7. All those considerations and the overwhelming majority of views expressed during the debate seemed to argue in favour of maintaining the rule enshrined in article 20, paragraph 4 (c), of the 1969 and 1986 Vienna Conventions. As agreed at an earlier meeting, he had drafted two (four, counting the bracketed text) alternative formulations for draft guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty).¹⁰³ While upholding the principle of not including a reserving State or international organization in the number of contracting States required for the entry into force of a treaty, the alternative formulations showed that the Commission would not go against current practice, which

seemed convenient, on the understanding that such practice would be described in the commentary.

8. If members were in agreement with that principle, and in view of the general consensus that had emerged during the debate, he suggested that the Commission did not need to discuss the matter any further in plenary meeting. Instead, it should refer the original version of draft guideline 4.2.2 along with the alternative formulations set out in the conference room paper to the Drafting Committee and allow that body to decide on the matter.

9. He had felt it important to deal with that question of principle at the outset, since most of the other comments made during the debate concerned the wording of the draft guidelines. One exception was the point raised by Mr. Gaja, not covered in his fourteenth report, that there were in fact two categories of modifying reservations, which could produce quite different effects when objections were made thereto. Although Mr. Nolte had stressed that the line between excluding and modifying reservations was not always clear, he himself believed that such a distinction was useful, if only to show that objections did not always have the same effects as acceptances of reservations.

10. Yet it must be admitted that their effects were not unambiguous, even where the two categories of modifying reservations were concerned. While some modifying reservations were intended to modify the effect of the treaty *vis-à-vis* the author of the reservation only, other modifying reservations were intended to establish what Mr. Gaja had referred to as "a counter-treaty regime". Examples of the first category were contained in paragraphs 268 and 269 of the fourteenth report. Mr. Gaja had given an example of the second category—the reservation of the former Union of Soviet Socialist Republics to article 9 of the Convention on the High Seas, which read: "The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships."¹⁰⁴ In other words, the immunities to which warships were entitled should apply to all government vessels. Another good example of a modifying reservation was the reservation by Israel to the Geneva Conventions for the protection of war victims, to the effect that Israel would replace the distinctive signs and emblems of the Convention with the Red Shield of David.¹⁰⁵ In the case of all those modifying reservations, their acceptance had a reciprocal effect.

11. However, that was not the case with the reservation by Finland¹⁰⁶ to article 18 of the 1968 Convention on road signs and signals (para. 269 of the fourteenth report): even if Finland reserved the right not to use certain road signs, its reservation could not produce reciprocal effects, since a contracting party that had accepted the reservation and undertook to use the signs in question *vis-à-vis* the other parties to the Convention could not use certain signs for

¹⁰² See footnote 84 above.

¹⁰³ Session document ILC(LXII)/RT/CRP.1 (distribution limited to the members of the Commission).

¹⁰⁴ *Multilateral Treaties* ... (see footnote 81 above), chap. XXI.2.

¹⁰⁵ United Nations, *Treaty Series*, vol. 75, Nos. 970–973, pp. 436–438.

¹⁰⁶ *Multilateral Treaties* ... (see footnote 81 above), chap. XI.B.20.

some parties and different signs for others. The reservations by the former Soviet Union, on the other hand, had a permissive effect for the parties that accepted them, and not only for the parties that had entered the reservation.

12. In summary, while he agreed that there were two categories of modifying reservations that had different effects, he believed that the current wording of draft guideline 4.2.6 (Modification of the legal effect of a treaty provision) covered both categories and did not need to be amended. If any slight adjustments were deemed necessary to cover the second category, they could be taken care of by the Drafting Committee, with input from Mr. Gaja. On the other hand, it would be necessary to draw a distinction between the two subcategories of modifying reservations should the Drafting Committee decide to delete the last two paragraphs of draft guidelines 4.2.5 and 4.2.6, as suggested by Mr. Dugard, Mr. Hmoud and Mr. McRae. As the substance of those paragraphs was not covered elsewhere, the Drafting Committee might wish to consider incorporating it in a new draft guideline, possibly placed after draft guideline 4.2.4 (Content of treaty relations).

13. A number of comments had been made on draft guideline 4.2.4. In response to Mr. Fomba's query as to why the verb "modifies" had been used instead of "excludes", Mr. Gaja had explained that article 21 of the 1969 and 1986 Vienna Conventions only used the term "modifies". Nevertheless, in order to address Mr. Fomba's concern, he suggested that it might be a good idea to base the text of the draft guideline on the definition of reservations contained in article 2, paragraph 1 (*d*), of the Vienna Conventions, according to which a reservation was a unilateral statement purporting "to exclude or to modify the legal effect of certain provisions of the treaty".

14. Mr. Nolte had observed that a reservation modified not the provisions of the treaty but rather the obligations arising under those provisions, and had proposed that the draft guideline be amended to reflect that idea. While he agreed with Mr. Nolte in principle, his preference would be to retain the original wording and to address the point in the commentary, so as to avoid departing from the wording of article 21, paragraph 1, and article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions.

15. Mr. Gaja had suggested that the title of the draft guideline was too broad but had not proposed any alternative title. Perhaps "Effects of an established reservation on treaty relations" might be appropriate.

16. Mr. McRae had questioned the appropriateness of the words "reservation established" in draft guidelines 4.2.1 to 4.2.7, but there was no reason not to use the term, since it was in keeping with article 21 of the Vienna Conventions. Furthermore, it was not enough, as Mr. McRae had suggested, simply to refer to "acceptance of reservations". Of course, the reservations in question had been accepted, otherwise they would not be established; however, such reservations needed to be accepted, valid in conformity with the procedure laid down in the second part of the Guide to Practice and permissible in accordance with the guidelines in the third part of the Guide to Practice. While he would not insist on the term,

he requested the Drafting Committee to bear those three criteria in mind and to ensure consistency between the draft guidelines under sections 4.1 and 4.2 of the Guide to Practice.

17. With regard to draft guideline 4.2.3 (Effects of the entry into force of a treaty on the status of the author of an established reservation), Mr. Fomba had asked why there was no reference to the time of the entry into force of the treaty. The Drafting Committee might decide otherwise, but he did not consider it good policy to refer in each draft guideline to all the rules that might be relevant to the guideline in question. In his view, it would be difficult to refer to all the rules governing the entry into force of treaties, which were set forth in article 24 of the Vienna Conventions, in draft guideline 4.2.3.

18. The last important question of principle raised during the debate had been that of reciprocity, which was dealt with in draft guideline 4.2.7. He rejected Sir Michael's accusation that he sought to place human rights treaties in a special category and challenged him to find any evidence in his reports or other written contributions to that effect. He had taken great care not to mention human rights *per se* in draft guideline 4.2.7. Human rights treaties were taken into account in the far more general category of treaties or treaty provisions that did not lend themselves to reciprocal application, under which the three subcategories listed in draft guideline 4.2.7 were subsumed: human rights treaties came under the second subcategory. In that connection, Mr. Hmoud had rightly observed that draft guideline 4.2.7 did not concern human rights treaties only, although he was not convinced by Mr. Hmoud's other example, namely commercial treaties which, on the contrary, seemed to be the typical example of bilateral treaties that did have reciprocal effects.

19. Moreover, he urged Sir Michael to take a close look at paragraphs 84 *et seq.* and 148 *et seq.* in his second report on reservations to treaties,¹⁰⁷ in which he had sought to convince the Commission, contrary to Sir Michael's assertion, that human rights treaties did not constitute a specific category of treaty. He believed that he had done so rather successfully, for in its preliminary conclusions of 1997 on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission in 1997,¹⁰⁸ the Commission had made it very clear that no particular category of treaty was at issue for the purposes of the application of reservation law. In paragraphs 2 and 3 of the preliminary conclusions, the Commission had considered that the Vienna "regime is suited to the requirements of all treaties, of whatever object or nature" and "achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty", including "in the area of human rights". He regretted that the Commission had revived an old religious war between the Human Rights Committee and certain States with regard to General Comment No. 24.¹⁰⁹ It was precisely because he was far from agreeing with the conclusion

¹⁰⁷ *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

¹⁰⁸ *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

¹⁰⁹ See footnote 83 above.

of General Comment No. 24 that he had urged the Commission to take a position on the issue in its preliminary conclusions of 1997.

20. He could hardly be suspected of “human rightism”, despite Mr. Dugard’s comments to the contrary, but he did not believe that the voice of a handful of powerful States should smother that of human rights bodies. It was important to find balanced and reasonable solutions, and it could not be reasonably denied that there were elements in human rights treaties that did not lend themselves to reciprocity, including with regard to reservations. Moreover, he had not said anything different in his explanations on the subject or in draft guideline 4.2.7. However, the Commission should not allow itself to be drawn into another dogmatic debate. He did not disagree with Mr. Hmoud or Mr. Nolte when they stressed that human rights treaties did contain elements of relevance to reciprocity. He had said as much in his second report when he had concluded that it “must also be admitted that the concept of reciprocity is not totally absent from normative treaties, including those in the area of human rights”;¹¹⁰ even more explicitly, he had noted in paragraph 85 of the same report that it “is, however, necessary to beware of taking an overly straightforward and simplistic view of things. While, as a rule, provisions that protect human rights have a marked normative character, human rights treaties also include typically contractual clauses.”¹¹¹ It did not seem to him that draft guideline 4.2.7 was contrary to such an analysis. It merely stated that whenever a reservation did not, for one of the reasons set out in the guideline’s three subparagraphs, lend itself to reciprocity, the mutuality of effects was not a factor. The draft guideline did not set out a position with regard to specific cases and was not intended to do so. In any event, if ambiguity persisted, he had no objection to asking the Drafting Committee to dispel it.

21. Referring to a comment by Sir Michael cautioning against the use of the term “contracting party”, he noted that the term was in common usage, and it might seem convenient to use it to cover both contracting States and contracting international organizations. However, use of that term was not compatible with a reading of the definitions of the terms “contracting State” and “contracting organization” in article 2, paragraph 1 (f), or of the term “party” in article 2, paragraph 1 (g), of the Vienna Conventions, and he was thus in favour of abandoning the words “contracting party”, which the Commission had used in a number of draft guidelines already adopted. Consequently, it would need to replace the term when it put the final touches on the Guide to Practice.

22. Mr. Hmoud had rightly noted that the fourteenth report said nothing about the case of reservations that were not established or not permissible for one reason or another. He wished to assure Mr. Hmoud that the guidelines falling under draft guideline 4.3 in the fifteenth report (A/CN.4/624 and Add.1–2) covered the effects of an objection and that those falling under draft guideline 4.5, to be discussed during the second half of the

current session, concerned impermissible reservations. Thus the omission was only temporary.

23. He was in complete disagreement with Mr. Gaja’s suggestion that the commentary on the draft guideline that would reproduce article 20, paragraph 4 (b), of the Vienna Conventions should specify that an objection would have the same effect on the entry into force of a treaty as an acceptance, and he drew attention in that regard to paragraphs 22 [312]¹¹² to 26 [316] of his fifteenth report, which introduced draft guidelines 4.3.1 and 4.3.2. There was, in fact, a fundamental difference between an acceptance of a reservation and an objection to a reservation. Mr. Gaja had made his comment before he had seen the fifteenth report, and it was to be hoped that he would change his mind once he had read it.

24. There was little doubt that the Commission wished to refer all the draft guidelines under section 4.2 to the Drafting Committee, but he insisted that the final version of draft guideline 4.2.2, however reformulated, must remain faithful to the letter of article 21, paragraph 4, of the Vienna Conventions.

25. Sir Michael WOOD agreed with the Special Rapporteur that if that was the general wish, the Commission should proceed on the basis that it should adhere to the rule established in the Vienna Convention, on the understanding that the commentary would make it clear that by adopting a draft guideline which followed the Vienna Convention, the Commission was not questioning the Secretary-General’s practice. To do otherwise would give the impression that the Commission was somehow establishing, 50 years after the rule had been adopted, that this practice was now customary international law, although that might not be the case. On a more general point, it had been his impression that the issue brought up by the Special Rapporteur actually arose in connection with draft guideline 4.2.1.

26. He did not think that he differed with the Special Rapporteur with regard to the question of human rights treaties. In his statement the previous week, he had been careful not to imply that the Special Rapporteur was endorsing a special category of human rights treaties. He had pointed out that it was not generally accepted that human rights treaties formed a special category or even, as the Special Rapporteur suggested, that they were part of a broader category of treaties that did not lend themselves to reciprocity. His own concern had been with the Special Rapporteur’s quotations from General Comment No. 24, which reflected too rigid a view. For example, the statement that “the principle of inter-State reciprocity has no place” in paragraph 17 of the General Comment was too absolute and should not be reproduced in the commentary.

27. The CHAIRPERSON said that she took it that the Commission wished to refer draft guidelines 4.2 to 4.2.7, together with the alternative proposals for draft guideline 4.2.2, to the Drafting Committee.

It was so decided.

¹¹⁰ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478, p. 65, para. 151 (c).

¹¹¹ *Ibid.*, p. 56.

¹¹² See footnotes 89 and 90 above.

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)*

28. The CHAIRPERSON invited the Commission to continue its debate on the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2), and more specifically on draft guidelines 4.3 to 4.4.3.

29. Sir Michael WOOD commended the Special Rapporteur on his fifteenth report and observed that the effect of objections to reservations was one of the central points of the whole topic. He agreed with the Special Rapporteur's overall approach: he was right to emphasize, in paragraph 2 [292], the importance of the cardinal principle which the ICJ had enunciated in its 1951 advisory opinion on *Reservations to the Convention on Genocide* that “no State can be bound by a reservation to which it has not consented” [p. 26]. Treaty relations were based upon consent. He also shared the view expressed in paragraph 47 [337] that it “is highly doubtful whether article 21, paragraph 3, of the Vienna Conventions is applicable to objections to reservations that do not satisfy the conditions of articles 19 and 23”. Indeed, he would have thought that this was the natural interpretation of article 21, paragraph 3, when read together with paragraph 1 of the same article, which dealt only with valid reservations. In any event, at the current stage of its work the Commission was concerned only with valid reservations.

30. It was perhaps not surprising that States and their advisers sometimes misunderstood or misapplied the Vienna Convention rules on reservations, particularly those on the effect of objections. The Vienna rules were not a model of clarity on that point. It should be borne in mind that the drafters of the Vienna Convention had been working only some 15 years after the ICJ had issued its 1951 advisory opinion on *Reservations to the Convention on Genocide*. The Court of Arbitration had recognized in the *English Channel* case, cited by the Special Rapporteur in paragraph 188 of the fourteenth report, “that the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties” [para. 38 of the opinion]. One result of the current exercise should be to clarify matters and thus to assist States in adopting a more uniform and consistent approach. That would help to give stability to treaty relations, which in turn would promote the purposes of the United Nations as described in the preamble to the Vienna Conventions.

31. There was not a great deal that needed to be said about draft guidelines 4.3 to 4.3.9. However, as the Special Rapporteur himself recognized, an effort should be made to simplify some of the drafting.

32. Guideline 4.3 read quite oddly, at least in English, and the Drafting Committee might wish to consider restructuring it—for example, by reversing the order, adding the word “already” and speaking of “acceptance” rather than of “establishment”. The opening words of the guideline might then read: “Unless the reservation has already been accepted by that State or international organization”.

33. He had no problem with guideline 4.3.4 in paragraph 18 [308], which in the English text was incorrectly numbered 4.3.3. However, read together with the explanation and with guideline 2.6.8, it raised the question as to how, or whether, the time limit “before the treaty would otherwise enter into force” for the two States in question applied in the many cases in which the practice of the Secretary-General was followed. Draft guidelines 4.3.4 and 2.6.8 were entirely in line with the current logic of the draft Guide to Practice, but perhaps the commentary might draw attention to the issue that could arise if the Secretary-General's practice was followed.

34. As to draft guideline 4.3.2, the Drafting Committee should consider whether it would be clearer if the text specified that the treaty entered into force as soon as both the reserving State and the objecting State had become parties.

35. In guideline 4.3.5, contained in paragraph 56 [346] of the report, the Special Rapporteur suggested inserting the words “or parts of provisions”, but he was not sure that that was really helpful. The notion of “the extent of the reservation” was more complex than the addition seemed to imply. For example, the reservation by France to article 6 of the Convention on the Continental Shelf,¹¹³ at issue in the *English Channel* case, had modified the scope of application of the article by excluding certain geographical situations, not by modifying any particular parts of the provision or individual words. Moreover, if the words “parts of provisions” were inserted, they might need to be added elsewhere, which would complicate the already complex drafting.

36. He agreed in substance with the other draft guidelines in the 4.3 cluster.

37. Turning to the draft guidelines on the effect of reservations on “extraconventional rules”, guidelines 4.4.1 to 4.4.3 (and he hoped the Drafting Committee could find a simpler English term than “extraconventional”), he noted that in those provisions—and indeed elsewhere in the draft Guide to Practice—the perfectly clear French word “*règle*” had been translated by the obscure and ambiguous English word “norm”. The Drafting Committee should try to find a more appropriate word; the term “norm” could then be left for the field of *jus cogens*.

38. The first two guidelines in cluster 4.4 stated the obvious, which in the current context was the right thing to do: it was somewhat surprising to see that States had occasionally tried to argue that reservations to one treaty could affect the position under another treaty or under customary international law.

39. Draft guideline 4.4.3, on *jus cogens*, was not really necessary, since the matter was already covered in general terms by the two preceding guidelines, and especially by draft guideline 4.4.2. If, however, the Drafting Committee decided to retain it, it might wish to consider whether it ought to include the final words “which are bound by that norm”, which appeared to have been based on the concluding words of draft guideline 4.4.2, dealing with

* Resumed from the 3043rd meeting.

¹¹³ *Multilateral Treaties* ... (see footnote 81 above), chap. XXI.4.

customary international law, where they might have a place. Their inclusion in 4.4.3 raised an interesting question, one that the Commission probably did not wish to go into in the current context: whether only certain States might be bound by a peremptory norm of general international law. The Commission should avoid appearing to take a position on the matter, which belonged rather to the field of *jus cogens*, and it could do so by omitting the concluding words if it decided to keep the guideline at all.

40. In closing, he said that he was in favour of referring all the draft guidelines presented in the fifteenth report to the Drafting Committee.

The meeting rose at 5.40 p.m.

3046th MEETING

Tuesday, 18 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to resume the debate on the draft guidelines in cluster 4, contained in the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2). The Special Rapporteur would then introduce his sixteenth report on the topic (A/CN.4/626 and Add.1).

2. Mr. GAJA said he could go along with the Special Rapporteur's proposals on the effects of objections to valid reservations. However, he wished to revisit draft guideline 4.3.4 which, as Mr. Kamto had pointed out, duplicated draft guideline 4.3.1. It would be preferable to employ affirmative wording in that provision and to state that an objection to a valid reservation *precluded* the entry into force of the treaty as between the reserving State and the objecting State if the latter had clearly expressed an intention to that effect. While the differences compared to draft guideline 4.3.1 were minimal, they made it possible to distinguish between an objection that prevented a treaty from entering into force and a "simple" objection which did not have that effect.

3. According to draft guideline 4.3.1, on the other hand, a "simple" objection could not have the same effect as did the acceptance of a reservation on the entry into force of a treaty between the reserving and the objecting State. As the Special Rapporteur had rightly observed, stating that an objection "did not preclude" a treaty from entering into force was not the same thing as saying that it "resulted in" its entry into force. His subsequent conclusion that, in any event, another State then had to accept the reservation, tacitly or expressly, was mystifying, however, given that the treaty was intended to produce effects between the reserving State and the State formulating the simple objection.

4. The Special Rapporteur correctly noted that the effects of a simple objection on the application of the provisions of a treaty were not always the same as those of acceptance. They were most often the same when the reservation purported to exclude the full or partial application of a provision, but they were not the same in the case of a modifying reservation, especially when its purpose was to modify the content of the obligations of the other contracting States as well. A distinction had to be drawn in that context, because objecting to a reservation with a modifying effect was not the same thing as accepting it. Although the Special Rapporteur had ranked him among those who thought that the effects of an objection were identical to those of acceptance, he basically shared the Special Rapporteur's opinion. In fact, in his own article entitled "Unruly treaty reservations",¹¹⁴ he had emphasized that when a reservation purported to extend or modify an obligation of other contracting States, their acceptance of or acquiescence to the reservation was essential if it were to produce its intended effect; in that case, a contracting State's objection certainly ruled out its acquiescence.

5. The objections that the Special Rapporteur termed "with intermediate effect" and which formed the subject of draft guideline 4.3.8 were an aspect of practice that had not been contemplated in the Vienna Conventions. They enabled the objecting State to exclude the application of provisions other than those to which the reservation related, provided that they had a "sufficiently close link" with it. Even if the objecting State abided by that condition, one might ask whether the principle of mutual consent among the parties would require that the reserving State could react against the objection. The reserving State might in fact prefer that there be no treaty relations. The reserving State had to accept or at least acquiesce to an objection with intermediate effect before the latter could produce all its intended effects. In practice, there was normally acquiescence, but whether a presumption should be established on the subject was a moot point.

6. The thrust of draft guideline 4.3.9 was that an objection to a valid reservation could not have "super-maximum" effect, a matter on which the Special Rapporteur was correct. What was less convincing, however, was his argument that an objection with "super-maximum" effect then became a simple objection. At least in some

¹¹⁴ G. Gaja, "Unruly treaty reservations", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I, Milan, Giuffrè, 1987, pp. 307–330.

instances, an objection with “super-maximum” effect should instead be converted into an objection purporting to preclude the entry into force of a treaty in relations with the reserving State.

7. Draft guideline 4.4.3 did not duplicate draft guideline 3.1.9. The former stated that a reservation did not affect the application of a rule of *jus cogens*, whereas the latter was concerned with a reservation, irrespective of the treaty provision to which it related, that was contrary to a rule of *jus cogens*: for example, a reservation intended to cause a treaty to be applied in a discriminatory manner.

8. In conclusion, he thought that all the draft guidelines presented in the fifteenth report on reservations to treaties could be referred to the Drafting Committee.

9. Mr. PELLET (Special Rapporteur) said, with regard to draft guideline 4.3.8, that it would be only fair to give a reserving State the opportunity to react to an objection with intermediate effect, as Mr. Gaja had suggested. That would in fact give the reserving State the last word concerning a kind of “counter-reservation”. Initially, he had thought that what was involved was something more akin to a dialogue between the States concerned than something that should be codified in the Guide to Practice, but he would like to hear the views of other members of the Commission on that point. He was prepared to propose a draft guideline on the subject if the majority of members so wished.

10. Mr. Gaja’s other suggestion, with regard to draft guideline 4.3.9, was also apposite. It seemed obvious that an objection with “super-maximum” effect that related to a valid reservation should become a simple objection, but it was also true that the “super-maximum” effect could be transformed into maximum effect. Although a hostile reaction to legitimizing objections with “super-maximum” effect was to be expected, he was prepared to propose a draft guideline on that subject as well.

11. Sir Michael WOOD supported both of Mr. Gaja’s proposals and was in favour of the drafting of a guideline on each of the points raised.

12. Mr. NOLTE said he agreed with the Special Rapporteur’s decision to draw a distinction between the effects of valid and invalid reservations. He therefore welcomed draft guideline 4.3, which referred to the main effect of objections while indicating that they did not have that effect if the reservation had already been accepted by the objecting State, although the notion of “establishment” did not translate that idea sufficiently clearly. Draft guidelines 4.3.1, 4.3.2, 4.3.3 and 4.3.4 were also satisfactory. It was useful to bring out the basic difference between the effects of an acceptance and those of an objection, as the Special Rapporteur had done in paragraph 44 [334]¹¹⁵ of his report, and to emphasize that the objective of article 21, paragraph 3, of the Vienna Convention was to safeguard as much as possible the agreement between the parties.

13. It was also appropriate to point out, as did draft guideline 4.3.5, that the exclusionary effect of an objection

could be limited to part of a treaty provision, although the current wording inadvertently suggested that the range of possibilities was extremely limited.

14. The distinction made in draft guidelines 4.3.6 and 4.3.7 between modifying and excluding reservations certainly helped to give a better understanding of the various possible effects of those reservations, but the distinction was not always clear and might be interpreted by someone who did not read the commentaries carefully as meaning that the two cases were mutually exclusive. In fact, however, certain reservations could have combined effects that must be taken into account. As the Special Rapporteur pointed out, quoting Frank Horn in paragraph 53 [343] in his fifteenth report: “A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An ‘exclusion’ of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms.”¹¹⁶ It would be worthwhile to stipulate in one of the two draft guidelines, or in a separate text, that excluding reservations could also have an indirect or direct modifying effect on other parts of a treaty.

15. Draft guideline 4.3.8 concerning objections with intermediate effect was satisfactory, but greater emphasis should be placed on the exceptional nature of those objections by stressing in the commentary that the underlying objective must be to safeguard the balance between the rights and the obligations flowing from the treaty (what was known as the “package deal”). The Commission must take care not to encourage a practice that was still quite rare but would cause difficulties if it became more widely used.

16. Due attention should be paid to Mr. Gaja’s suggestion that the reserving State be allowed to have the last word, in a sense. He had nothing against that idea, since he shared Mr. Gaja’s concerns that, by drawing up a draft guideline on reservations with intermediate effect, the Commission might inadvertently encourage States to adopt such a practice, and that would certainly give rise to difficulties, because the fact that the reserving State had the last word might have a deterrent effect. If the option could be restricted and adequately explained in the commentary, he would be in favour of elaborating a draft guideline, as proposed by the Special Rapporteur.

17. He agreed with draft guideline 4.3.9 concerning the exclusion of the “super-maximum” effect of an objection to a valid reservation. The question, however, was whether the result would be that it had minimum or maximum effect. If the draft guideline made it clear that such objections would have minimum effect unless it was expressly stated that they had maximum effect, he would be in favour of draft guideline 4.3.9 as proposed by the Special Rapporteur.

18. As for draft guidelines 4.4.1 and 4.4.2 on the effects of a reservation on extraconventional obligations, he was of the opinion that, as such, a reservation and the

¹¹⁵ See footnotes 89 and 90 above.

¹¹⁶ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Thesis, University of Uppsala (Sweden), The Hague, T.M.C. Asser Instituut, 1988, p. 178.

combined effect of a reservation and an objection had no effect on the provisions of another treaty or on customary international law. He realized, however, that declarations of States which appeared at first sight to be reservations or objections could, in reality, have two or more facets, seeking also to produce an interpretative or other effect on another treaty or on a rule of customary international law. That would be the case, for example, when a reserving State justified its reservation by reference to what it regarded as a rule of customary international law. It would then not only be formulating a reservation but also expressing *opinio juris* on a rule of customary international law. The phrase “as such” should therefore be added to both draft guidelines. The first part of draft guideline 4.4.2 would then read: “A reservation to a treaty provision which reflects a customary norm does not, as such, affect the binding nature of the customary norm.” Draft guideline 4.4.1 could be amended in a similar fashion.

19. He wondered if draft guideline 4.4.3 on *jus cogens* was really necessary in view of the contents of draft guideline 4.4.2 on customary law. He nonetheless shared Mr. Gaja’s opinion that draft guideline 4.4.3 was not a mere repetition of draft guideline 3.1.9.

20. In conclusion, he was in favour of referring all the draft guidelines to the Drafting Committee.

21. Mr. McRAE said that the Special Rapporteur had shown that the basic principle that a State could not be bound by something that it had not accepted was central to the topic and that the relevant rules were derived from that principle. He therefore had no substantive objections to the approach adopted by the Special Rapporteur in the fifteenth report or to the draft guidelines that he proposed.

22. He did have some queries regarding objections with intermediate effect, which formed the subject of draft guideline 4.3.8. The basic idea, as he understood it, was that the effect of an objection could extend to treaty provisions other than those to which the reservation strictly referred, in order to safeguard the “consensual balance” of the treaty, because the provision to which the reservation related was linked to other provisions of the treaty. In other words, if provision A did not apply in treaty relations between the parties and if provision B was somehow related to provision A, then provision B would not apply either.

23. Assuming that that was the exact meaning of draft guideline 4.3.8, two points required clarification. First, must the objecting State or organization explicitly declare that such a related provision did not apply, or could that simply be inferred from the objection? Although the reference to the expression of intention by the objecting State or organization in draft guideline 4.3.8 seemed to suggest that it could be inferred, it was unclear why the author of the objection should not be under the onus of specifying the provisions which, in its opinion, did not apply between itself and the reserving State or organization.

24. The second point in need of clarification followed from the first: if the related provisions could be inferred from the objection, what was the nature of the requisite link between the provision to which the reservation referred and the related provisions?

25. In paragraph 71 [361], the Special Rapporteur said that the effect of the objection should be allowed to extend to provisions of the treaty that had a “specific” link with the provisions to which the reservation referred, yet draft guideline 4.3.8 spoke of a provision of the treaty “which has a sufficiently close link” with the provision or provisions to which the reservation referred.

26. The phrase “sufficiently close link” did not provide enough guidance on the nature of the link required and seemed to express a different concept than did the “specific link” mentioned in paragraph 71 [361] of the report. The Drafting Committee could certainly handle that question, but it would be helpful if the Special Rapporteur could explain his thinking and say what obligation the objecting State was to be under to specify the related provisions that would not apply in the treaty relations between itself and the reserving State. Once that point had been clarified, it would doubtless be necessary to recast the draft guideline in order to indicate the nature of the requisite link.

27. Draft guidelines 4.3.1 and 4.3.4 essentially said the same thing, but under different headings. Draft guideline 4.3.4 reproduced article 20, paragraph 4 (b), of the Vienna Convention, whereas draft guideline 4.3.1 reproduced only part of that text but included the rest through a cross reference to draft guideline 4.3.4. That was also a matter which could be considered by the Drafting Committee.

28. Turning lastly to draft directive 4.4.3, he acknowledged the logic of including a provision on *jus cogens*, since some draft guidelines concerned the absence of effect of reservations on other treaties or customary international law. In the past, that issue had been a contentious one within the Commission, however, some members having argued that a reservation to a *jus cogens* provision might itself be contrary to *jus cogens*. That point would need careful treatment in the commentary. He was nevertheless in favour of deleting the phrase “which are bound by that norm” at the end of draft guideline 4.4.3, because it seemed to imply that some States or international organizations might not be bound by certain rules of *jus cogens*.

29. He was in favour of sending all the draft guidelines submitted in the fifteenth report to the Drafting Committee.

30. Ms. JACOBSSON said that with the Special Rapporteur’s fifteenth report, the Commission had reached the centre of gravity of the topic of reservations to treaties.

31. Newer Commission members who had not followed the debates on the topic from the start must accept the results that had already been achieved. That was true, for example, in respect of the role of treaty monitoring bodies, a subject that had triggered lively debates within the Commission before and after the adoption of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties¹¹⁷ in 1997. She agreed with the Special Rapporteur that the Commission and the treaty monitoring bodies had found middle ground and it had thus been possible to draw up a series of

¹¹⁷ See footnote 108 above.

guidelines on the competence of treaty monitoring bodies to assess the permissibility of reservations. Those guidelines had been adopted at the previous session¹¹⁸ and were reasonable, generally acceptable and, it was to be hoped, useful to States.

32. Turning to the fifteenth report, she noted that reservations with “super-maximum” effect formed the subject of draft guideline 4.3.9, which provided that: “The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation.”

33. In order to fully understand the implications of that provision, one had to remember that in English, the term “permissibility” (in French “*validité substantielle*”) had been retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions.¹¹⁹ She was not sure she understood the ramifications of draft guideline 4.3.9 as now worded. Could it open the door to an *a contrario* reading, namely that it was acceptable to sever the reservation from the obligation to be bound by the treaty in its entirety if the reservation did not meet the conditions for permissibility? That would allow for a situation where the reserving State would not benefit from its reservation, but would be bound by the treaty in its entirety. Alternatively, perhaps the Special Rapporteur was leaving open the question of whether such an interpretation was acceptable.

34. She found it puzzling that the example given in paragraph 75 [365] was one of what an objecting State considered to be an invalid reservation. How should that be interpreted, in view of the Special Rapporteur’s very clear statement that it was unacceptable for a reserving State to be able to benefit from a valid reservation if it was contrary to the object and purpose of the treaty? What was even more confusing was the lack of references to recent State practice on the severability of reservations, such as in the context of the Convention on the Elimination of All Forms of Discrimination against Women, to which a number of non-Nordic States had submitted reservations. It would be most unfortunate if the proposed draft guideline sought to disregard the long-standing practice of a growing number of States with regard to human rights treaties, consisting in severing reservations deemed to be contrary to the object and purpose of the treaty and, in such cases, in applying the treaty in its entirety to the reserving State.

35. Mr. Gaja’s comments on draft guideline 4.3.8 had been very interesting, all the more so in the light of Mr. McRae’s statement. She was unable to comment at that juncture, but thought that the issues must be discussed in greater depth. As far as *jus cogens* was concerned, it would be wise to retain draft guideline 4.4.2, but she agreed with Sir Michael and Mr. McRae that the words “which are bound by that norm” must be deleted. In

conclusion, she suggested that the draft guidelines under consideration should be sent to the Drafting Committee.

36. Mr. AL-MARRI congratulated the Special Rapporteur for the entire set of reports he had submitted to the Commission. Those reports and the Commission’s comments thereon had enabled the latter to make a substantial contribution to the study of the topic of reservations to treaties. The reports demonstrated that reservations could be objected to by another party and that interpretative declarations could be formulated in the context of procedures for clarifying the meaning of a treaty or of some of its provisions. Countries signing a treaty interacted with one another and with the author of the reservations. Reservations that were contrary to the object and purpose of the treaty were devoid of legal effect, however. The Special Rapporteur, who had emphasized that point in relation to the permissibility or impermissibility of reservations, had succeeded in dispelling certain ambiguities and in highlighting the importance of that area of treaty law.

37. The draft guidelines under consideration were well balanced and intended to increase the transparency of the reservations regime without falling into the pitfalls of the Vienna Convention, under which reservations or modifications were permissible if there was no opposition. The Commission had adopted guiding principles designed to safeguard the object of treaties.

38. Most of the draft guidelines, especially those contained in the report before the Commission, were perfectly acceptable and he had no objection to them. He hoped that their consideration on first reading would be completed by the end of the next session.

39. Mr. DUGARD said that he agreed with draft guideline 4.3.9 on reservations which met the conditions for permissibility. Nevertheless, careful attention must be paid to the issue of reservations with “super-maximum” effect, since they raised the question of how a State should respond to another State that was the author of a reservation stipulating, as was more and more often the case, that its constitution took precedence over the treaty to which it was a party. The other States parties to the treaty were not necessarily familiar with the provisions of the reserving State’s constitution, or might be unaware of how it was interpreted by that State’s courts. They therefore would not know what stance to adopt in such a situation, for until any possible conflict between the treaty and the constitution, or between the treaty and the interpretation of the constitution, had been resolved, it would be impossible to know if the reservation was incompatible with the object and purpose of the treaty.

40. In the final version of the commentary to draft guideline 4.3.9, the Special Rapporteur should draw attention to the serious difficulties caused by that kind of reservation which, unfortunately, was becoming increasingly common, especially in relation to human rights treaties. He completely agreed with Ms. Jacobsson’s views about reservations to human rights instruments: the issue must be kept in mind, because those were the reservations that were the most harmful. The Special Rapporteur would recall that in 1997, the Commission had embarked on a wide-ranging debate on the admissibility of General

¹¹⁸ *Yearbook ... 2009*, vol. II (Part Two), chap. V, sect. C.2, guidelines 3.2.1, 3.2.2, 3.2.3 and 3.2.4.

¹¹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 144, para. (7) of the general commentary to section 3 (Validity of reservations and interpretative declarations) of the Guide to Practice.

Comment No. 24 of the Human Rights Committee¹²⁰ on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto or in relation to declarations under article 41 of the Covenant. Draft guidelines 4.4.2 and 4.4.3 answered many of the concerns expressed during that debate.

41. Like other members of the Commission and for the same reasons, he suggested that the last words of draft guideline 4.4.3 (“which are bound by that norm”) should be deleted.

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR

42. Mr. PELLET (Special Rapporteur), introducing the first part of his sixteenth report on reservations to treaties (A/CN.4/626 and Add.1), said that in 2009 the Secretariat had issued a memorandum of reservations to treaties in the context of succession of States.¹²¹ That excellent document had helped to expedite the drafting of his sixteenth report on the status of reservations and objections in the case of succession of States.

43. According to the general plan for the Guide to Practice that he had proposed in his second report,¹²² the question of reservations in relation to succession of States would constitute the fifth and final part of the Guide to Practice (which was why the draft guidelines in the sixteenth report began with the number 5). That part should prove useful, because the Vienna rules on the subject were rare and fairly laconic. There was nothing on the subject in the 1969 and 1986 Vienna Conventions. The only universal treaty rules that could be used as a basis for studying the status of reservations and related declarations in the context of succession of States were in article 20 of the Vienna Convention on succession of States in respect of treaties (hereinafter “the 1978 Vienna Convention”). That provision related solely to “newly independent” States which, in the language of the Convention, meant States formed as a result of decolonization. The provision was also incomplete, in that it left open several important questions, especially whether third States could enter an objection when a newly independent State maintained a reservation. Above all, article 20 was silent with regard to succession to objections and acceptances themselves. A methodological problem therefore arose: whether the rules and principles set forth in the 1978 Vienna Convention should be deemed to be established despite the Convention’s relative lack of success (it had not been ratified by many States). He thought they should. First, as indicated in paragraphs 6 and 7 of the sixteenth report, he was obviously not calling into question the definition of succession of States given in the Convention (“the replacement of one State by another in the responsibility for the international relations of territory”), which was now widely accepted and reproduced in several other instruments. Secondly, he was using the same vocabulary and the same definitions of the forms of succession as did the Convention. Thirdly, he started from the premise that it was the succession of States and not the direct

expression of its consent to be bound which conferred on the successor State the status of contracting State or State party to a treaty. Fourthly, as he explained in paragraph 8 of the sixteenth report, he was concerned only with cases where the predecessor State had expressed its consent to be bound and was therefore either a contracting State or a State party to the treaty in question (otherwise, the issue of succession would not arise).

44. One of the two vital questions posed by the succession of States was the status of reservations to treaties, the key issue being the status of objections. Article 20 of the 1978 Vienna Convention dealt with the status of reservations in the case of a newly independent State. Like many of the Vienna rules on reservations, that provision originally stemmed from a proposal by Sir Humphrey Waldock, who at the time had been the Commission’s Special Rapporteur on succession of States in respect of treaties.¹²³ Sir Humphrey’s proposals were thus the origin of the principle of succession to reservations, in other words, the principle of continuity contained in article 20, paragraph 1. The principle had been retained in the Convention and at the United Nations Conference on Succession of States in Respect of Treaties held in Vienna, despite rather insistent attempts to call it into question by a surprisingly wide range of States (attempts described in paragraphs 11 to 15 of the sixteenth report).¹²⁴ Despite some fairly sharp theoretical criticism, he was personally convinced of the merits of the presumption of continuity, both for the reasons put forward by the Commission in its commentary of 1974¹²⁵—including that, in any case, the successor State could always abandon the reservation—and for a similar but more down-to-earth reason, namely that a newly independent State would normally have far more pressing concerns than pondering the status to be given to the reservations of its predecessor State.

45. Still, the presumption was not immutable: according to article 20, paragraph 1, of the 1978 Vienna Convention, it could be reversed by the successor State merely by expressing a contrary intention or formulating a “reservation which relates to the same subject matter”, with no need to worry about the latter reservation’s compatibility with the reservation of the predecessor State that it was intended to withdraw.

46. Of course, that presupposed that the newly independent State could formulate reservations, which it was certainly empowered to do under article 20, paragraphs 2 and 3, of the 1978 Vienna Convention, provided that those reservations met the requirements for permissibility set forth in article 19. It was also clear that the rules laid down in articles 20 to 23 of the 1969 Vienna Convention applied to reservations of the successor State.

¹²³ See the third report on the succession of States in the context of treaties, in *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add. 1, pp. 46–52 (article 9 and the commentary thereto).

¹²⁴ See also *Official Records of the United Nations Conference on Succession of States in respect of Treaties, First Session, Vienna, 4 April–6 May 1977, vol. I, Summary records of the plenary meeting and of the meetings of the Committee of the Whole* (A/CONF.80/16, United Nations publication, Sales No. E.78.V.8), 27th meeting, paras. 59–95, 28th meeting, paras. 1–42, and 35th meeting, paras. 16–23.

¹²⁵ *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 222 *et seq.*; see in particular paragraphs (17)–(19) of the commentary to article 19.

¹²⁰ See footnote 83 above.

¹²¹ See footnote 12 above.

¹²² *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 48–49.

47. As was explained in paragraphs 26 *et seq.* of the sixteenth report, when one thought about it carefully, the solution rested on less-than-Cartesian logic. It did not fit in with the type of succession to treaties that seemed to be appropriate to the factor triggering the process, namely notification of succession by the successor State. Even though the solution was not very logical, however, it was wise, consistent with practice (itself quite varied, as indicated in paragraph 29 of the sixteenth report) and had to be accepted for practical reasons.

48. There was therefore no compelling reason to depart from the substance of article 20 of the 1978 Vienna Convention, even though it could not be incorporated verbatim in draft guideline 5.1 (Newly independent States), because it referred to other provisions of the 1978 Vienna Convention that had no counterpart in the Guide to Practice. To do so would be fairly pointless anyway, since, as he had already said, the whole of Part 5 of the Guide to Practice was based on the assumption that in matters of succession, the rules of the 1978 Vienna Convention were to be respected.

49. As pointed out at the start of his introduction, article 20 of the 1978 Vienna Convention concerned only States that had newly gained their independence as a result of decolonization. It was interesting to see that the drafters of the Convention had been aware of that gap but had not filled it. It was now up to the Commission to do so by means of the Guide to Practice, whose purpose was to clarify and supplement the Vienna rules on reservations.

50. The principle of maintaining the predecessor State's reservations in the case of newly independent States was all the more necessary in the case of the uniting or separation of States, for at least two reasons. First, whereas a clean break was the rule in the case of decolonization, the principle of succession in the most literal sense of the term applied in the event of the separation or uniting of States. Secondly, the prevailing practice, especially in the context of succession to the former Yugoslavia, tended more towards continuity and therefore towards the maintenance of reservations, as shown in paragraphs 41 to 46 of the sixteenth report.

51. It seemed reasonable to embody that practice in paragraph 1 of draft guideline 5.2 (Uniting or separation of States) which, in the case of the separation or uniting of States, was the counterpart to draft guideline 5.1 for newly independent States, it being understood that the principle of maintenance or of continuity was not immutable and must yield to an express or implied contrary intention of the successor State.

52. Despite that element of flexibility, the principle of continuity could not be fully applied to the uniting of States if one of the two predecessor States had been a party to the treaty, and the other, only a contracting State. In that rather special case, the unified State became a party to the treaty as the successor to the State party, and there was no reason to preserve the reservation of the contracting predecessor State which, by definition, was no longer bound by the treaty. That was the rather special eventuality covered by draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States), found in paragraph 58 of the sixteenth report.

53. Draft guideline 5.2 reinforced that exception by beginning with the phrase "Subject to the provisions of guideline 5.3".

54. In his opinion, although the presumption of continuity did not seem, in principle, to give rise to any objections in respect of either newly independent States or other successor States (in the case of separation or uniting), the transposition to those cases of the other principle applicable to the succession to reservations of newly independent States seemed much more problematic. He did not think it could be contended in those other cases that successor States might freely formulate new reservations. In those cases, succession was not a matter of choice—which newly independent States could make by notification of succession—it was automatic and came about *ipso facto*. In those circumstances, it seemed difficult to say that a successor State might avoid its obligations or alleviate them by formulating reservations. For the sake of intellectual honesty, he drew attention to an extremely interesting article, published in 1975,¹²⁶ in which Mr. Gaja had taken the opposite view and had argued that partial withdrawal from the treaty would achieve the same result and make it possible to avoid automatic continuity. He regretted to say that he disagreed; apart from the fact that partial withdrawal was not the same as a reservation (and would therefore lie outside the scope of the Guide to Practice), it was not always feasible—far from it. The possibility likewise did not appear to be confirmed by the scant practice available, to which reference was made in paragraph 50 of the sixteenth report.

55. It would seem, then, that with regard to situations where succession occurred *ipso facto*, paragraph 2 of draft guideline 5.2 should establish the principle that a successor State might not formulate a new reservation at the time of succession. On the other hand, the position was different when, instead of being automatic, succession occurred through notification of succession, as was the case of reservations made by a successor State to a treaty that had not been in force in respect of the predecessor State (which was only a contracting State at the time of succession). In that situation, there was no reason not to transpose the solution applying to newly independent States and to give successor States the freedom to formulate new reservations. Paragraphs 2 and 3 of the draft guideline were intended to embody those rules, which might appear to be extremely complex but which were ultimately just simply logical.

The meeting rose at 11.40 a.m.

3047th MEETING

Wednesday, 19 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki,

¹²⁶ G. Gaja, "Reservations to treaties and the newly independent States", *The Italian Yearbook of International Law*, vol. I (1975) pp. 52–68, especially pp. 64–65.

Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET (Special Rapporteur), continuing with the introduction to his sixteenth report on reservations to treaties (A/CN.4/626 and Add.1), said that the fundamental principle governing the status of reservations to treaties in the context of succession of States, and more particularly, in relation to newly independent States and States formed by unification or separation, was that of continuity. That was clear from article 20 of the 1978 Vienna Convention. According to the principle of continuity, any reservation formulated by one of the uniting States to a treaty that had been in force in respect of that State at the date of unification continued in force in respect of the State subsequently formed through unification, unless the latter expressed a contrary intention. However, if one of the uniting States had been a party to the treaty, but another had been simply a contracting State in respect of which the treaty had not yet entered into force, then the reservation was maintained exclusively for the State that had been a party to the treaty, and the unified State became a party to the treaty in its capacity as successor to that State. That was the somewhat unusual situation covered by draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States).

2. Draft guideline 5.4 (Maintenance of the territorial scope of reservations formulated by the predecessor State) established the fairly self-evident principle that the territorial scope of reservations formulated by the predecessor State was retained. Despite the superb simplicity of that principle, it was necessary to provide for an exception in cases where, in the event of State unification, a treaty became applicable to part of the unified territory to which it had not applied at the date of succession. Draft guideline 5.5 (Territorial scope of reservations in cases involving a uniting of States), an ostensibly complex provision, dealt with that eventuality. The wording was complex because a distinction had to be drawn between two possible situations. The first was where, following a uniting of two or more States, a treaty had been in force in respect of only one of the uniting States, and after unification, it became applicable to other parts of the territory of the unified State. The second was where a treaty in force at the date of the succession of States in respect of part of the territory of two or more of the uniting States became applicable to another part of the territory of what would become the unified State. Initially he had harboured doubts about the need for such a distinction, considering that the crucial factor was not the number of uniting States whose territory was concerned, but the fact that the treaty

did not apply to the whole of the unified State. The secretariat had provided the following explanations, however, that had convinced him of the viability of the distinction.

3. In the first case, where the treaty was in force for only one of the uniting States, there was no danger of a contradiction between the reservations of the uniting State and those of the unified State, and all the reservations of the uniting State that was a party to the treaty could be presumed to extend to the whole of the new State, unless the unified State excluded such an extension, a situation for which provision was made in draft guideline 5.5, paragraph 1 (*a*), or unless by its very nature the reservation was of limited territorial scope, the eventuality covered in paragraph 1 (*b*) of that guideline.

4. In the second case, where two or more of the uniting States had been bound by the treaty and had formulated reservations, the position was much more complicated, because the reservations might be mutually incompatible and it was sometimes difficult, impossible even, to determine the unified State's intention unless the reservations formulated by the uniting States were identical or similar. Actually, the fairly restrictive wording he had chosen for draft guideline 5.5, paragraph 2 (*a*), which spoke solely of "an identical reservation", might need to be reconsidered. The presumption that the territorial scope could not be extended could be overturned: as envisaged in paragraph 2 (*b*) and (*c*) of the draft guideline, the unified State could expressly announce or implicitly indicate a different intention, provided that, as explained in paragraph 3, the reservations that would thus be extended to the entire territory did not contradict one another.

5. Paragraph 4 of the same draft guideline proposed to extend the provisions in paragraphs 1 to 3 when the treaty to which reservations had been made had not been in force for any of the uniting States at the date of succession, yet one or more of those States had been contracting States of the treaty at that date.

6. The text of draft guideline 5.6 (Territorial scope of reservations of the successor State in cases of succession involving part of a territory) was designed to cover the circumstances addressed in article 15 of the 1978 Vienna Convention, which ruled out succession to treaties when that succession concerned only part of a territory. In such cases, the treaties of the successor State extended to the territory in question to which the treaties of the predecessor State had ceased to apply, one State literally being replaced by another in full concordance with the definition of "succession of States". In addition, a reservation made by the successor State applied to the territory in question unless the successor State expressed a contrary intention, which could be likened to a partial withdrawal of the reservation, or unless the reservation did not lend itself to extension of its territorial scope. The wording proposed also covered circumstances in which the reserving State was only a contracting State of the treaty.

7. Moving on to the effects *ratione temporis* of a reservation in the context of a succession of States, something that had scarcely been touched on in the 1978 Vienna Convention, save in article 20 concerning newly independent States, he said that the solutions proposed in draft

guidelines 5.7 to 5.9 were simply a matter of logic. The underlying principle was that the non-maintenance by a successor State of a reservation formulated by the predecessor State could be treated as the withdrawal of the reservation.

8. Draft guideline 5.7 (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State) stated, logically enough, that non-maintenance became operative only when the contracting States or contracting international organizations had received notice thereof. Similarly, draft guideline 5.8 (Timing of the effects of a reservation formulated by a successor State) stated that the reservations of a successor State became operative as from the date of their notification. Of course, the successor State's capacity to formulate reservations, when it possessed such capacity, ought not to be unlimited over time.

9. Draft guideline 1.1 containing the definition of reservations, which was modelled on article 2, paragraph 1 (*j*), of the 1978 Vienna Convention, established that a reservation meant a unilateral statement made by a successor State when making a notification of succession to a treaty. Naturally that implied that successor States could make reservations at the time of succession. If the reservation was not made at that time, it seemed legitimate to regard it as a late reservation and to apply to it the legal regime for late reservations. That was what draft guideline 5.9 (Reservations formulated by a successor State subject to the legal regime for later reservations) did, while differentiating between three possible situations: when succession resulted from a notification of succession by a newly independent State (subpara. (*a*)) or by a successor State of a contracting State which was not a party to the treaty (subpara. (*b*)) or when a reservation was formulated by a successor State other than a newly independent State in respect of which the treaty remained in force (subpara. (*c*)).

10. Draft guideline 5.9 was the last in the set that concerned the status of reservations in the event of succession of States, yet there remained the question of the status of other unilateral declarations with regard to treaties, namely acceptances of and objections to reservations—the subject of Part II of the report, and interpretative declarations—to be covered in paragraphs 151 to 158 of the sixteenth report.

11. Concerning objections to reservations in the case of succession of States (paras. 102–138), he proposed draft guidelines 5.10 to 5.16 for referral to the Drafting Committee. While that might be seen as more in line with the progressive development of international law than with its codification, he would argue that it constituted a third approach, one that might be called logical development of the law. Despite some attempts to raise the issue of objections during the *travaux préparatoires* to the 1978 Vienna Convention, the latter remained completely silent on the matter, and practice was virtually non-existent. That made it difficult to identify any general practices or rules amenable to progressive development or codification. But the provisions he was proposing were the logical and almost ineluctable extension of other rules whose existence could not be disputed.

12. The part of the report on the status of acceptances of and objections to reservations in the case of succession of States (paras. 99–150) attempted to answer some relatively simple questions. First, what happened to objections made by the predecessor State to reservations formulated by other States or international organizations that were parties or contracting States or contracting organizations? Second, what of objections made by such other States or international organizations to reservations of the predecessor State? Third, what happened to the reservations of the predecessor State to which no objections had been made before the date of the succession of States? Fourth, could the successor State itself object to existing reservations at the time of the succession? Fifth, could the other States and international organizations object to reservations formulated by a successor State at the time of the succession and, if so, under what conditions?

13. Although the first question had not been addressed in the 1978 Vienna Convention, it had been tackled on several occasions during the *travaux préparatoires*. The general position had been that the predecessor State's objections should be deemed to be maintained. Recent practice was rare and the few examples he had been able to find also seemed to suggest that a successor State should be deemed to maintain its objections. It therefore seemed reasonable to lay down that principle in draft guideline 5.10 (Maintenance by the successor State of objections formulated by the predecessor State). The practical grounds for doing so were the same ones he had put forward in respect of the presumption that the reservations of the predecessor State were maintained, reflected in draft guidelines 5.1 and 5.2. In addition, it was difficult to ask a newly independent State to give high priority to examining reservations and objections; it was easier for such a State to withdraw a reservation or an objection than to formulate new ones within the requisite time limits.

14. The principle should be qualified by two exceptions. First, the presumption that the predecessor State's objections were maintained should not be immutable: the successor State, irrespective of whether it was a newly independent State or a State formed by the separation or uniting of States, must be able to discard the objections made by the predecessor State. Draft guideline 5.10 specified that a contrary intention could be expressed at the time of succession. However, article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions stipulated that an objection to a reservation could be withdrawn at any time, hence his preference for the deletion of the final phrase of draft guideline 5.10, "at the time of the succession", although he would like to hear the views of members of the Commission on that point.

15. The second set of exceptions to the principle of the maintenance of the predecessor State's objections in the event of State unification applied in two different cases of State unification and was covered in draft guideline 5.11 (Irrelevance of certain objections in cases involving a uniting of States). Paragraph 1 specified that objections to a reservation formulated by a uniting State which, at the date of succession, had been a contracting State in respect of which the treaty had not been in force, were not maintained. Paragraph 2 stated that when, following a uniting of two or more States, the unified State was a party or a

contracting State to a treaty to which it had maintained reservations, objections to a reservation made by another contracting State or contracting international organization or by a State or international organization party to the treaty were not maintained if the reservation was identical or equivalent to a reservation which the unified State itself had maintained.

16. With regard to objections made by other States or international organizations to the reservations of a uniting State, the presumption that those objections were maintained was all the stronger. Not only was it consistent with the few positions expressed on the subject during the *travaux préparatoires* for the 1978 Vienna Convention, but it also made good sense since, in the event of State succession, there was no cause to oblige States to renew an objection for which a reason still existed, and after all, objections could be withdrawn at any time. As that was not a rule that fell into the realm of the succession of States, however, there was no point in spelling it out in draft guideline 5.12, which established the principle of the maintenance of objections formulated by another State or international organization to reservations of the predecessor State.

17. The third question was what happened if a contracting State or international organization or a State or international organization party to the treaty had failed to object to a reservation of the predecessor State within the requisite time limit. The logical reply was that there was no reason whatsoever to consider that the succession of States had altered the situation. If the time limit had expired, no objection could be formulated, and succession of States could not be used as a pretext for such an objection. The position was different if the time limit had not yet expired at the date of the succession of States, in which case an objection remained possible until the time limit expired. That was the principle laid out in draft guideline 5.13 (Reservations of the predecessor State to which no objections have been made).

18. The fourth question was whether a successor State could object to reservations formulated in respect of a treaty to which it became a party as a result of the succession of States. In that context, there were two categories of situation: those of automatic or *ipso jure* succession by a State to a treaty of its predecessor, and those in which the succession to a treaty resulted from the successor State's decision established by making a notification to that effect. In the first case, the successor State had inherited the treaty and had to accept it as it stood, without having the capacity to formulate new objections unless the time period for formulating an objection had not expired at the date of the succession of States and the objection was made within that time period. That eventuality was covered by draft guideline 5.15 (Objections by a successor State other than a newly independent State in respect of which a treaty continues in force).

19. The other possibility, envisaged in draft guideline 5.14 (Capacity of a successor State to formulate objections to reservations), was more complicated. It arose when the successor State freely agreed to remain bound by the treaty. It would then be logical for the successor State to be able freely to modify its commitments

by formulating new reservations—as envisaged in the first paragraphs of draft guidelines 5.1 and 5.2—or to formulate objections to reservations made by other contracting States or States parties. That option should be open to all States that established their succession to treaties of the predecessor State by notification, irrespective of whether they were newly independent States or other successor States in respect of treaties to which the predecessor State had been a contracting State but not a party. The two situations were envisaged in paragraphs 1 and 2, respectively, of draft guideline 5.14.

20. Paragraph 3 provided for an exception in cases where a reservation required unanimous acceptance by States which were parties or were entitled to become parties to the treaty. It would be unfortunate if the new State's objection were to upset long-standing treaty relations by compelling the reserving State to withdraw from the treaty. Lastly, there was the question of objections to reservations formulated by the successor State itself in conformity with draft guidelines 5.1, paragraph 2, and 5.2, paragraph 2. It went without saying that any such objections must be formulated in accordance with the principle of consent and subject to the usual conditions. Sometimes what went without saying went even better when said, however, and that was why he was proposing draft guideline 5.16 (Objections to reservations of the successor State).

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

21. He wished now to sum up the debate on his fifteenth report (A/CN.4/624 and Add.1–2), containing draft guidelines 4.3 to 4.4.3, on the effects of an objection to a valid reservation, and subsection 4.4, on the effect, or absence of effect, of a valid reservation on extraconventional obligations. The statements on the report had been of limited quantity, but of high quality, and members of the Commission who had not spoken had told him to interpret their silence as consent. He welcomed the fact that the general approach he had adopted had been generally well received: indeed, as one speaker had pointed out, there had been so little disagreement that it was almost frustrating.

22. The English text of draft guideline 4.3 apparently needed to be better aligned with the French, and although that was a job for the Drafting Committee, he wished to register his slightly reluctant acceptance of the proposal to add the word “already” in the final portion of the text. On the other hand, replacing the words “established reservation” with “accepted reservation” would cause a problem of concordance with the draft guidelines already adopted by the Drafting Committee. In the light of a number of comments, he had realized that the correlation between draft guidelines 4.3.1 and 4.3.4, wrongly numbered 4.3.3 in the English text, needed to be improved. One speaker had pointed out a possible solution by suggesting that draft guideline 4.3.1 might be left with its negative wording, “does not preclude ... except in the case...”, whereas draft guideline 4.3.4 could be worded in a positive manner, stating that when an objecting State so indicated clearly, the objection precluded the entry into force of the treaty in the relations between the two States. He did not agree with the proposals to delete one of the two

draft guidelines, to combine them or to invert their order, however. The two served two different purposes: draft guideline 4.3.1 dealt with objections that had minimum or normal effect, whereas draft guideline 4.3.4 covered those that had maximum effect.

23. With regard to draft guideline 4.3.1, Mr. Gaja had maintained that a simple objection would have the same effect as acceptance with respect to the establishment of the reservation between the reserving State and the objecting State. He himself maintained the opposite viewpoint, for reasons set out in paragraphs 22 to 24 [312–314]¹²⁷ of his fifteenth report. Mr. Gaja agreed, however, that the phrase “does not preclude”, in article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions, was not easy to interpret. When in doubt, one must favour any interpretation that maximized the differences between objection and acceptance. Accordingly, an objecting State must be regarded as having intended its objection to produce all the effects that were not incompatible with the Vienna Conventions. The problem was not really with the wording of draft guideline 4.3.1, which was based on article 20, paragraph 4 (*b*), but rather with the commentary, which would outline the two opposing viewpoints. After having listened to Mr. Gaja’s remarks, he was now thinking of making the text of the draft guideline even more explicit, rather than relegating the doctrinal quarrel to the commentary. The Drafting Committee would thus have to change the text to indicate that an objection did not have the same effect as acceptance and did not result in the entry into force of the treaty between the two States.

24. Unless he was much mistaken, draft guideline 4.3.2 had not elicited any comments, save for an editorial amendment with which he did not agree, but that would be a matter for the Drafting Committee to decide. Draft guideline 4.3.3 had been regarded by one speaker as saying the same thing as draft guideline 4.3.4, but that was a misreading of the texts, the former relating to cases when an objection automatically precluded the entry into force of a treaty between the reserving State and the objecting State, and the latter dealing with objections with maximum effect resulting from a clearly expressed contrary intention.

25. In draft guideline 4.3.5, according to two speakers, the phrase “or parts of provisions” might cause confusion and should be deleted. He was inclined to agree, but for an even simpler reason: a provision need not be an entire article or paragraph: it could even be a phrase or clause within them. In seeking maximal precision, he had thus inadvertently complicated matters.

26. Like draft guidelines 4.2.5 and 4.2.6, which had already been referred to the Drafting Committee and concerned the effects of established reservations, draft guidelines 4.3.6 and 4.3.7 were based on what seemed to him an indispensable distinction between reservations that had an excluding effect and those that had a modifying effect. The member of the Commission who had misread draft guidelines 4.3.3 and 4.3.4 had also been mistaken about draft guidelines 4.3.6 and 4.3.7. While it was true that the

distinction tended to simplify the issues and should not be viewed as being an absolute—reservations that had an excluding effect could also have modifying effects—the point should be taken into account in the commentary, not incorporated into a new draft guideline. In addition, the Drafting Committee should be careful to ensure that the same treatment was given to draft guidelines 4.2.5 and 4.2.6 as to draft guidelines 4.3.6 and 4.3.7.

27. Turning to draft guideline 4.3.8 on objections with intermediate effect on treaty relations, he said he was not averse to the Drafting Committee’s attempting to strengthen in the text itself the idea of a balance in treaty relations between the reserving State and the objecting State. He was less enthusiastic, however, about the idea that the objecting State must, in its objection, engage in a legal and historical analysis of the link among the provisions whose effects it wished to exclude. It was stated elsewhere in the Guide to Practice that, to the extent possible, reasons had to be given for objections, and that ought to suffice. The reference to a “sufficiently close link” was actually not as vague as some had suggested. It was very hard to strike the proper balance between the right of the reserving State not to be bound by the provisions in question, as long as they were not essential to the object and purpose of the treaty, and the objecting State’s right to have its view of the treaty relationship respected. That lent substance to the proposal by one speaker that the draft guidelines should permit the reserving State to say whether or not it accepted the objection with intermediate effect—a kind of counter-reservation. In other words, a State could say, “All right, you do not want A, but in that case, in my relations with you, I refuse to accept B, which for me is intrinsically related to A”. It was perfectly consistent with the fundamental principle of consent that the reserving State should then be able to indicate whether it accepted that condition or whether it preferred not to be bound by the treaty with the objecting State that had excluded certain provisions from the future treaty relations between the States. That was clearly not envisaged in the 1969 and 1986 Vienna Conventions, but neither did it run counter to them, and it was the logical extension of the reservations dialogue that the Commission had always sought to foster. Hence, hoping that he had properly gauged the Commission’s mood, he had prepared a new paragraph 2 to be added to draft guideline 4.3.8. The new text had been circulated in an informal document available in the meeting room and read:

“The treaty shall apply between the author of the reservation and the author of the objection to the extent of the reservation and the objection, unless the reserving State or international organization has opposed, by the end of a period of 12 months [one year] following the notification of the objection, the entry into force of the treaty between itself and the objecting State or international organization.”

He was well aware that the Commission’s adoption of such a text would be an act, not of codification, but of progressive development, but that, too, was its role. He was in no way wedded to the wording he had just read out, but he would like the Commission to accept the underlying principle so that the Drafting Committee could embark on a search for the proper wording.

¹²⁷ See footnotes 89 and 90 above.

28. Draft guideline 4.3.9 was undoubtedly the text that had provoked the most, albeit generally favourable, discussion, no speaker save one having opposed its referral to the Drafting Committee. Admittedly, he had failed to find examples of valid reservations that had given rise to objections with maximum effect, since objecting States always used the reservation's invalidity as a screen to hide behind, yet the sole subject of the draft reservation was objections to a reservation that were presumed to be valid.

29. When the Commission came to address the effects of invalid reservations, in the discussion of paragraphs 96 to 236 [386–514] of the fifteenth report, he intended to ask it to depart from the principle of consent and focus on the will of the author of the reservation. He would also ask it to accept the position of the human rights bodies that if—and only if—there was any doubt as to the intention of the State that had made an invalid reservation, the will to be bound by the treaty as a whole must be deemed to take precedence over the will to make a reservation. Thus, in the context of invalid reservations, the problem was posed not from the standpoint of the objection, but from that of the reservation: the question was not whether the objection could produce “super-maximum” effects but, rather, whether the invalidity of the reservation could permit the treaty as a whole to be implemented.

30. With regard to draft guideline 4.3.9, he would revert to the basic position that an objecting State could not force a reserving State to renounce a valid reservation. Yet a number of speakers had raised the question as to whether, if an objection with “super-maximum” effect did not produce the effect desired by its author—which by definition was the application of the treaty as a whole—it should be regarded as a simple objection; as an objection with “super-maximum” effect; or even as null and void, producing no effect whatsoever. The latter was, as he understood it, the position of one speaker, who had suggested that the problem be addressed from the standpoint of the validity of the objection, something with which he was inclined to agree.

31. That put him in an awkward position: in preparing his fifteenth report, he had almost automatically assumed that objections with “super-maximum” effect should be brought down to the level of simple objections. Few remarks had been made on that point, and they were fairly divergent. One speaker had said—and upon reflection, he agreed—that it would be hard to invent an effect for an objection that was unable to produce the effect desired by its author. It would also be bizarre to assume that an objection with “super-maximum” effect must produce maximal effects, whereas what the objecting State wanted was the widest possible application of the treaty. Accordingly, he felt that the draft guideline should be referred to the Drafting Committee, with instructions that the text itself was not to address the consequences of the principle that was being laid down and that the arguments for and against the various possibilities were to be incorporated in the commentary.

32. Turning to draft guidelines 4.4, 4.4.1 and 4.4.2, he said that of the few comments made, one had been particularly interesting: clearly, reservations had no effect on the extraconventional obligations by which the parties to

the treaty were bound, but they could nevertheless reveal the *opinio juris* of their authors on the existence or development of customary norms. There was every advantage to be gained, therefore, if the Drafting Committee were to add language to the effect that the absence of effects was attributable solely to the reservation as such, thereby preserving the role that the reservation played in the overall context of the development of custom.

33. With one outstanding but, fortunately, isolated exception, no speaker had advocated the deletion of draft guideline 4.4.3. He was delighted, as he was with the remark that the text did not duplicate the rather bizarre draft guideline 3.1.9, which, as had rightly been pointed out, was not one of his favourites. Many speakers had requested the deletion of the phrase “and other States or international organizations which are bound by that norm” in the final part of draft guideline 4.4.3, since it implied the possibility that not all States were bound by a norm of *jus cogens*. He could go along with that, even though the situation was not quite so simple, for the deletion of the phrase would exclude the possibility that regional peremptory norms might apply.

34. No real opposition had been expressed to referring the entire set of draft guidelines to the Drafting Committee, which should, however, be given the instructions he had already outlined with regard to draft guideline 4.3.8, including the new paragraph that had been circulated to members in an informal paper, and on draft guideline 4.3.9.

35. Replying to a question by Mr. Nolte, he said that draft guideline 4.3.8 should be referred to the Drafting Committee on the understanding that it must incorporate the new paragraph, subject to possible drafting changes.

36. The CHAIRPERSON said she took it that the Commission wished to refer draft guidelines 4.3 to 4.4.3, together with the new paragraph proposed for draft guideline 4.3.8, to the Drafting Committee.

It was so decided.

Cooperation with other bodies

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

37. The CHAIRPERSON welcomed Mr. Castillo Castellanos, of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

38. Mr. CASTILLO CASTELLANOS (Inter-American Juridical Committee) said it was an honour to represent the Inter-American Juridical Committee before the International Law Commission for the purpose of furthering the customary dialogue between two institutions that shared a common legal heritage in pursuing the codification and progressive development of international law.

39. One important topic on the IAJC agenda, on which he himself was Rapporteur, was innovative forms of access to justice in the Americas. The topic had been

under consideration since 2005, initially in relation to the principles of legal ethics. At the seventy-second regular session of the IAJC, held in Rio de Janeiro in March 2008, it had been decided to focus on new or alternative forms of access to justice in many countries of the Americas, such as conciliation mechanisms that avoided litigation and saved the judiciary time and money. As Rapporteur on the topic, he had proposed 10 basic principles.

40. First, access to justice, although an inalienable human right, should also be regarded as a social right. Second, equal access to justice was integral to the rule of law; the legal exclusion of large segments of the population delegitimized democratic institutions. Third, the State had the duty to guarantee access to justice for all and must work to achieve maximum equity in its provision of services, functioning and results. Fourth, policies to make access to justice more equitable must not be limited to a sort of “judicial charity”—free legal aid or tax exemption, for example—actions which, although positive, were insufficient. Instead, such policies must aim to ensure authentic, not simulated, protection of the weakest. That presupposed a break with practices and norms that had made the justice system vulnerable to the laws of the market. Fifth, the democratization of the judicial system was not limited to equal access, but also implied greater social participation in how it was handled. A State monopoly on justice was not incompatible with forms of social or community dispute settlement.

41. Sixth, many decisions to correct injustices could be taken rapidly at administrative level, provided they were subject to judicial control. Seventh, a legal culture must be promoted to open the way to harmonizing forms of conciliation in cases where there was no need to go to the courts. Even when cases, including criminal matters, did reach the courts, an attempt must be made to reach outside settlements or compensation agreements. Eighth, the effective independence of the judiciary must be ensured. That meant independence not only from other branches of power but also from powerful groups that used all kinds of pressure to influence court decisions. Better training of judges and proper monitoring could help to strengthen judicial autonomy. Ninth, the legal and ethical training of judges should be of ongoing concern for society and the State. Today, universities basically trained lawyers, not judges. More advanced legal training was not acquired until after graduation from law school; that failing had been noted throughout the Americas. The training of judges must begin at the undergraduate level. Tenth, reform of the judicial system to achieve full access to justice called for urgent political decisions that should be given priority in all areas of international law, since access to justice was a fundamental right that permeated all aspects of human life.

42. The IAJC had adopted a report on the prospects for a model law on State cooperation with the International Criminal Court and a guide to general principles and criteria for such cooperation. Steps had now been taken in many countries of the Americas to promote cooperation with the Court. At its thirty-ninth regular session, held in 2009, the General Assembly of the Organization of American States (OAS) had requested the IAJC to use the relevant OAS guide to promote the adoption of national

legislation on cooperation with the International Criminal Court and to assist States in training administrative and judicial officials and academics to that end. The General Assembly had also instructed the IAJC to draft model legislation on implementation of the Rome Statute of the International Criminal Court containing a definition of crimes within the Court’s jurisdiction. At the seventy-fifth regular session of the IAJC, in 2009, the elaboration of a model law concerning the three relevant crimes covered by the Statute, namely genocide, crimes against humanity and war crimes, had been proposed.

43. The promotion and strengthening of democracy had been another important topic in the Americas of late. On 11 September 2001, the General Assembly of the OAS had adopted the Inter-American Democratic Charter, and the IAJC had subsequently been mandated to conduct a study on its applicability. The Charter was based on principles set forth in a treaty, namely the Charter of the Organization of American States, but it was not a treaty or a convention itself, and that made its practical application difficult. For some, it represented a moral commitment rather than a binding instrument. At the thirty-ninth regular session of the General Assembly of the OAS, the view had been expressed that the IAJC should not become involved in the matter, which was basically political, but the Secretary-General of the OAS had encouraged the IAJC to continue looking into it and into the somewhat controversial or ambiguous aspects of the Charter. One was the question of who could call for the application of the Charter by the OAS. Under the usual practice, that initiative was open to member States, but solely through their Governments and not through the judiciary, the legislature, civil society or other sectors of society. Some in the Americas believed that other entities should also be empowered to call for the Charter’s application. The situation in Peru, with the confrontation between Congress and President Fujimori, had been cited in support of that decision. When adopting its resolution on collective action under the Inter-American Democratic Charter, the IAJC had made a detailed analysis of the principles and values that made up democracy, including the independence of branches of government. The item was still on the agenda; the current focus was on social aspects of strengthening democracy in the Americas.

44. The General Assembly of the OAS had also tasked the IAJC with proposing model laws to support efforts to implement treaty obligations concerning international humanitarian law on the basis of priority themes defined in consultation with member States and the International Committee of the Red Cross (ICRC). To that end, the IAJC had drawn up a questionnaire for member States, but many had yet to reply. On the basis of those replies that had been received from States and input from the ICRC, the IAJC was producing a list of the priorities identified by States in the area of international humanitarian law.

45. At its seventy-fourth regular session, in March 2009, the IAJC had placed on its agenda the topic of cultural diversity in the development of international law. One of the reasons for doing so was that, in October 2005, UNESCO had adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, thereby making cultural diversity the subject not of a

declaration, but of a binding instrument. The Convention had been well received and had been rapidly ratified by a large number of States. However, that posed a number of challenges, including the need to adapt domestic legislation and to exchange information in areas to be affected, such as trade. In advance of the Convention's adoption, the World Trade Organization (WTO) had raised a number of important points, including that the bulk of the issues addressed in the Convention fell exclusively within the sphere of its own competency. The response of UNESCO, incorporated in the Convention itself, was that while cultural activities, goods and services had an economic value, they were not solely commercial in nature. As such, they should be given special treatment in bilateral and multilateral trade agreements. In other words, the former "cultural exception" had been transformed into a positive rule binding on all States parties to the Convention.

46. A second reason for the inclusion of cultural diversity in the IAJC agenda was that it was a defining characteristic of the societies of Latin America. Included among the recommendations being developed by the IAJC was, first of all, that cultural diversity itself, and not only its expressions, should be recognized as part of the cultural heritage of mankind, and that as such, it should be granted effective legal protection. A second recommendation was that cultural expressions be promoted and protected in an equitable manner. That was not an easy task, given market forces as well as the historical predominance of certain cultural trends. Although such trends must be preserved, a way had to be found to ensure equality of treatment of other less prominent cultural expressions. A third recommendation was that, apart from their legitimate economic use, cultural goods be considered as products of the mind, and not merely as commodities. That potentially controversial notion has already been incorporated in the Convention but could benefit from further development by the IAJC. A fourth recommendation was that educational mechanisms to strengthen public awareness of cultural diversity be established and that interculturality should be seen as a viable path towards social cohesion. Since education in the Americas had, by and large, been monocultural, achieving interculturality would require real efforts to bring different cultural groups to a true understanding of one another. The fifth recommendation was that public and private initiatives to study the ramifications of cultural diversity and its impact on international law should be promoted and supported. Although anthropologists and sociologists had addressed the subject, its examination from the legal standpoint had not been carried out as rigorously as was warranted.

47. In recent years, the work of the IAJC had increasingly focused on public international law, which had emerged during the twentieth century as a fundamental and practical tool for peace, coexistence and respect for national sovereignty. It was the field in which the IAJC had made its first major contribution to law in the Americas, in the form of the Convention on Private International Law (Bustamante Code). Over the past several years, the IAJC had participated in the Inter-American Specialized Conferences on Private International Law, making contributions on such important topics as consumer protection and e-commerce, including through the input of its rapporteurs.

48. The IAJC had also focused its attention, and had made considerable progress, on the draft inter-American convention against racism and all forms of discrimination and intolerance. The elaboration of such a text had been mandated by the General Assembly of the OAS, overriding the argument advanced in some quarters that it would be superfluous, since various international instruments already condemned all forms of discrimination. The draft had been extensively debated and many parties consulted. For its part, the IAJC had decided to issue a resolution containing its views on the draft, including that the term "racism" was too narrow and that reference should be made to all forms of discrimination. It was significant that the draft convention addressed forms of discrimination that were not only new, but were perpetrated through new means or mechanisms.

49. On the topic of migration, in which the IAJC shared the Commission's interest, a recommendation had been issued and a manual produced to remind migrants of their human rights and how to exercise them when outside their country of origin and to remind States of their obligation to respect migrants' rights. The OAS had welcomed those efforts and had asked the IAJC to pursue them. The IAJC was currently working on the topic of migration in conjunction with that of refugees.

50. All of the topics just mentioned were on the agenda for the seventy-seventh regular session of the IAJC, in August 2010. One additional—and controversial—issue to be discussed was the establishment of an inter-American court of justice: many were of the view that it was unnecessary, given the possibility of recourse to the ICJ. Another new topic, placed on the agenda at the request of the General Assembly of the OAS, was freedom of thought and expression.

51. The IAJC was aware of the need to enhance the role of consultative bodies, such as the IAJC itself and the International Law Commission, both of which had been entrusted with strengthening international law as a tool for world peace. He reiterated the willingness of the Inter-American Juridical Committee to continue the valuable institutional exchange that had become a tradition shared by the two bodies.

52. Mr. VARGAS CARREÑO said that the Inter-American Democratic Charter provided an important stimulus to representative democracy in the Americas. He encouraged the IAJC to pursue its study of the scope of the Charter with a view to laying the groundwork for the General Assembly of the OAS to pronounce legally binding interpretations of the Charter.

53. One of the most important topics that the IAJC dealt with was that of innovative forms of access to justice in the Americas, with a view to seeking amicable solutions to disputes before appealing to ordinary justice, especially in the areas of family law or employment. In that context, the independence of the administration of justice was a particularly important principle. Without an independent judiciary that had the power to punish abuses of authority, not only was democracy not possible, but grave violations of human rights could result, as evidenced by past events in Argentina and Chile. The development of measures to

strengthen the independence of the judiciary seemed to him an essential task to which the IAJC might wish to give priority.

54. Lastly, he suggested that it would be useful to organize a working session during which the International Law Commission and the Inter-American Juridical Committee could set parameters for distinguishing between the topics suitable for codification and progressive development at the regional level and those that represented a duplication of efforts.

55. Mr. CASTILLO CASTELLANOS (Inter-American Juridical Committee) said that the IAJC had, in fact, encountered some difficulties in approaching the Charter from a technically correct standpoint while also taking political considerations into account. Mr. Vargas Carreño's suggestion that the IAJC might wish to view those efforts as paving the way for decisions by the General Assembly of the OAS was a practical solution that would advance the work to enhance the applicability of the Charter.

56. He agreed that strengthening the independence of the judiciary was an essential task, despite a certain tendency to avoid it because it gave rise to controversy. As a technical juridical body, the IAJC was obliged to address the issue in depth and to examine historical examples, some of which had had a devastating impact in some countries of the Americas.

57. Lastly, he was certain that the IAJC would be receptive to the idea of organizing a working session with the Commission in order to seek common themes and to determine the desirability of codifying them at the regional level. Thanks to modern communications, the IAJC remained in permanent contact with the activities of the International Law Commission and was ever-ready to interact with it.

58. The CHAIRPERSON expressed appreciation to Mr. Castillo Castellanos for his remarks, which had facilitated a valuable exchange between the Commission and the IAJC.

The meeting rose at 1.10 p.m.

3048th MEETING

Thursday, 20 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, 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. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPOREUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their debate on the first part of the Special Rapporteur's sixteenth report (A/CN.4/626 and Add.1).

2. Mr. GAJA said that the sixteenth report on reservations to treaties addressed a complex subject which was only partially regulated by the 1978 Vienna Convention. The practice of States and depositaries was not always consonant with the provisions of that Convention. He commended the Special Rapporteur on shedding light on the subject on the basis of the outstanding memorandum prepared by the Secretariat.¹²⁸

3. Article 20 of the 1978 Vienna Convention established the presumption that reservations made by the predecessor State were maintained when a newly independent State declared, by a notification of succession, that it intended to become a party to the treaty. The same article allowed a newly independent State to accompany its notification of succession with new reservations. Although the Special Rapporteur considered that practice to be "less than Cartesian" (para. 30 of the report), it nevertheless seemed to be consistent with the principle underpinning the Convention, namely that succession to treaties for newly independent States was not automatic, but depended on an expression of intention in the form of either accession or notification of succession. It therefore seemed logical that such an expression of intention could be accompanied by new reservations.

4. Like article 20 of the 1978 Vienna Convention, draft guideline 5.1 referred to the criteria which had to be met if those reservations were to be valid. It did not, however, tackle the question of when a reservation formulated by a newly independent State became what the Special Rapporteur called an "established reservation". Unless he was mistaken, nowhere in the report—or in the addendum which had yet to be presented—was there any mention of the acceptance by other contracting States of new reservations formulated by a newly independent State. The rule laid down in article 20, paragraph 4, of the 1969 Vienna Convention should also apply when a newly independent State formulated a new reservation in its notification of succession.

5. The timing of the effects of such a notification when accompanied by reservations warranted more in-depth examination. Draft guideline 5.8 in paragraph 92 stipulated that a "reservation formulated by a successor State ... when notifying its status as a party or as a contracting State to a treaty becomes operative as from the date of such notification". One could employ the wording of article 22, paragraph 3 (b), of the 1978 Vienna Convention in order to specify the date on which the notification

¹²⁸ See footnote 12 above.

of succession was deemed to have been made, except that a reference to the period of time needed to establish the reservation should be added.

6. His comments regarding new reservations made by a newly independent State also applied to the cases covered in draft guideline 5.2, entitled “Uniting or separation of States” (para. 54). Those were exceptional cases where a new reservation could be made by successor States other than newly independent States. A reference to the conditions governing the permissibility of reservations should be added to that draft guideline.

7. Under the 1978 Vienna Convention, successor States other than newly independent States automatically became parties to a treaty which had been in force for the predecessor State and they could not make reservations. Attention should be drawn to the fact that practice in that connection was not always consistent, because States that were not newly independent also sometimes made notifications of succession. The latter generally proved to be declarations confirming a succession which had already taken place automatically, and that was not therefore a situation in which the successor State could formulate a new reservation.

8. The commentary should deal with those terminological niceties and, above all, indicate that, especially in the event of the separation of States, the practice of States and depositaries was anything but clear and uniform and did not necessarily tend towards automatic succession to the treaties in force for the predecessor States.

9. In conclusion, he thought that draft guidelines 5.1 to 5.16 could be referred to the Drafting Committee.

10. Mr. FOMBA thought that, for the reasons put forward by the Special Rapporteur in paragraphs 3 and 4 of his sixteenth report, it was advisable to include in the Guide to Practice guidelines on the problems posed by reservations, acceptances of reservations and objections to reservations in the context of succession of States. The footnote in brackets to paragraph 4, which made reference to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, showed that there was still one unanswered question, namely that of whether and to what extent States resulting from dissolution could be purely and simply likened to newly independent States. He had no set ideas on the subject and he noted that the Special Rapporteur suggested that the issue be left aside.

11. He wondered why the term “new States” could not be applied, at least in the wider sense, to the uniting or separation of States, rather than being confined to instances of dissolution. With regard to method, the choice seemed to be one of either the codification or the progressive development of international law, and it was therefore a matter of assessing and ascertaining if and to what extent it was necessary to propose rational solutions to problems that had not been resolved by the 1978 Vienna Convention.

12. He endorsed the idea that the rules and principles established by the 1978 Vienna Convention should not be called into question and that, whenever possible, the Convention’s terminology should be reproduced, as the Special

Rapporteur proposed in paragraph 6. He agreed *a priori* with the initial premise which formed the point of departure of the logic of paragraph 7, although the fact that some aspects of the situation were not to be examined might be a source of concern. Similarly, in paragraph 8 it was proposed that the Commission should confine its consideration to reservations formulated by the predecessor State that had been a contracting State or a State party to the treaty at the date of the succession of States. That seemed to be a suitable approach. He was in favour of examining the situations which had not been dealt with in article 20 of the 1978 Vienna Convention and of clarifying the territorial (*ratione loci*) and temporal (*ratione temporis*) scope of the reservations in question (para. 10). He likewise concurred with the opinion in paragraph 30 of the report that there was no good reason not to include, as a guideline, article 20 of the 1978 Vienna Convention in the Guide to Practice, and he approved of the idea of covering reservations to treaties between States and international organizations.

13. In the footnote to paragraph 31, the Special Rapporteur rightly indicated that a reservation was not “applicable” as stated in article 20, paragraph 1, of the 1978 Vienna Convention, but “established” in respect of a territory, even though he concluded that it would be inappropriate to “retouch” the text of the Vienna Convention.

14. With regard to paragraph 32 of the report, it would be useful to mention in the title of guideline 5.1 the limitation of that provision to reservations in cases where a newly independent State made a notification of succession, and to consider the advisability of extending that solution to other modalities of State succession in other draft guidelines, an approach which he favoured.

15. As for the question of the internal linkage between the provisions of the 1978 Vienna Convention, especially the relationship between article 20 and articles 17 and 18, and the linkage between the 1978 and 1969 Vienna Conventions, he agreed with the approach suggested in paragraphs 33 and 34 of the report.

16. Draft guideline 5.1 (Newly independent States), paragraph 1 of which repeated almost word for word article 20, paragraph 1, of the 1978 Vienna Convention, the sole difference being the omission of any reference to articles 17 or 18, did not call for any comments. The same was true of paragraph 2, which reproduced paragraph 2 of article 20 of the 1978 Vienna Convention without the reference to articles 17 or 18 and which replaced the mention of article 19 of the 1969 Vienna Convention with a reference to guideline 3.1 of the Guide to Practice, which corresponded to it. As for paragraph 3, which reproduced paragraph 3 of the 1978 Vienna Convention, except that it replaced the phrase “the rules set out in articles 20 to 23 of the Vienna Convention” with “the relevant rules set out in the second part (Procedure) of the Guide to Practice”, his only comment was that it might be helpful to mention the relevant rules in question in the commentary for the convenience of users of the Guide to Practice.

17. As far as draft guideline 5.2 (Uniting or separation of States) was concerned, paragraph 1 did not raise any problems. Paragraph 2 was important in that it was a provision designed to fill a substantial gap in the 1978 Vienna

Convention. Paragraph 3 did not pose any difficulties, although the word “Procedure” in parentheses could be deleted.

18. The wording of draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States) did not call for any particular comments. The scope of that guideline seemed wide enough to cover the cases for which specific provision was made in the 1978 Vienna Convention and for other cases, which was most sensible. Draft guideline 5.4 (Maintenance of the territorial scope of reservations formulated by the predecessor State) did not call for any particular comment either. The same could not be said of draft guideline 5.5 (Territorial scope of reservations in cases involving a uniting of States), because it was obviously long and at first sight rather complex. After a thorough perusal of it, he had, however, reached the conclusion that it reflected some fairly clear, logical, coherent and convincing ideas. It therefore merited closer examination, on the understanding that, if necessary, it might be quite substantially recast by the Drafting Committee. Its current wording was going in the right direction, for it did not seem to raise any questions of principle.

19. Draft guideline 5.6 (Territorial scope of reservations of the successor State in cases of succession involving part of a territory), which filled a gap in article 15 of the 1978 Vienna Convention, did not cause any special difficulties. The interpretation given to the scope of the verb “apply” (at the end of paragraph 79) seemed to be correct, as was the assumption contained in paragraph 80. It was right to acknowledge that the solutions provided for in draft guideline 5.2 applied *mutatis mutandis* to reservations formulated in respect of “territorial treaties” (para. 81).

20. Draft guideline 5.7 (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State) did not pose any particular problems. The square brackets could simply be removed, or a reference could be made to the commentary. It appeared, however, as stated in paragraph 89, that two different legal regimes might be established with regard to temporal scope. He agreed with the reasoning in paragraphs 90 and 91.

21. Draft guideline 5.8 (Timing of the effects of a reservation formulated by a successor State) did not call for any particular comment; once again the square brackets could be removed or, failing that, a reference should be made to the commentary.

22. An editorial question arose in connection with references to specific articles or draft guidelines, namely whether there was any precise criterion for distinguishing between cases in which an express reference had to be made to articles or draft guidelines and those in which reference could simply be made to the commentary. Was not the guiding principle that of focusing on the user-friendliness of the Guide to Practice?

23. In conclusion, he proposed that draft guidelines 5.1 to 5.8 be referred to the Drafting Committee.

24. Sir Michael WOOD commended the Special Rapporteur on his presentation of his sixteenth report and said

that he looked forward to his introduction of the addendum thereto, which was unlikely to give rise to any additional problems. He also expressed his gratitude to the Secretariat for the excellent memorandum it had produced in 2009 and which the Special Rapporteur had described as the original report on which his sixteenth report had been based.

25. As the Commission approached the fifth and final part of the Guide to Practice, it had to bear in mind that it was not revisiting the rules on the succession of States in respect of treaties, but was solely concerned with questions of succession in respect of, *inter alia*, reservations and objections to reservations. It might be worth stressing, including in the commentary, that nothing in that exercise should be regarded in any way as passing judgement on the status as customary law, or on the appropriateness of the various rules set forth in the 1978 Vienna Convention, as far as succession to treaties was concerned. As the Special Rapporteur said in paragraph 7 of his sixteenth report, there was not even any need to ascertain whether the successor State’s status as a contracting State or State party had arisen by virtue of and in accordance with the rules laid down in the 1978 Vienna Convention or other rules of international law.

26. The 1978 Vienna Convention remained quite controversial. It had not been widely accepted and had only 22 parties. Unlike the 1969 and 1986 Vienna Conventions, its provisions were not widely thought to reflect rules of customary international law. But despite its imperfections, it constituted a useful starting point. Its terminology and the concepts underlying it were valuable and the Special Rapporteur and the Secretariat were right to have largely adopted them.

27. It was important to remember that the 1978 Vienna Convention was a creature of its age, more so than the 1969 and 1986 Vienna Conventions. The focus had been on a category of States termed “newly independent States” in relation to which the Convention had set special and distinctive rules for treaty succession. What had perhaps been understandable at the time might currently appear artificial and dated. In the 1978 Convention, the term “newly independent State” had what the rules on treaty interpretation of the 1969 Vienna Convention called a “special meaning”. It referred to “a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”. As the Special Rapporteur pointed out in his rather cryptic last footnote to paragraph 4, which referred to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, it would appear that the term as used in the 1978 Vienna Convention would not cover most of the new States that had emerged over the previous two decades.

28. In fact, it was not always possible to categorize cases of State succession in the same way as the 1978 Vienna Convention. They did not all fall neatly into the categories of newly independent States, newly independent States formed from two or more territories, separation of parts of a State or uniting of States. In order to grasp the complexity of the matter, it was sufficient to consider the history of much of Europe over the previous two centuries.

29. There was no treaty law on the status of reservations and objections to reservations (except for the provisions of the 1978 Vienna Convention concerning “newly independent States”, which applied to a fairly limited number of cases). State practice was sparse and essentially pragmatic. Logic was not necessarily a sound basis for the law, even if everyone agreed on what logic should dictate. Perhaps what the Special Rapporteur had in mind was the “less-than-Cartesian” logic to which he referred in paragraph 30 of his sixteenth report. In paragraph 47, he even seemed to have adopted a “common-sense” approach. In the 1970s, the Commission had endorsed a “pragmatic and flexible approach”. It should do so again and recognize that, in that part of the Guide to Practice, for most of the time it was not basing itself on either the Vienna Conventions or established State practice. As the Commission had little to go on, it should perhaps be rather cautious.

30. He drew three conclusions from that background. First, it would be rather odd, in that day and age, to regard the case of newly independent States, within the meaning of the 1978 Vienna Convention, as the paradigm. To make it the subject of the first guideline in that series simply because it was the only provision on the matter to appear in the 1978 Convention might even be misleading. That was why it would be preferable for the Drafting Committee to look carefully at the order of the guidelines and, as suggested by the Special Rapporteur, to align their numbering with that of the rest of the draft text of the Guide.

31. Secondly, the Commission should not be overprescriptive, for it could not predict all the various situations that might occur in the future. On the contrary, it should make it clear that it was not seeking to prescribe inflexible new rules in that area, but was simply offering tentative pointers to good practice. State practice might, or might not, crystallize along those lines.

32. Thirdly, in that context, it was especially necessary to acknowledge the residual nature of the guidelines. A successor State, or other States, might consider it appropriate to look for solutions tailored to a particular case of succession, or a given treaty.

33. Successor States did not necessarily succeed *ipso jure* to all the treaties of their predecessors and were not inevitably in the same position as their predecessors. That was true, for example, of the Treaty on the Non-Proliferation of Nuclear Weapons. That comment applied largely to succession to treaties, which was not the subject of the Commission’s work, but it could also apply to reservations. After all, the Commission was not considering day-to-day situations; almost by definition cases of succession were likely to be exceptional. The Special Rapporteur said that the principles laid down in article 20 of the 1978 Vienna Convention—and repeated in draft guideline 5.1—“are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations” (para. 29 of the sixteenth report). In his view, the same should apply to all of the guidelines in Part 5 of the Guide to Practice.

34. With those words of caution, he largely agreed with the approach adopted by the Special Rapporteur in his sixteenth report and with his overall conclusion in

paragraph 3 that “it seems appropriate to consider including, in the Guide to Practice, some guidelines” on the matter. He wished to make a few comments on the draft guidelines themselves, but they were only of a tentative nature as he was uncertain whether he had fully understood the Special Rapporteur’s intentions.

35. Draft guideline 5.1, which closely followed article 20 of the 1978 Vienna Convention, did not pose a problem. On the other hand, its placement should be altered and it might be wise to include a definition of the term “newly independent State” somewhere in the guideline itself.

36. In paragraph 1 of draft guideline 5.2, he wondered if the phrase “at the time of the succession” qualified both “formulates a reservation” and “expresses a contrary intention”. If the succession took place *ipso jure* at the moment of uniting or separation, was it realistic to expect the new State or States to act instantaneously, if that was indeed what the provision required?

37. As it stood, the wording of draft guideline 5.3 was rather dogmatic. It seemed to be based on the assumption that, in the words of paragraph 57 of the report, “a State ... can have only one status in respect of a single treaty”. That was no doubt true of a unitary State, but not necessarily of a State consisting of two or more separate units. The 1969 and 1986 Vienna Conventions themselves provided for cases where a treaty did not apply to the whole of the territory of a State. The idea that a treaty might apply in different ways to various parts of the territory of a State could not be excluded. The rule set out in draft guideline 5.3 perhaps needed to recognize that there might be exceptions to it.

38. Draft guidelines 5.4 and 5.5 were difficult to understand. Perhaps matters would become clearer in the Drafting Committee, where the Special Rapporteur would have more opportunity to explain the meaning of certain words and phrases. It was to be hoped that the text could be simplified, or that some of the complexities could be avoided.

39. Draft guidelines 5.8 and 5.9 seemed to assume that all successor States had to notify their status as a contracting State or State party, but it was hard to see how that would fit in with the notion of succession *ipso jure*.

40. With regard to draft guideline 5.10, he agreed with the Special Rapporteur that the last phrase “at the time of the succession” should be deleted.

41. Lastly, in draft guideline 5.15, the Special Rapporteur might consider the special case of a successor State formulating an objection to a reservation made by the predecessor State. Such a reservation might conceivably concern events in the territory of the successor State. The latter should perhaps be allowed to enter that kind of objection.

42. In conclusion, he would be happy to see all the draft guidelines contained in the sixteenth report and the addendum thereto sent to the Drafting Committee.

The meeting rose at 11.05 a.m.

3049th MEETING

Friday, 21 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, 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. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET (Special Rapporteur), introducing the addendum to his sixteenth report (A/CN.4/626/Add.1), said that the addendum was divided into two parts. The first part (paras. 139–150) concerned the status of acceptances of and objections to reservations in the case of succession of States, as set out in draft guidelines 5.16 *bis*, 5.17 and 5.18, while the second part (paras. 151–158) concerned interpretative declarations in the context of State succession, as set out in draft guideline 5.19.

2. Before discussing each of those draft guidelines at greater length, he wished to make three general comments. First, the question of the status of acceptances in the context of State succession arose only insofar as it related to express acceptances formulated by the predecessor State. That was because the status of tacit acceptances by predecessor States was governed by the rules on succession with regard to objections, as contained in draft guidelines 5.14 and 5.15, which dealt with the capacity, or lack thereof, of successor States to formulate objections to reservations, the issue at stake being whether a successor State could reverse tacit acceptance of a reservation by the predecessor State by formulating an objection. Since the question of tacit acceptance was dealt with implicitly in draft guideline 5.14, there was no need to come back to it.

3. Secondly, it went without saying that, in accordance with guideline 2.8.3, which the Commission had already adopted, a successor State could at any time expressly accept a reservation. That meant that a State's status as a successor State did not affect its capacity expressly to accept a reservation because it had that capacity whether or not it was a successor State.

4. Thirdly, the Commission should bear in mind that one of the main thrusts of the sixteenth report was to draw a distinction between cases of voluntary succession, namely, those that occurred through notification of succession, and those in which succession was automatic.

On that basis, he wished to begin by introducing draft guideline 5.16 *bis* (Maintenance by a newly independent State of express acceptances formulated by the predecessor State), noting first of all that the word “international”, which had been erroneously included in the text, should be deleted.

5. Draft guideline 5.16 *bis* concerned the maintenance by a newly independent State of express acceptances formulated by the predecessor State. He would not go so far as to claim that the draft guideline codified an existing practice; it was merely a logical transposition of the application to acceptances of reservations of the principle that applied to reservations themselves, as set out in article 20 of the 1978 Vienna Convention and reproduced in draft guideline 5.1 (Newly independent States). Thus, despite what some people believed, Cartesian logic and common sense were not necessarily contradictory.

6. Yet that principle, namely the principle of continuity, was not absolute: it could be presumed, as it was for reservations, but it could not be imposed on a successor State against its will. It was the logical consequence of the freedom of choice to which newly independent States were entitled since, as its title indicated, draft guideline 5.16 *bis* concerned only newly independent States—namely, States that had gained independence as a result of decolonization. Such States had the capacity to exercise succession rights but did not have an obligation to do so. While a successor State could revoke an express acceptance, it could not do so at any time without seriously endangering the stability of treaty relations. Accordingly, he had proposed that draft guideline 5.16 *bis* should provide for the exercise of that option within 12 months of the date of the notification of succession to the treaty. In his view, the withdrawal of an express acceptance could in fact be equated with an objection, thus making it reasonable to apply the same deadline as that applicable to the formulation of objections. Moreover, it was not reasonable to require that the first task of a State in the process of becoming independent should be to determine the status of all reservations, acceptances or objections formulated by the predecessor State. Thus the 12-month deadline was also aimed at allowing the newly independent State some time for reflection. In practice, it was quite probable that if a newly independent State chose to withdraw an express acceptance formulated by the predecessor State, it would do so when it formulated its own objection to the reservation in question. Moreover, the withdrawal of the express acceptance would doubtless be the implicit result of the objection, so that a separate declaration would not be necessary.

7. Turning to draft guideline 5.17 (Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State), he noted that the word “international” should again be deleted from the text. Draft guideline 5.17 also dealt with the problem of determining the status of express acceptances formulated by the predecessor State. However, it did not address the case of the newly independent State, within the relatively strict meaning assigned to that term in both the 1978 Vienna Convention and the Vienna Convention on Succession of States in respect of State Property, Archives and Debt, but rather other cases of

succession—namely, the uniting or separation of States. Generally speaking, the solution that should be applied in those cases was the opposite of the solution outlined in draft guideline 5.16 *bis*. Draft guideline 5.17 concerned cases in which succession was automatic, and just as a successor State did not have the capacity to formulate a new objection to a reservation to which the predecessor State had not objected under the terms of draft guideline 5.15, neither did it not have the capacity to revoke an express acceptance formulated by the predecessor State. That was what was prescribed in the first paragraph of draft guideline 5.17. The principle reflected in the present guideline, that of maintenance, should not be absolute because marginal cases existed in which the unification or separation of a State did not give rise to automatic succession. One such case was that in which the predecessor State was a contracting State *vis-à-vis* the treaty, but was not a party to it because the treaty had not come into force for that State at the time the succession occurred. In that particular case, the solution needed to be aligned with that applied to newly independent States, and for the same reason—namely, that the maintenance of express acceptances was chosen rather than inherited. In other words, the successor State in such cases must be able to withdraw the express acceptance under the same conditions as those accorded newly independent States. That was what was provided for in the second paragraph of draft guideline 5.17, the wording of which was admittedly complicated, but since the subject was a technical one, there was apparently no other solution than to reflect all its nuances.

8. All that remained was to determine the precise moment at which the withdrawal of an express acceptance of a reservation produced its effects. Draft guideline 5.18 (Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State) was modelled closely after the solution proposed in draft guideline 5.7 (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State) and described a similar operation. He suggested that the Drafting Committee might wish to employ the word “effect” rather than “effects”.

9. Lastly, there were a number of questions that could arise concerning the status of interpretative declarations in the case of a succession of States. Like the 1969 and 1986 Vienna Conventions, the 1978 Vienna Convention was silent on the subject, notwithstanding a timid attempt by the Federal Republic of Germany to raise the issue at the United Nations Conference on Succession of States in Respect of Treaties in 1978, which was described in paragraph 152 of the addendum to his sixteenth report. Even so, it was not clear that the proposal made by the Federal Republic of Germany¹²⁹ at that time actually concerned interpretative declarations. In any case, given the silence of the Convention on the status of such declarations, the Commission should be governed by the principle contained in guideline 2.4.3 whereby an interpretative declaration could be formulated at any time. That principle was

sufficient to establish that any successor State was entitled to formulate an interpretative declaration under the same terms as any other State.

10. Thus a specific draft guideline on that subject was not necessary in the fifth part of the Guide to Practice because the question did not specifically concern State succession. On the other hand, it would be useful to include some indication of the status of interpretative declarations formulated by the predecessor State. That said, he did not think that such an indication could be very substantive, since interpretative declarations were quite diverse in nature, as members would see when the Commission turned its attention to the effects of interpretative declarations, a subject to be addressed in an addendum to the fifteenth report (A/CN.4/624 and Add.1–2). Those effects were relatively uncertain, and it was therefore advisable to exercise prudence with regard to the wording of draft guideline 5.19. Accordingly, he had proposed that, as it had done in other instances, the Commission should formulate draft guideline 5.19 in the form of a recommendation in order to avoid being overly prescriptive; the draft guideline should be entitled “Clarification of the status of interpretative declarations formulated by the predecessor State”. If such clarification was not expressed in a formal declaration, it ought to be possible to deduce it from the conduct of the successor State, as the second paragraph of the draft guideline made clear.

11. With those comments, he had concluded his introduction of the addendum to his sixteenth report as well as the sixteenth report itself and all the draft guidelines comprising Part 5 of the Guide to Practice that dealt with reservations in the context of succession of States.

12. Mr. HASSOUNA asked whether the term “*réputé*” used in the French version of draft guidelines 5.16 and 5.17 had the same meaning as the term “*présupposé*”.

13. Mr. PELLET (Special Rapporteur) said that he understood the two terms to mean the same thing. It was true that one spoke of “*présomption irréfragable*” and not of “*réputation irréfragable*”. He had simply used the term “*réputé*” in order to maintain consistency with other draft guidelines in which he had employed that term.

14. The CHAIRPERSON invited the Commission to resume its consideration of the sixteenth report on reservations to treaties.

15. Mr. NOLTE said that he was largely in agreement with the substance of the draft guidelines proposed in the sixteenth report on reservations to treaties. However, he concurred with Sir Michael that while the fifth part of the Guide to Practice ought to contain a guideline concerning newly independent States, as the Special Rapporteur had suggested, it should not begin with an exception rather than a rule merely because the only article of the 1978 Vienna Convention that addressed reservations concerned newly independent States.

16. Furthermore, there were no grounds for creating the misleading impression that the concept of a newly independent State had grown in importance since 1978. As Sir Michael had rightly noted, the opposite was true.

¹²⁹ *Official Records of the United Nations Conference on the Law of Treaties, 1977 Session and Resumed Session 1978, Vienna, 4 April–6 May 1977 and 31 July–23 August 1978, vol. III, Documents of the Conference (A/CONF.80/16/Add.2, United Nations publication, Sales No. E.79.V.10), document A/CONF.80/C.1/L.36, p. 115.*

The Commission should therefore define the category of newly independent States in such a way as to limit it to States that had achieved their independence through decolonization, in order to preclude any misunderstanding that the draft guideline in question might apply to most of the States that had achieved statehood in recent years. Accordingly, draft guideline 5.1 should come later in the Guide to Practice and should include a definition of the notion of newly independent States.

17. He also endorsed Sir Michael's view that the guidelines should not be drafted in overly prescriptive terms; rather, their wording should emphasize their residual nature, since State succession was a field in which the legitimate divergence of practice was not a cause for concern.

18. He wondered whether the rule established in draft guideline 5.5, paragraph 3, was not too rigid. In principle, of course, it was up to the reserving State to withdraw any previous reservations that were incompatible with its most recent reservation; there were, however, cases in which mutual incompatibility was not obvious and where it was simply understood that the latest reservation prevailed.

19. Perhaps draft guidelines 5.7 and 5.8 could be merged under the heading "Timing". Like previous speakers, he would prefer to see the final phrase "at the time of the succession" deleted from draft guideline 5.10. He was unsure whether draft guideline 5.13 should be formulated so categorically, because if two States united it was conceivable that the effect of maintaining a predecessor State's reservation might alter its significance and meaning for the other States parties. Was it really always advisable to prevent other States parties from objecting to the extension of the reservation to the entire territory of the successor State?

20. Perhaps that question showed that the Drafting Committee should try to ensure that the draft guidelines encompassed a broader range of practical considerations. At the same time, he hoped that the Committee would be able to simplify those parts of the text where the wording was still difficult to understand. All in all, he was in favour of referring the draft guidelines to the Drafting Committee.

21. Mr. PELLET (Special Rapporteur) said that it was worrying that so few members had chosen to speak on his sixteenth report and that two of them had focused on the position of draft guideline 5.1 and on possible confusion concerning the notion of newly independent States. It was true that, if one was not conversant with the law on the subject, it might be thought that the term referred to any new State. The definition set forth in the 1978 Vienna Convention and the Vienna Convention on Succession of States in respect of State Property, Archives and Debt nevertheless made it clear that the term "newly independent State" meant a State formed by decolonization.

22. One of the basic principles underpinning the sixteenth report was that all the terms encountered in the context of State succession had established definitions. If that premise was not accepted, it would be necessary to reimport almost all the definitions in question into the

Guide to Practice, which would be taking matters too far. For that reason, he did not wish to embark on such an exercise, especially as any definition of the term "newly independent States" would merely entail reproduction of the language of the Vienna Conventions.

23. He urged other members of the Commission to express their opinion on the matters raised by Sir Michael and Mr. Nolte. While the position of draft guideline 5.1 was not a major concern, as it was the only guideline in that section that was based on an existing treaty provision, it might serve as a useful starting point. Moreover, he found it somewhat difficult to regard the status of reservations in the case of decolonized States as constituting an exception, as there had been numerous examples of decolonization in the past, even though few instances were likely to occur in the future.

24. He was curious to know whether the opinions of the two aforementioned speakers were widely shared. He personally disagreed with them.

25. Mr. NOLTE pointed out that the 1978 Vienna Convention did not begin with newly independent States: it first set out general provisions and then dealt with newly independent States as an exception. The Commission should therefore reflect that order in the draft guidelines.

26. Mr. CANDIOTI, commenting on the order of the provisions in the draft guidelines, said that the Commission's draft articles on nationality of natural persons in relation to the succession of States¹³⁰ had begun with general provisions, which had been followed by provisions relating to specific categories of succession of States. The Drafting Committee might therefore consider first grouping together the general provisions proposed by the Special Rapporteur on the status of reservations in the case of succession of States and then devoting some separate sections to their status when States were formed through decolonization or other ways.

27. Mr. PETRIČ said that the draft guidelines did not reflect the tremendous changes that had occurred in the world since the 1978 Vienna Convention. When the drafters of that Convention had dealt with succession, the main question had been how to regulate the situation arising as a result of decolonization. However, the decolonization process was virtually over. In the 1990s, the States of the former Socialist Federal Republic of Yugoslavia had been confronted with a vacuum when they had looked for rules governing the issues they faced in matters of succession. They had been unable to follow the rules applying to former colonies that had gained independence because their problems had been different from those of the colonies. Moreover, the situation of the successor States to the former Yugoslavia was dissimilar to that of the States which had earlier formed part of the Union of Soviet Socialist Republics. The Russian Federation had retained the legal personality of the Soviet Union, whereas none of the successor States to Yugoslavia had kept its legal personality. The separation of Montenegro and Serbia also raised different issues, as did developments in Kosovo. It was therefore vital

¹³⁰ *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 47.

for the Commission to provide guidance in such situations, and in that connection the approach suggested by Mr. Candioti might be best.

28. He pointed out that his own country had also been faced with huge difficulties because of the differentiation between open and closed multilateral treaties, a distinction that had its basis in the 1978 Vienna Convention. It might therefore be advisable for the Drafting Committee to consider the questions posed by that situation.

29. While the rules which the Commission had formulated were a step forward and were ready to be referred to the Drafting Committee, guidance still was needed in addressing the kind of dilemmas encountered by European and Central Asian States in the 1990s.

30. Mr. FOMBA said that draft guideline 5.9 was acceptable. The questions listed in paragraph 101 of the report highlighted the issues raised by objections in the context of succession of States. It was indeed essential to draw attention to the dearth of practice and to the need for caution when interpreting recent practice. He agreed with the view expressed in paragraph 108 with regard to the parallel to be drawn between the presumption in favour of the maintenance of reservations and the presumption in favour of the maintenance of objections for all categories of successor States, although exceptions must be made in some cases involving the unification of States.

31. Draft guideline 5.10 was satisfactory, and he concurred with the comments made in paragraphs 110 and 111. Paragraph 1 of draft guideline 5.11 likewise did not pose any problems. He agreed with the Special Rapporteur's comment in paragraph 111 of the report that paragraph 2 of that guideline provided for a well-justified exception, since it precluded the illogical attitude of wanting to have one's cake and eat it, too. The phrase in brackets, meanwhile, would be better explained in the commentary.

32. Draft guideline 5.12 did not call for any comment and draft guideline 5.13 was acceptable. The reasoning in paragraphs 122 to 124 of the report was convincing, even though examples of practice were scarce. Paragraphs 1 and 2 of draft guideline 5.14 were unproblematic, and the Special Rapporteur had clearly explained which guideline was to be inserted in the square brackets in paragraph 3. He was in favour of the *modus operandi* proposed in paragraph 130 and could accept draft guideline 5.15. Draft guideline 5.16 did not raise any problems, since it was couched in very clear language. The inclusion of the predecessor State, if it continued to exist, in the scope *ratione personae* of the notion of "any contracting State" was wise.

33. He therefore recommended the referral of draft guidelines 5.9 to 5.16 to the Drafting Committee. He was, however, doubtful about the advisability of redefining the term "newly independent States".

The meeting rose at 10.50 a.m.

3050th MEETING

Tuesday, 25 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, 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.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue the debate on the draft guidelines contained in the sixteenth report on reservations to treaties.

2. Mr. HMOUD commended the Special Rapporteur on his well-researched report, which contained a thorough analysis of the complex issues involved, and he thanked the Secretariat for its memorandum¹³¹ on the subject, which had provided background support for the report.

3. The elaboration of guidelines on the question of reservations to treaties was a difficult task that involved contemplating multiple scenarios in terms of both the form of the succession of States and the type of unilateral statement concerned in the treaty relation at a particular time and in a particular circumstance. That task had been complicated by the insufficiencies of the 1978 Vienna Convention, the scarcity of practice and the lack of a doctrinal basis. The Special Rapporteur had relied mostly on logical reasoning, without imposing ready-made solutions to the complex scenarios that might arise. The draft guidelines did not contradict past practice, no matter how scarce it was, and if the parties concerned did not agree with the presumptions contemplated in the guidelines, they would at least be aware of them and could choose to follow a different approach. The guidelines could constitute a reference that would help parties to treaties and depositaries in dealing with situations of succession of States in which the lack of practice had led to confusion as to which rules to apply, and shown in the report. It was unlikely that the Guide to Practice would resolve all problems in treaty relations associated with succession of States, but it set important principles that would help in addressing most cases which might arise in relation to reservations.

4. Although the 1978 Vienna Convention was not universal, there was no reason to depart from its terminology.

¹³¹ See footnote 12 above.

While the rules it enunciated might not be sufficient, the terms it used to describe different forms of State succession could nevertheless be retained in the guidelines, provided that the commentary elaborated on the forms of succession and the situations covered under each draft guideline, as the Special Rapporteur had done in the report.

5. With regard to draft guideline 5.1, although newly independent States were new States that had emerged from colonial rule and not successor States *per se* in treaty relations, the fact that the 1978 Vienna Convention treated them as such and even set out rules on reservations concerning them might justify adherence to such rules, notably the one contained in article 20. In the Convention, the presumption of the continuity of the reservation formulated by the predecessor State was based on the premise that the newly independent State succeeded the former State in treaty relations. The presumption of continuity, which provided the newly independent State with the possibility to choose, should be maintained in draft guideline 5.1.1. That flexibility also guaranteed the granting of such a State the right to formulate new reservations, provided that they were in conformity with the criteria for permissibility and procedure as enunciated in the guidelines.

6. He did not have strong feelings about the placement of draft guideline 5.1, but it might be preferable to insert it after the current draft guideline 5.2. Most situations of succession were within the general framework of draft guideline 5.2, and it seemed natural for it to be followed by the rule on the specific situation of newly independent States.

7. As to draft guideline 5.2, the sixteenth report discussed the practice in the context of different types of State succession in the course of the past 20 years. The fact that in several such cases, notably that of Czechoslovakia and the former Yugoslavia, the States concerned had thought it prudent to confirm the reservations (and the objections) of the predecessor States indicated at the very least that they did not consider that there was a well-established rule on the continuation or non-continuation of reservations. However, that practice did not mean that the Commission should not enunciate a presumption in favour of continuity. If the presumption of automatic continuity had been enunciated for the newly independent State in article 20 of the 1978 Vienna Convention on the premise that it would be treated as a successor State, the same logic should be followed in situations in which the State concerned was *ipso jure* a successor State. Although that presumption had been formulated in draft guideline 5.2 as progressive development, nothing in general practice appeared to contradict it, and thus it should be retained. As a practical matter, a guideline should perhaps be drafted to encourage the depositaries to seek the intention of the successor State in future cases involving reservations by a predecessor State.

8. On the question of whether a successor State should have the right to formulate new reservations, as a general rule it should not be able to do so. It was after all a successor State and should be treated as such, unless there was a major policy consideration to accord such a right. The exception set out in draft guideline 5.2, paragraph 2, concerning the right to formulate a new reservation when the treaty had not been in force for the predecessor State,

seemed acceptable. It would be useful to specify in paragraph 3 that the newly formulated reservation must conform to the conditions of permissibility set out in the Guide to Practice.

9. Draft guideline 5.3 was acceptable, but it dealt only with a reservation formulated by one of the predecessor States which had been a contracting party to a treaty that had not been in force *vis-à-vis* that State at the time of succession. It did not resolve the situation discussed in paragraph 55, namely when the predecessor States had formulated two contradicting reservations to the same treaty. The question remained as to which, if any, of the reservations would be presumed to be maintained.

10. The part of the report dealing with the territorial scope of reservations in the context of succession of States exemplified the complexity of the issue and showed how difficult it would be to predict all possible scenarios and find solutions for all the hypothetical situations based on a logical approach. According to the general rule enunciated in draft guideline 5.4, the reservation retained the territorial scope that it had had at the date of the succession of States, but the differences in the treatment of certain situations or exceptions as contained in draft guidelines 5.5 and 5.6 might be difficult to apply in real situations. It would therefore be preferable to harmonize the approach *vis-à-vis* the three cases envisaged in the two draft guidelines, in particular those in draft guideline 5.5.

11. The remaining draft guidelines, on timing of the effects of a reservation and on the status of objections in the case of succession of States, did not pose any particular problem. They were in keeping with the logical approach which the Special Rapporteur had followed for reservations, including in respect of the presumption of continuity and the formulation of new reservations. There was no reason to change that approach for objections.

12. In closing, he recommended that draft guidelines 5.1 to 5.15 be referred to the Drafting Committee.

13. Mr. FOMBA, referring to the question of acceptance of reservations, said that he shared the view expressed by the Special Rapporteur in paragraph 141 of his sixteenth report: while there appeared to be no practice, the presumption in favour of the maintenance of reservations should logically be transposed to express acceptances. As to the time period within which the newly independent State could express its intention not to maintain an express acceptance, he agreed with the point made by the Special Rapporteur in paragraph 143. The modalities for the expression of intention set out in paragraph 144 were logical and relevant.

14. The wording of draft guideline 5.16, or 5.16 *bis* in accordance with the Special Rapporteur's renumbering, was acceptable, as were the conclusions formulated in paragraphs 146 and 147 of the report.

15. The wording of draft guidelines 5.17 and 5.18 was likewise acceptable.

16. With regard to interpretative declarations, he shared the view expressed in paragraph 154, according to which

the Commission should opt for prudence and pragmatism. The form chosen for draft guideline 5.19, that of a recommendation, therefore seemed appropriate. It was important to cover all cases of succession and not to insist on distinctions. The two paragraphs were acceptable, but for the situations covered in the second one, it might be useful to add clarifications in the commentary. As to the successor State's capacity to formulate interpretative declarations, he agreed that there was no need to devote a draft guideline to the question, which could be clarified in the commentary.

17. In closing, he said that he was in favour of referring draft guidelines 5.16 *bis* to 5.19 to the Drafting Committee.

18. Mr. WISNUMURTI expressed appreciation to the Special Rapporteur for his sixteenth report and for his usual lucid introduction, and he thanked the Secretariat for the quality of its 2009 memorandum, on which the Special Rapporteur had largely based his work.

19. It was heartening that the Special Rapporteur had finally reached his final chapter of the study of reservations to treaties. The Special Rapporteur had made a valuable contribution to addressing the lacunae left in the 1978 Vienna Convention. As already noted, the question of reservations to treaties in the case of succession of States was dealt with only in article 20 of the Convention, on reservations in respect of newly independent States. The Convention was silent on applicable rules for cases of succession involving part of a territory and for cases involving the uniting or separation of States. The Special Rapporteur had also elaborated draft guidelines on reservations, acceptances of and objections to reservations, and interpretative declarations in the case of the succession of States, which were missing in the 1978 Vienna Convention. It was thus understandable that, as indicated by the Special Rapporteur in paragraph 5 of his report, some of the draft guidelines reflected the current state of positive international law on the subject, while others represented the progressive development of international law or were intended to offer logical solutions to the lacunae.

20. Despite all the weaknesses of the 1978 Vienna Convention, article 20 had contributed to the work on reservations to treaties in the case of succession of States. It was based on the presumption of the maintenance of reservations formulated by the predecessor State, with the exception of cases in which the successor State expressed a contrary intention or formulated a reservation that related to the same subject as the reservation of the predecessor State. He welcomed the Special Rapporteur's decision to adopt the principle of continuity in the draft guidelines, including in draft guideline 5.1 on newly independent States, which more or less reproduced article 20 of the 1978 Vienna Convention.

21. There had been suggestions that draft guideline 5.1 should not be placed at the beginning. He did not agree with that suggestion or with the reasons behind it. It was important to recognize that article 20 of the 1978 Vienna Convention, on which draft guideline 5.1 was based, constituted a historic advance in the area of the succession of States that had proven its worth to many States in the

context of decolonization, and the provisions on reservations in respect of newly independent States should not be placed after those applicable to other categories of successor States. Moreover, the principle of the presumption of the continuity of reservations had been adopted in the subsequent draft guidelines, including those relating to the territorial scope of reservations and the status of acceptances of and objections to reservations in the case of succession of States.

22. He thus approved the adoption of the principle of presumption of continuity of the reservations of the predecessor State in the draft guidelines on successor States other than newly independent States, notably draft guideline 5.2 (Uniting or separation of States), because it reflected State practice. He also endorsed the provision in paragraph 2 of that draft guideline concerning the power of a successor State to formulate a new reservation at the time of a uniting or separation of States when the treaty, at the date of the succession of States, had not been in force for the predecessor State, but with regard to which the predecessor State had been a contracting State. There was also justification for draft guideline 5.3 on the non-maintenance of reservations formulated by any of the States involved in a uniting of States and which at the date of the succession of States had been a contracting State in respect of which the treaty had not been in force.

23. In reading the part of the report on the territorial scope of reservations in the context of succession of States and draft guidelines 5.4 and 5.5, he had realized the complexity of the matter, in particular in cases involving a uniting of States. While draft guideline 5.4 seemed to be a more straightforward provision respecting the principle of the maintenance of reservations formulated by a predecessor State with regard to territorial scope, draft guideline 5.5, which purported to prevail over draft guideline 5.4, was more complex, since it dealt with the territorial scope of reservations in cases involving a uniting of States. In particular, draft guideline 5.5 addressed the principle of continuity applicable to a part of the territory of one of the States forming the successor State, with specific exceptions for reasons linked to the expression of a contrary intention and the nature or purpose of the reservation. It also provided for exceptions to reservations to a treaty in force at the date of the succession of States in respect of two or more of the uniting States as concerned a part of the territory to which the treaty had not been in force at the date of the succession of States. He had no difficulty with draft guideline 5.5, but had a problem understanding the provision of paragraph 2 (c), which allowed the extension of a reservation to a treaty in force to a part of the territory of the successor State to which it had not applied at the date of the succession of States when a contrary intention of the successor State "otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty". It was very difficult to determine the intention of the successor State on the basis of "circumstances surrounding that State's succession to the treaty". Perhaps the Special Rapporteur could enlighten him.

24. The Special Rapporteur had attempted to redress another lacuna in article 20 of the 1978 Vienna Convention by proposing draft guidelines 5.7 to 5.9, on the

effects *ratione temporis* of reservations in the context of a succession of States. The effect *ratione temporis* of a reservation was essential for ensuring legal certainty, and he therefore had no difficulty with the three draft guidelines.

25. As noted in paragraph 99 of the sixteenth report, the 1978 Vienna Convention did not deal with the status of objections to or acceptances of reservations in the context of the succession of States. He therefore appreciated the Special Rapporteur's effort to bridge the existing gap by proposing draft guidelines on those issues, which related to newly independent States and successor States other than newly independent States, and in which the principle of continuity had basically been retained with the necessary adaptations.

26. He was in favour of referring draft guidelines 5.10 to 5.16 to the Drafting Committee.

27. Mr. McRAE recalled that the Special Rapporteur had sought the views of members of the Commission on the suggestion to reverse the order of draft guidelines 5.1 and 5.2. It seemed to him that the suggestion had initially been made by Sir Michael on the basis that it would be preferable for the general rule set out in draft guideline 5.2 to precede the particular rule in draft guideline 5.1, since draft guideline 5.1 dealt with a particular case which was unlikely to arise in the future (newly independent States as defined in the 1978 Vienna Convention).

28. There was some logic to that, but it raised a further question, namely whether the general rule enunciated in draft guideline 5.2 was appropriate in all circumstances. Under draft guideline 5.2, in most cases a new State resulting from a separation of a State or a unification of States could not make reservations to a treaty to which it succeeded. That rule was based on the principle of continuity in treaty relations. By contrast, the "newly independent" State could do so.

29. The rationale behind the rule in the case of the newly independent State at the time of the drafting of the 1978 Vienna Convention had apparently been the practice of the Secretary-General of the United Nations and the need to ease the access of such States to treaties, and perhaps to treaty relations in general. There was a deeper underlying rationale in respect of both the practice of the Secretary-General and the notion of easing the access of a State to a treaty: emerging from a process of decolonization, a newly independent State as defined by the Convention had never had an opportunity to have a proper say in issues of treaty relations, and that might be the first time that those who governed could consider the treaty in question and its implications.

30. The question which came to mind was whether States that emerged from a process of self-determination were adequately dealt with in the draft guidelines. It was true that many such processes resulted in independent States that fit the category of newly independent States within the meaning of the 1978 Vienna Convention, and as the Special Rapporteur pointed out in paragraph 28 of his sixteenth report, self-determination had been advanced as a reason for supporting the rule in the Convention. However, it was not impossible that a State could

result from a process of self-determination that was a non-colonial situation, and that would fall outside the scope of the 1978 definition. Such a State would have no right to formulate new reservations to treaties to which it succeeded, because it would come under draft guideline 5.2 and not draft guideline 5.1.

31. Arguably, the idea that a new State that had never had a proper say could be eased into a treaty and treaty relations would apply equally to a State emerging from a process of self-determination today and to one that had emerged from decolonization under the 1978 Vienna Convention.

32. Admittedly, it would be difficult to distinguish between States that emerged from a self-determination process and others. He was also aware that, as previous speakers had pointed out, the area was one in which there was limited State practice on which to base codification, and what might be seen as appropriate progressive development might be quite speculative. Moreover, it might be very difficult to define the nature of a category of States that had achieved independence through self-determination independently of draft guidelines 5.1 and 5.2.

33. In any event, the issue would arise when the draft guidelines were examined by a wider audience, and it would be useful to indicate in the commentary that the Commission had considered that States emerging from a process of self-determination could potentially come under draft guideline 5.1 or draft guideline 5.2. If the Commission took the view that no separate category should be created for such States, then it should indicate in the commentary that it saw no basis in State practice or elsewhere for extending the treaty rule enunciated in draft guideline 5.1 beyond what was provided for in the 1978 Vienna Convention. That solution might not be entirely convincing, but had the advantage of being pragmatic and would avoid what might be a complicated exercise in progressive development.

34. Thus, the order of draft guidelines 5.1 and 5.2 was relevant. If draft guideline 5.2 came first, it would illustrate that the primary consideration was the continuity of treaty relations. The specific rule in draft guideline 5.1 would then readily appear as an exception deriving from the 1978 Vienna Convention. It would then be much easier to argue that draft guideline 5.1 must not be expanded to other cases, such as that of self-determination.

35. Draft guideline 5.19, on interpretative declarations, encouraged the new State to clarify, to the extent possible, its position concerning the status of interpretative declarations formulated by the predecessor State. It made no distinction between different kinds of interpretative declarations on the basis of whether they were simple or conditional. In each case, the new State was merely asked to make its position clear. However, the principle of continuity of treaty relations perhaps required further action. Under draft guideline 5.2, a new State that did nothing was bound by the reservations formulated by the predecessor State. Why, then, in the absence of any indication to the contrary, should it not be considered that the new State shared the views of the predecessor State on how to interpret the treaty? Draft

guideline 5.2 provided that, when it became independent, a State must review the reservations formulated by its predecessor and indicate by which ones it did not wish to be bound. As interpretative declarations were closely related to reservations and had probably been made at the same time as any reservations, why should the new State not also review those interpretative declarations and indicate its position on them? In the absence of any comment, other States might then consider that it shared the view of the predecessor State. Of course, it could be argued that this did not really matter, because an interpretative declaration could be changed at any time, but the stability of treaty relations would be strengthened if States could assume that, in the absence of an indication to the contrary, the new State shared the views of the predecessor State on the interpretation of a treaty. The new State would not have to do much more than what the draft guideline provided, and that would clarify the position of the new State better than the current provisions of the draft guideline did.

36. Mr. PELLET (Special Rapporteur) said that the two points raised by Mr. McRae were matters of principle which he was reluctant to leave to the Drafting Committee to decide. With regard to the first point, on which Mr. McRae concluded that the question of whether there was a category of succession based on self-determination other than in the case of decolonization should be dealt with in the commentary, he said that the Commission did not need to make a formal decision. Concerning Mr. McRae's second point, however, namely that the principle of the presumption of the continuity of interpretative declarations should be posed in draft guideline 5.19, he very much hoped that members of the Commission would make their views known. Personally, he endorsed Mr. McRae's proposal, since in practice it would not change anything: nothing prevented the successor State from changing its view and making an interpretative declaration at any time through which it retracted the interpretative declaration made by the predecessor State. That would, after all, provide a bit more legal certainty.

37. Mr. NOLTE, noting that Mr. McRae had raised the important question of whether the Commission should consider establishing a third category of States that were not newly independent States but whose emergence resulted from the principle of self-determination and that were treated like newly independent States, said that the Special Rapporteur's reaction was puzzling, because he seemed to indicate that the question was too important to be resolved in the Drafting Committee, but sufficiently secondary to be dealt with in the commentary. In his own view, it would be preferable to follow the Special Rapporteur's opinion, namely to avoid tampering with the situation as it had been addressed more or less clearly in the 1978 Vienna Convention. If the Commission decided to examine the question, it should do so in plenary in a proper debate.

38. Mr. FOMBA said that if it was considered that the emergence of a newly independent State or of an independent State constituted only one of the modalities for the implementation of the right to self-determination, then he was not in favour of the establishment of a new category.

39. Mr. SABOIA, while recognizing that certain situations of decolonization had not given rise to the emergence of newly independent States, said that the entity that usually emerged in such cases was not responsible for international relations, which remained within the competence of the central State. It would therefore be preferable to retain the Special Rapporteur's proposal and perhaps deal with the issue in the commentary.

40. Mr. WISNUMURTI said that he was not very enthusiastic about Mr. McRae's proposal, because the provisions of article 20 of the 1978 Vienna Convention and draft guideline 5.1 were broad enough to cover various modalities of the process leading to the emergence of newly independent States. Although the Special Political and Decolonization Committee of the General Assembly (Fourth Committee) dealt with situations in which the independence of States was not established, that no longer concerned any more than a few territories. Sometimes the solution adopted had not been based on United Nations principles, as seen in the case of Indonesia, which had become a newly independent State following a process of self-determination, although the term had not been employed at the time, or, more recently, East Timor. He therefore preferred draft guideline 5.1 as worded.

41. Mr. PETRIČ said that Mr. McRae had raised a fundamental problem, and he was tempted to follow his reasoning, but he was also concerned that the Commission might find itself in a dead end. He did not know of any State from all those that had emerged since 1945, including after the collapse of the Eastern Bloc, which would not claim that it had emerged from the process of self-determination. Of course, that old principle, founded on the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (also known as the "Declaration on Seven Principles"),¹³² gave rise to controversy with regard to the sovereign equality of States, non-intervention, the territorial integrity of States, etc. However, that was such a delicate subject that for more than 50 years, the Commission had invariably considered that it was too political or controversial to address. As interesting as Mr. McRae's suggestion might be, it would be wiser to follow the Special Rapporteur's approach and not open a Pandora's box.

42. Mr. HMOUD said that this was a very important point. There were, of course, territories that were not under colonial rule and that nevertheless gained independence through self-determination. The point, as noted by Sir Michael, was whether to give a separate definition to newly independent States. He was not convinced, because the subject under consideration was reservations to treaties in the context of succession of States. If, as suggested by the Special Rapporteur, the Commission agreed that the category of independent States that did not emerge from decolonization could be included under draft guidelines 5.1 or 5.2, it would not be necessary to provide a definition, and the question could be dealt with in the commentary.

¹³² General Assembly resolution 2625 (XXV) of 24 October 1970, annex, para. 1.

43. Mr. DUGARD said that he was not troubled by the problem of succession, but by that of secession of States, which understandably the Special Rapporteur had not addressed in the draft guidelines and which might create tremendous confusion. In the request for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, which had been transmitted to the ICJ pursuant to General Assembly resolution 63/3 of 8 October 2008, some 60 States had recognized it and more than 100 had not. What happened if Kosovo made a declaration of succession to a particular treaty and wished to maintain or abandon reservations made to that treaty? The question of recognition of States that was inevitably raised could not be dealt with in the draft guidelines, but the Special Rapporteur should address it in the commentary.

44. Mr. PELLET (Special Rapporteur) said that he had hoped that this debate would not take place, but since the question had been raised, he stressed that the very idea that a special category of accession to independence or succession existed because the new State was based on the right to self-determination was untenable. As pointed out by Mr. Petrič, all States would claim that they existed because their population had had a right to self-determination. Basically, Mr. McRae was not proposing a real hypothesis, but was merely putting forward another way of reasoning, and that was precisely why he was hostile to the very idea being envisaged, notwithstanding all the rhetoric about succession of States. As he had already indicated, his entire construction was built on existing categories and was based on the 1978 Vienna Convention and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. If the Commission began to consider that there were particular cases and different situations, it would change the subject and rewrite the law on the succession of States, which he was not prepared to do. Not only was he not in agreement with the idea, the very exercise would put him in a predicament. In any event, he was not willing to address self-determination, sovereignty or independence, and certainly not in the context of the Guide to Practice. Fortunately, the predominant view in the Commission seemed to be reasonable.

45. Mr. NOLTE agreed with the Special Rapporteur. To prevent a misunderstanding which might result from the debate, he said that the point was not whether it was possible for a State to emerge from the application of the principle of self-determination. If such a possibility was accepted, the Commission would need to consider whether it would be appropriate in such a case to apply the regime established under the 1978 Vienna Convention for newly independent States or whether emphasis should instead be placed on the principle of continuity. The debate had not taken place, and it would have to take place if the Commission wanted to create a new category. Over and above the general question of the implications of the principle of self-determination and whether Slovenia had emerged in application of that principle, the problem was much more specific and it had not been discussed, and therefore no conclusions should be drawn in that regard.

46. The CHAIRPERSON, speaking as a member of the Commission, said that in her view it was impossible to add a new category of States emerging from

self-determination for the simple reason that the concept of self-determination, which today was established in international law, had developed in the framework of the decolonization process and thus could not be separated from the category of newly independent States under the 1978 Vienna Convention.

47. Ms. JACOBSSON said that she was in favour of referring all the draft guidelines to the Drafting Committee, since all the questions raised needed to be addressed in the guidelines, but she had a few concerns on a structural level. The starting point of the analysis was the 1978 Vienna Convention. That was defensible, but it was not entirely unproblematic, as the preceding debate had shown. The Convention had few signatories, it was not entirely clear to what extent it reflected customary rules, and it had been written in an era of decolonization, with a focus on newly independent States. The international community had changed, and it was to be hoped that the era of colonization and decolonization was over. All members were well aware that the Commission was not elaborating new rules on succession of States to treaties but only the status of reservations, acceptances, objections and interpretative declarations in the case of succession of States. Yet reservations and objections relating to newly independent States had a prominent place in the draft guidelines of the Special Rapporteur's sixteenth report. Succession of States would continue to take place and questions relating to reservations and objections would become a bigger problem in the future, given the abundance of treaty relations in the modern world. The practice of States that applied the 1978 Vienna Convention was diverse and heterogeneous and reflected their needs in a particular situation. It was clear that such practice was pragmatic and political and that States reserved the right to find pragmatic solutions, since there was no law prohibiting them from doing so. The sixteenth report addressed newly independent States in draft guideline 5.1 and uniting or separation of States in draft guideline 5.2. The crucial issue was whether those provisions would have helped States regulate their treaty relations with the States that emerged from the dissolution of the Soviet Union and the former Yugoslavia, and the question arose as to whether a general rule was needed followed by a series of exceptions, as proposed by Mr. Candioti and supported by Mr. Petrič—or by Mr. McRae in a different context. It was difficult to know whether additional guidelines were needed or whether it was sufficient to restructure the draft guidelines and address the issue in the commentary. In any event, detailed rules could not cover all situations, for example when the successor State did not consider itself to be a successor State but a “resurrected” State, as in the case of the Baltic States after the collapse of the Soviet Union. For those States that had recognized the Soviet Union's annexation *de jure* and *de facto*, the Baltic States technically needed to be treated as successor States, whereas for those States that had not recognized the Soviet annexation, it was not a question of the Baltic States being successor States, and hence questions relating to reservations and objections to reservations had to be dealt with separately. She was not convinced that States had always done so, because they had adopted a very pragmatic approach, to which the 2009 memorandum by the Secretariat testified. In sum, it was not necessary for the Commission to elaborate a very detailed rule, but it must address the

issue either in the commentary or in a “without prejudice” clause in order to take account of the evolution of the situation and of the policies of States.

The meeting rose at 11.15 a.m.

3051st MEETING

Wednesday, 26 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti.

Effects of armed conflicts on treaties¹³³ (A/CN.4/622 and Add.1,¹³⁴ A/CN.4/627 and Add.1¹³⁵)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited Mr. Caflisch, Special Rapporteur, to introduce his first report on the effects of armed conflicts on treaties (A/CN.4/627 and Add.1).

2. Mr. CAFLISCH (Special Rapporteur) said that he would introduce at the present meeting articles 1 to 12 of the draft adopted on first reading by the Commission at its sixtieth session in 2008 and, later in the session, he would present the sections related to draft articles 13 to 18 as well as a few general questions. His introduction would focus on scope (draft article 1), use of terms (draft article 2), survival, suspension or termination of treaties (draft articles 3 to 8) and various other provisions (draft articles 9 to 12).

3. The report before the Commission concerned a set of draft articles for which the Commission was indebted to Sir Ian Brownlie,¹³⁶ and he was determined to continue in the spirit of Sir Ian's work. At issue was the second reading of a text, the general thrust of which had been approved on first reading with the help of the Drafting Committee. Thus, a major recasting of the text should not be necessary, nor should new research be undertaken unless it was absolutely essential. Instead, the

Commission should consider the reactions of Member States to the draft and decide which of their comments ought to be taken on board, either in full or in part. That did not mean that the Commission should refrain from introducing changes where doing so appeared useful. The topic, which had been debated at length as far back as the nineteenth century, should be the subject of an approach that was grounded in practice and in doctrine, and was acceptable to most States. In other words, the approach should be reasonable, realistic and balanced.

4. He drew attention to two errors in the text which had been pointed out to him by Mr. Vázquez-Bermúdez. First, at the end of paragraph 21, the words “or between such groups within a State” should be deleted. Secondly, paragraph 41, subparagraph (b), of the French text should read “à la nature et à l'ampleur du conflit armé et son effet sur le traité, au contenu de celui-ci et au nombre des parties au traité”, with the other language versions aligned as necessary.

5. Some 34 Member States had expressed their views during the debate in the Sixth Committee¹³⁷ and 11 Member States had submitted written observations (A/CN.4/622). Additional written observations had been forwarded to the Secretariat well after the deadline of January 2010, and for that reason it had not been possible for the Special Rapporteur to take them into consideration (A/CN.4/622/Add.1). That situation suggested the existence of a problem that the Commission might do well to look into when it addressed its working methods.

6. Turning to the first issue discussed in the report (paras. 5–13), the scope of the draft articles, he said that the question had arisen as to whether the draft should apply solely to inter-State conflicts or also to non-international conflicts, and whether it should only cover inter-State treaties or also deal with treaties involving international organizations.

7. With regard to the first question, he said that a majority in the Working Group had favoured the inclusion of non-international conflicts, arguing that most armed conflicts in the contemporary world fell under that category, and that if they were excluded the draft article would be of limited impact. That argument served to justify *a fortiori* the suggestion by one State to restrict the scope by also excluding situations of international conflict in which only one State party to the treaty was involved in the conflict. However, the approach chosen in the text raised the question of whether armed conflicts had different effects on treaties according to whether or not they were international, a question that he took up in paragraphs 161 and 162 of the report.

8. The second point—the fate of treaties to which one or more international organizations were parties—had been placed in limbo by the Commission. A number of States wished to see the draft articles extended to include that type of agreement, whereas others were opposed to such an extension. It was clear that if that type of treaty was

¹³³ For the draft articles and commentaries thereto adopted on first reading by the Commission at its sixtieth session in 2008, see *Yearbook ... 2008*, vol. II (Part Two), chapter V, section C, pp. 45 *et seq.* At its sixty-first session, the Commission appointed Mr. Lucius Caflisch Special Rapporteur for the topic, after the resignation of Sir Ian Brownlie (*Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 229).

¹³⁴ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

¹³⁵ *Idem.*

¹³⁶ See footnote 133 above.

¹³⁷ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat (A/CN.4/606 and Add.1), sect. B (mimeographed; available on the Commission's website, documents of the sixty-first session).

included, new research would be needed, which would take considerable time and delay the Commission's work. He therefore suggested that the Commission should take the approach proposed by one State, which was discussed in paragraph 158 of the report, and leave open the possibility of studying the matter after the current draft articles were completed. For all those reasons, he was in favour of retaining draft article 1 as it stood.

9. In draft article 2 (Use of terms), the problem centred on the definition of "armed conflict". One aspect had already been commented on: whether the definition included non-international conflicts. In draft article 2, he had proposed that it should. The description of the term "armed conflict" in draft article 2, subparagraph (b), was not really a definition: it defined conflicts covered by the draft articles as being those likely to affect the application of treaties, which made it somewhat circular and not very useful. Moreover, it was an *ad hoc* definition for the sole needs of the draft articles; it would be preferable to choose a more neutral, more generally valid definition.

10. One State had suggested that the concept of "armed conflict" should not be defined. He understood the reasons for that suggestion, but the draft articles would cease to be viable without a definition of this expression, which established the limits of the scope of the draft articles. A definition was therefore needed, but it should be better than the one contained in article 2, subparagraph (b), as currently worded.

11. Two approaches to that problem were possible. The Commission could combine common article 2 of the Geneva Conventions for the protection of war victims (international conflicts) and article 1, paragraph 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (non-international armed conflicts). That approach would have the advantage of using the same definition of the term "armed conflict" in the fields of international humanitarian law and treaty law. The disadvantage was that it was cumbersome and, once again, somewhat circular.

12. The other approach would be to opt for the more modern and comprehensive wording used in 1995 by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" [para. 70 of the decision]. Yet that wording was perhaps too modern: it even included armed rivalries between organized groups within a State, which was inappropriate in the context of the draft articles, since under draft article 3, subparagraphs (a) and (b), the draft articles applied only to situations involving at least one State party to the treaty that was a participant in the armed conflict. Accordingly, the final portion of the Tribunal's definition—"or between such groups within a State"—should be deleted, as he suggested in paragraph 21 of his report.

13. Lastly, there was the issue of occupation. One Member State had argued that the concepts of armed conflict

and occupation had different meanings. That was no doubt true for occupations that went beyond the framework of an armed conflict, whereas the draft articles concerned armed conflicts, of which occupation was an integral part. That would need to be reaffirmed in the commentary.

14. Paragraph 30 of the report proposed new wording for article 2, subparagraph (b), based on the *Tadić* wording, and he invited members to indicate whether they could agree to it. More specifically, he wished to know what they thought about using the wording from the Geneva Conventions for the protection of war victims or the wording from the *Tadić* case.

15. Articles 3 to 8 lay at the heart of the draft articles and at the centre of the controversies as well. The provisions of draft articles 3 to 5 and the annex to draft article 5 formed an inseparable whole, and each text should be assessed in conjunction with the others. The basic rule was that set out in draft article 3, which drew to a certain extent on article 2 of the resolution adopted in 1985 by the Institute of International Law on the same subject.¹³⁸ Draft article 3 had been well received in the sense that, although some had sought to modify it slightly, no one had expressed an outright objection to it (see paragraph 34 of the report). However, one Member State had suggested, without offering specific wording, that a positive formulation was needed, along the lines of "treaties shall survive, unless ..."; in other words, there was a presumption of survival. Of course, that would constitute a change of direction which might entail a complete rethinking of the draft articles. Moreover, such an affirmation was not in keeping with reality. It was important to be realistic, and he therefore favoured retaining the provision, although he endorsed the suggestion of some Member States to return to the expression "*ipso facto*" and agreed with the remark about the unclear title. He was not certain that the title "Presumption of continuity", proposed by one State and used provisionally, was correct. Perhaps a member of the Commission had a better suggestion.

16. In view of the "negative" content of draft article 3, it was necessary to determine the elements that would make it possible to identify agreements likely to be affected by the outbreak of an armed conflict, which could thus be the subject of the notifications referred to in draft article 8 and could, where appropriate, help settle any disputes that might arise.

17. The earlier version of draft article 4 had been the subject of considerable debate in the Commission. It had been based on the notion of interpreting the treaty in accordance with articles 31 and 32 of the 1969 Vienna Convention, an interpretation that was supposed to reveal the intention of the authors of the treaty. The Commission and its Working Group had ultimately decided to include among the criteria to be used the nature and extent of the conflict, its effect on the treaty, the subject matter of the treaty and the number of parties to the treaty. Contrary to what some States apparently believed, those criteria were intended to supplement the criterion of the intention of the parties and not to replace it.

¹³⁸ Institute of International Law, *Yearbook*, vol. 61 (1986), Session of Helsinki (1985), Part II, p. 200 (available from www.idi-iil.org, resolutions).

18. One comment concerning draft article 4 had been that the reference to the “effect of the armed conflict on the treaty” was circular, since that effect was the result which the application of article 4 ought to achieve and not a criterion for achieving it. Yet as he had explained in the report (para. 43), it was possible that the effect might be of short duration, suggesting that it was minimal, but could become significant if the conflict should last longer. Thus, the fact that the effect could vary might make the survival of the treaty impossible in the long run.

19. Some Member States wanted to delete the reference to “the nature and extent of the armed conflict” while others wanted it to be retained, as he himself did (para. 45). Some States had suggested the addition of new “indicia”, such as change of circumstances, impossibility of performance and material breach of the treaty. However, such additions were not really appropriate, as they were already covered by articles 60 to 62 of the 1969 Vienna Convention (para. 46). Another State wished to insert a reference to the subject matter of the treaty, but as subject matter was dealt with in draft article 5, that addition did not seem appropriate either (para. 48). Some Member States thought that the list of indicia in draft article 4 was not exhaustive (para. 49), but that fact was made clear by paragraph (4) of the commentary to the draft article.¹³⁹ Adding a statement to that effect to draft article 4 would weaken the normative value of the text.

20. Lastly, it had been suggested that draft article 4 should include other factors, such as the possible results of terminating, withdrawing from or suspending a treaty, but that was already covered implicitly. However, given that the criterion of the subject matter of treaties was dealt with in draft article 5, he wondered whether the reference to that criterion in draft article 4, subparagraph (b), ought not to be deleted.

21. He failed to see why a State could not speak of a “withdrawal” from a treaty in the context of draft article 4. He also thought that the simple reference to articles 31 and 32 might be too elliptical and that the text might become clearer if article 4, subparagraph (b), spoke of “the intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties”.

22. Turning to draft article 5 and its annex, which had elicited many comments, he said that a few preliminary remarks would be useful: first, the outbreak of an armed conflict itself never terminated a treaty; secondly, the continuity of a treaty might involve the treaty as a whole or only a part thereof; and thirdly, the list contained in the annex to draft article 5 should be described as “indicative”.

23. One State had criticized draft article 5 for its ostensible lack of clarity, but had failed to specify what was unclear, and a group of States had asserted that treaty clauses that survived did not necessarily have to be applied as they were, but that “some basic treaty principles need to be taken into account during armed conflict”. If that meant that they must be applied flexibly, he had no objection; he sought further clarification of that comment.

24. One Member State had wished to know the factors that made it possible to determine whether a treaty or some of its provisions should continue in operation. The answer to that question was to be found in draft articles 4 and 5, read together with the annexed list. Another State had proposed that “relevant factors or general criteria” should be identified. In fact, draft articles 4 and 5 clearly identified general “criteria” or “factors”, and the annex explained the meaning of draft article 5 in an indicative fashion.

25. It had also been asserted that, given that a general provision existed in the form of draft article 3, draft article 5 was superfluous. He disagreed: draft article 3 specified that termination was not automatic, while draft articles 4 and 5 and the annex provided criteria for determining whether a treaty survived in whole or in part (para. 58). In that connection, he wished to point out that draft article 10, on the separability of treaty provisions, made it possible to apply draft articles 3 to 5 with the necessary flexibility, a matter that had perhaps not been sufficiently stressed in the course of the debate.

26. One Member State wanted a second paragraph added to draft article 5 to specify the applicability, in times of armed conflict, of treaties relating to the protection of the human person (humanitarian law, human rights, “international criminal law”) and of the Charter of the United Nations. Although he did not object to that suggestion *a priori*, it did pose a number of problems (para. 61). For example, where exactly did the boundary between the scope of humanitarian law and human rights law lie? Would it not be preferable to refer to treaties on international criminal justice rather than speak of “international criminal law” as a whole? Was it really necessary to ensure the survival of the monument that was the Charter of the United Nations? And could or should the list of categories include, as another State wished, treaties relating to boundaries and limits? Assuming that the idea of such an amendment was accepted, a text for a second paragraph was proposed in paragraph 62 of the report. It should be noted that the categories that would thus be incorporated into draft article 5 would then be deleted from its annex. The disadvantage of that proposal was that it created two categories of treaties that could survive.

27. Like the members of the Commission, Member States were divided on whether to retain the list. One State was in favour of incorporating the entire list into the text of draft article 5, whereas others wanted it consigned to the commentary. The list retained was the one that the Commission had ultimately adopted on first reading, on the understanding that it was indicative and that the continued application of the categories of treaties contained in it could be partial or complete, given that some treaty instruments were separable under draft article 10. That solution was, in his view, a realistic one.

28. As to the content of the list, the Special Rapporteur said that if the Commission endorsed the suggestion to incorporate the reference to certain categories of treaties into the body of draft article 5, those categories would have to be deleted from the annex. He agreed with the suggestion of one State to include treaties establishing an international organization, which would also cover the

¹³⁹ *Yearbook ... 2008*, vol. II (Part Two), p. 46, para. 66.

Charter of the United Nations (para. 68). The same State had also suggested deleting five categories from the list: treaties of friendship, commerce and navigation as well as analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to international watercourses and related installations and facilities; treaties relating to aquifers and related installations and facilities; and treaties relating to commercial arbitration. Those categories of agreements did not survive every time or in full, but the list was indicative and, once again, the question of separability was addressed in draft article 10. Thus the proposed deletion was neither necessary nor desirable. Moreover, retaining draft articles 4 and 5 along with the list would afford greater stability.

29. His proposed texts for draft articles 4 and 5 appeared in paragraphs 51 and 70 of the report. The Commission should decide whether the texts should be retained more or less in their current form, whether a reference to certain categories of treaties should be included in the body of draft article 5, whether a new category of agreements—"international criminal justice"—should be incorporated into the list and whether other categories, namely treaties of friendship and treaties relating to the protection of the environment, watercourses, aquifers and commercial arbitration, should be excluded.

30. Draft article 6 (Conclusion of treaties during armed conflict) embodied two ideas that appeared obvious: a State party to an armed conflict retained the capacity to conclude treaties, and such States could agree to terminate treaties that would otherwise continue in operation. Since he had proposed only minor changes to the existing text of draft article 6, he drew the Commission's attention to paragraphs 71 and 76 of his report.

31. Draft article 7 (Express provisions on the operation of treaties) stipulated that where a treaty expressly provided that all or part of the text should continue to apply during an armed conflict, that provision prevailed. It was in fact useful to state that rule even if it seemed obvious. However, thought must be given to the placement of article 7 within the draft, and he would like to know the views of the members of the Commission in that regard. His own choice would be to place it after draft article 3, because draft article 7 referred to a treaty rule that departed from the system established in draft articles 4 and 5 and the latter's annex. His rationale for doing so could be found in paragraph 79 of his report.

32. The last in the cluster of draft articles concerning the survival, suspension and continuity of treaties in the event of an armed conflict was draft article 8 (Notification of intention to terminate, withdraw from or suspend the operation of a treaty). That provision had been introduced rather late in the day and had given rise to a heated debate both within the Commission and subsequently among Member States. As currently drafted, article 8, paragraph 1, provided that a State that was involved in a situation of armed conflict and wished to terminate, withdraw from or suspend the operation of all or part of a treaty was required to notify the other State party or States parties or the treaty depositary of its intention to do so. According to paragraph 2, such notification took

effect at the time of receipt of notification by the State or States concerned, even if the notification had been sent to the depositary. Under draft article 8, the State or States concerned could formulate an objection if they considered that the measure notified was not in accordance with the rules of international law. That was as far as the current draft of article 8 went.

33. That text could be criticized as incomplete on two grounds. First, unlike article 65, paragraph 2, of the 1969 Vienna Convention, it did not set a time limit for raising objections to the contents of notifications, which would have the effect of rendering the announced measures ineffective until the end of the armed conflict. Secondly, that lacuna would also prevent the peaceful settlement of dispute by any means available to the States concerned, not all of which were involved in the armed conflict. While in its commentary to draft article 8, the Commission had considered it "unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of the operation of treaties in the context of armed conflict",¹⁴⁰ he believed that there were good reasons to review that conclusion.

34. The new text that he proposed in paragraph 96 of his report addressed the two lacunae he had just mentioned by drawing on article 65 of the 1969 Vienna Convention. As one Member State had explained, there did not appear to be any reason why a dispute between the notifying State and the objecting State should remain suspended until the end of the armed conflict, when a means of settling the dispute existed. That consideration obviously depended on the solution to the other issue—namely, the introduction of a time limit for raising an objection to the notification. Article 65, paragraph 2, of the 1969 Vienna Convention established a three-month deadline. He had left a blank space for the time limit, on the reasoning that it should in any event be longer than three months, since worrying about the status of treaties was probably not the foremost concern of a warring State.

35. One Member State had asked what effects would be produced by a notification made under the terms of draft article 8. According to the proposed new text contained in paragraph 96 of his report, there were two possibilities: either no objection was raised within the prescribed time limit, which meant that the notifying State could proceed to terminate, withdraw from or suspend the operation of the treaty in whole or in part; or else an objection was raised and recourse could be had, where necessary, to existing mechanisms for the peaceful settlement of disputes.

36. Contrary to what certain States believed, he did not see why it should be unreasonably difficult for States to make notifications and raise objections during an armed conflict. What the draft article needed to specify was that the provisions of article 65, paragraphs 1 and 2, of the 1969 Vienna Convention must be complied with to the greatest extent possible.

37. One interesting suggestion was to extend the scope of draft article 8 to contracting States that were not parties

¹⁴⁰ *Ibid.*, p. 60, para. (1) of the commentary.

to the conflict. Technically, that would be an easy matter: the current text of draft article 8, paragraph 1, could simply be replaced with the following: “A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, whether or not it is a party to the conflict, shall notify ... of that intention.” He invited Commission members to express their views on the substance of that suggestion, as well as on his proposed wording for draft article 8, which could be found in paragraph 96 of the report.

38. The final part of his introduction dealt with draft articles 9 to 12. Draft article 9 (Obligations imposed by international law independently of a treaty), which had been based on article 43 of the 1969 Vienna Convention, had not been contested and did not require any comment.

39. Draft article 10 (Separability of treaty provisions) had been modelled after article 44 of the 1969 Vienna Convention and was of crucial importance, given that it would govern the termination or partial suspension of the operation of a treaty, which in practice could occur frequently. Draft article 10 listed the cases in which separability applied. In his view, there was no reason to amend the text.

40. Draft article 11 (Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty) was derived from article 45 of the 1969 Vienna Convention. It was essentially aimed at protecting the good faith of the other contracting parties, which even in situations of armed conflict should be preserved to some extent. States that lost the right covered by the draft article were those that had expressly agreed that the treaty should remain in force and those that by reason of their conduct could be considered as having acquiesced in the continued operation of the treaty.

41. One Member State felt that that rule was “too rigid” and that perceptions regarding the survival of treaties could change over the course of an armed conflict (see paragraph 104 of the report). The same State had pointed out that the circumstances that led to the loss of the right to terminate, withdraw from or suspend the operation of a treaty could sometimes be assessed only after the armed conflict had produced its effects on the treaty. Those effects did not appear immediately but only after the conflict was well under way. Draft article 11 could be maintained if the point he had just raised was included in the commentary.

42. That left draft article 12 (Revival or resumption of treaty relations subsequent to an armed conflict), which must be considered together with draft article 18, on the same subject. Draft article 12 provided that the resumption of the operation of a treaty suspended as a consequence of an armed conflict was determined in accordance with the indicia enumerated in draft article 4: articles 31 and 32 of the 1969 Vienna Convention, the nature and extent of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty. Draft article 18 enabled States parties, subsequent to an armed conflict, to regulate, on the basis of agreement, the revival of treaties that had been terminated or suspended. He believed that merging the two articles into a text that

would replace draft article 12 would clarify the meaning and highlight the difference between the two existing provisions. It should be noted that as the result of that merging draft article 18 would no longer be a “without prejudice” clause. Commission members were invited to express their views on the proposal to merge draft articles 12 and 18. The new text suggested for draft article 12 was contained in paragraph 114 of his report.

43. In order to facilitate the discussion of the report in plenary, he suggested that the Commission might wish to organize its debate around three clusters of draft articles: draft articles 1 and 2; draft articles 3 to 8; and draft articles 9 to 12.

44. The CHAIRPERSON invited the members of the Commission to consider the first cluster of draft articles indicated by the Special Rapporteur.

45. Mr. GAJA said that the Special Rapporteur’s first report was remarkably clear and well organized, and contained reasonable proposals for either confirming or amending the draft articles that had been adopted on first reading. The fact that some of the Special Rapporteur’s proposals had not found specific support among Member States should not prevent the Commission from endorsing amendments that were considered to improve the text.

46. There was, however, one aspect of the report with which he had been disappointed. Given that the 2008 commentary to the draft articles made only limited reference to State practice, he had hoped that the Special Rapporteur would support his review of the subject by including additional references to such practice, especially in relation to draft articles 4 and 5. Regrettably, there were none. However, a thorough analysis of practice was required when the Commission embarked on the codification of a subject that was covered, at least to some extent, by practice.

47. He had one major concern relating to the substance of the draft articles. Draft article 1 essentially confirmed the scope of the draft articles as adopted on first reading. In paragraph 39 of his report, the Special Rapporteur stated that the draft articles also covered cases in which two States parties to a treaty were on the same side in an armed conflict. Moreover, the majority of States had endorsed the Commission’s approach not to restrict the draft articles to cases in which two States parties to a treaty were engaged in an armed conflict as adversaries, while the bulk of State practice related to such cases. It was far from clear, however, whether the same conclusions should be drawn in those cases and in cases in which only one State party to the treaty was involved in an armed conflict, whether internal or international in nature. It was difficult to see how an armed conflict as such would affect the operation of a treaty in conflicts involving only one State party. A specific analysis of cases other than those involving a conflict between States parties to a treaty was missing from the first report, and the Commission should address that omission before completing its second reading of the draft articles. He welcomed the fact that the Special Rapporteur intended to address that question in the forthcoming addendum to his report, as it might affect the wording of some of the draft articles included in the present report.

48. He welcomed the inclusion in draft article 2 of a definition of the term “armed conflict” with the corrections proposed at the outset by the Special Rapporteur. That definition was based on the wording used in the *Tadić* judgement. In his view, another reason to prefer the *Tadić* definition over those contained in the Geneva Conventions for the protection of war victims and the Additional Protocols of 1977 was that it was better suited to the purpose of the draft articles, which concerned something other than the extension of the application of international humanitarian law. The wording of the *Tadić* judgement with the abridgement suggested by the Special Rapporteur met the Commission’s needs and reflected what had been implied by the Commission in its consideration of the topic.

49. He agreed with the Special Rapporteur’s suggestion in paragraph 81 to place draft article 7 after the general statement contained in draft article 3. Draft article 3 contained a Latin expression, and preferably those should be avoided, but that was a matter perhaps best left to the Drafting Committee. He also agreed to the deletion of the word “express” in current draft article 7, since the effects of an armed conflict on treaty relations might be regulated implicitly in a treaty.

50. Although the criteria referred to in articles 31 and 32 of the 1969 Vienna Convention, which were mentioned in draft article 4, subparagraph (a), were certainly helpful in ascertaining whether a particular treaty addressed the issue of the consequences of an armed conflict on treaty relations between the States parties or on the treaty in general, Mr. Gaja saw no need to reintroduce a reference to the intention of the parties to the treaty in draft article 4. The goal of treaty interpretation was not to ascertain the intention of the parties with regard to the effects of an armed conflict, and it was in fact highly unlikely that any such intention existed.

51. The subject matter of a treaty, which was considered in draft article 5, was also likely to provide some useful elements for the interpretation of treaties. However, the criteria listed in draft article 4 (b), useful though they were, might or might not be relevant for interpreting treaties. Yet draft article 4 did not deal exclusively with interpretation: it also dealt with the major issue of what to do if the treaty failed to address the effects of an armed conflict on treaty relations. It was necessary to establish a general rule to address the case of such treaties.

52. Draft articles 4 and 5 looked, respectively, at the dark side and the bright side of the operation of treaties. Draft article 4 concerned the “indicia”—another Latin word that he believed ought to be changed—of susceptibility to termination, withdrawal or suspension of treaties, or the fact that the operation of a treaty could cease. Draft article 5, meanwhile, concerned treaties whose operation was implied from their subject matter, or the fact that the treaties continued to operate. It was possible, however, that draft article 5, paragraph 2, could be construed as implying that categories of treaties not included in the indicative list provided in the annex were susceptible to termination, withdrawal or suspension. In his view, the relationship between the dark and the bright sides of treaty operation should be clarified. It might in fact be

useful to consider draft articles 4 and 5 together, with a view to their possible combination.

53. One thing was certain: the Commission should give greater weight to State practice concerning identified categories of treaties that continued in operation during an armed conflict. One example was treaties relating to international commercial arbitration: the Commission should review practice in that area to determine whether it was justified in including that category of treaties in the indicative list, or whether it was better to remove it because the jurisprudence of various countries was divided on the issue of the continued operation of such treaties during an armed conflict.

54. Draft article 8 assumed that the termination or suspension of the operation of a treaty was always conditional on notification by the State intending to produce those effects; however, that approach did not fully reflect State practice. States usually did not make such notifications. While the introduction of the notification requirement could be a positive development, the Commission might wish to consider the possibility that in certain cases notification would not be required. An extreme example was a bilateral treaty that provided for joint military parades on a particular date. Such a treaty could not be applied during an armed conflict between the States parties, irrespective of notification.

55. He was in favour of referring most of the draft articles to the Drafting Committee; however, he would like to see his general concerns regarding cases other than those involving a conflict between States parties to a treaty, which he understood would be taken up in an addendum to the first report, and the need for an analysis of State practice, adequately addressed before the Commission adopted the draft articles on second reading.

56. Mr. NIEHAUS said that the Special Rapporteur had done well to begin his first report with words of appreciation addressed to his predecessor, Sir Ian Brownlie, whose contribution to the topic had provided an excellent basis for its continued development. The current Special Rapporteur’s clarity and incisiveness had resulted in an excellent synthesis of the four main areas covered by the draft articles, the comments of representatives of States put forward in the Sixth Committee and the written comments submitted by Member States. He agreed with the Special Rapporteur that the Commission should limit its changes to those that were absolutely necessary, as the draft articles had already been adopted on first reading.

57. With regard to article 1 and the fact that certain Member States would like to restrict the scope of the draft articles to treaties between two or more States of which more than one was a party to the armed conflict, he noted that the Commission had considered the issue in depth at its sixtieth session, and that the vast majority of members had chosen to have article 1 include the effects of armed conflicts involving only one State. The Special Rapporteur endorsed that view, as he himself did. He objected, however, to the exclusion from the scope of the draft articles of the effects of armed conflicts on treaties to which international organizations were parties. Given the important role of many international organizations in that area, such

exclusion was not advisable. However, since it appeared that most Commission members as well as representatives of Member States in the Sixth Committee were inclined to exclude treaties to which international organizations were parties, he would go along with the wording of draft article 1 proposed by the Special Rapporteur.

58. Draft article 2, on use of terms, raised the fundamental issue of whether the scope of the draft articles should include treaties between States and international organizations, and the Special Rapporteur had concluded that it would be preferable not to do so. A further question was whether the draft articles ought to cover non-international conflicts. There was no doubt that this idea had been accepted. Thus the proposed text was satisfactory as it stood, apart from the reference to a “protracted” resort to armed force in subparagraph (b), since it was unclear whether the period of time in question was to be measured in months or years. Moreover, since the existence of conflicts between States should plainly not be determined by any reference to the length of resort to armed force, it was illogical and confusing to apply that criterion to internal conflicts. He would therefore be inclined to delete the word “protracted”.

59. In draft article 3, concerning the absence of *ipso facto* termination or suspension, the difficulty apparently stemmed from the replacement of “*ipso facto*”, the term employed in the *chapeau* of the original text with the word “automatically” and, subsequently, the word “necessarily”. The Special Rapporteur was suggesting that the Commission should revert to the original expression. Since the matter had been discussed at length both in plenary meetings and in the Drafting Committee, it would be helpful if colleagues who had objected to the use of the term “*ipso facto*” could remind the Commission of their arguments. The title of the article was indeed far from clear: the phrase “absence of” was particularly infelicitous; “principle of application”, “principle of maintenance” or “continuity” would all be preferable.

60. He endorsed the Special Rapporteur’s suggestion that the current version of draft article 4 be retained. Draft article 5 and the annex thereto were important and aptly worded. Despite the indicative nature of the list of categories of treaties contained in the annex, he, like Ms. Escarameia, was of the opinion that it would be logical for it to include treaties embodying *jus cogens* rules.

61. Draft article 6 did not present any difficulties, but he suggested that it would be more logical to place draft article 7 between draft articles 3 and 4. The amended wording of that draft article was acceptable. The amended version of draft article 8 was an intelligent response to all the comments made by Member States during the extensive debate on that article in the Sixth Committee, and the supplementary wording proposed by the Special Rapporteur constituted a substantial improvement. Further reflection was needed, however, on the interesting suggestion put forward in paragraph 92 of the report that the scope of draft article 8 be extended to cover States that were not parties to the conflict but were parties to the treaty.

62. Draft articles 9 to 11 did not pose any problems and should be retained as they stood. The Special Rapporteur’s

suggestion that draft articles 12 and 18 should be merged because they were closely linked was logical, and the text that he had proposed was a definite improvement on the two original provisions.

63. Mr. MURASE said that since the draft articles supplemented the 1969 Vienna Convention, they should be confined to treaties concluded between States and exclude treaties involving international organizations. He was unsure whether they should cover non-international or internal armed conflicts. He noted that Austria, China and Portugal had been omitted from the list of States that had criticized the Special Rapporteur’s inclusive approach and said that, at best, States’ views on that matter had been divided (see the footnotes to paragraph 15 of the report). The Commission should therefore give further consideration to the issue, but in doing so should take a minimalist approach in order to safeguard the effectiveness of the draft articles.

64. The lack of a trigger mechanism or trigger article was a matter of great concern, since there was no way of knowing when the draft articles became applicable. There was no clear definition of the terms “armed conflicts” or “outbreak of an armed conflict” in any of the draft articles. A more detailed definition of “armed conflict” was required in draft article 2, subparagraph (b), in order to clarify the point at which the draft articles started to operate. Since the definition of “treaty” in subparagraph (a) of that draft article reproduced verbatim the definition of the 1969 Vienna Convention, there was nothing to prevent the Commission from borrowing the definition of armed conflict from common article 2 of the Geneva Conventions for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). Even though the language of the Geneva Conventions needed updating, it was nonetheless preferable. Accordingly, he suggested that draft article 2, subparagraph (b), should be revised to read:

“ ‘Armed conflict’ means:

“(i) all cases of hostilities which may arise between two or more States, even if the existence of such a conflict is not recognized by one of them; and/or

“(ii) all cases of partial or total occupation of the territory of a State, even if the said occupation meets with no armed resistance; and/or

“(iii) all cases which take place in the territory of a State between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement international law relevant to armed conflicts.”

65. It was surprising that no one in the Commission or the Sixth Committee had ever seen a need to define the word “outbreak”, which appeared in draft article 3 and draft article 6, although it was crucial to the whole set of draft articles. Presumably there were certain objective criteria for determining the date on which an armed

conflict broke out. That date had to be ascertained in order to determine when a treaty could be suspended or terminated, since such action could not be taken unilaterally. Furthermore, determination of that moment had a direct bearing on the rights and obligations of the States concerned. One instance of a war whose exact starting date was uncertain was the Iran–Iraq war in the 1980s, where both States claimed to be the victims of initial armed attacks that had in fact occurred on different dates. That disparity demonstrated the difficulty inherent in the application of the draft articles in the absence of a more specific definition. For that reason, unambiguous criteria for identifying when the “outbreak” occurred should be set forth in a separate article, which could be numbered article 2 *bis*. The intensity of the conflict should be one of those criteria, in order to avoid any abuse of the draft articles in the event of sporadic incidents that did not constitute a true armed conflict.

66. If that proposal was not accepted, a clear explanation of the term should be included in the commentary. While it was true that the Geneva Conventions for the protection of war victims did not define the notion “outbreak of armed conflict” in the texts of the Conventions themselves, the commentary to common article 2 stated that:

The Convention becomes applicable as from the actual opening of hostilities. The existence of armed conflict between two or more Contracting Parties brings it automatically into operation. ... Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of [such a conflict].¹⁴¹

Similar wording should be included in the commentary to draft article 3, which should stipulate that the application of that provision should not depend on the discretionary judgement of the parties and that the draft articles should apply automatically as soon as the material conditions defined in that commentary were fulfilled.

67. Mr. DUGARD, after paying a tribute to the substantial contribution made to the topic by the former Special Rapporteur, Sir Ian Brownlie, said that the report before the Commission was a model report: it was clear, concise and took account of the views expressed by Member States.

68. He agreed with the Special Rapporteur’s approach to draft article 1, because international organizations must be excluded from the scope of the draft articles for the reasons cited in the report.

69. It was essential that draft article 2, subparagraph (b), cover both international and non-international armed conflicts. He therefore disagreed with Mr. Murase’s proposal. The Commission must face the fact that most conflicts in the modern world were non-international or did not fit neatly into the category of international armed conflicts. For that reason, the definition of “armed conflict” contained in common article 2 of the Geneva Conventions for the protection of war victims was unsuitable for the draft articles. The definition in the Protocol Additional to the

Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) was acceptable, although it had been superseded by the definition provided by the International Tribunal for the Former Yugoslavia in the *Tadić* case. While he shared Mr. Niehaus’s view that the word “protracted” was not the best adjective to use in the context, it was the term accepted by international criminal tribunals. It would therefore be unwise for the Commission to set about redefining the notion. Thus he once again agreed with the Special Rapporteur’s approach.

70. On the other hand, he was unsure as to the advisability of addressing the question of occupation in the commentary. While it was always difficult to decide what to include in a provision and what to leave to the commentary, he believed it would be wise to make some reference to occupation in the definition. Many current situations involving armed conflict concerned occupation, the three most obvious cases being northern Cyprus, Palestine and Western Sahara. In paragraph 29 of the report, the Special Rapporteur drew attention to the need for clarity; the best way of achieving such clarity was to make some mention of occupation in the text of the draft article itself.

71. One conundrum, which should perhaps be dealt with in the commentary, was that of State succession. For example, what had been the position of Western Sahara immediately after the withdrawal of Spain? Had it succeeded to treaties to which Spain was a party, or had those treaties been suspended or terminated? The same issue arose in the context of some of the treaty obligations of Palestine.

72. Mr. PETRIČ commended the Special Rapporteur on his precise and balanced report, and endorsed his methodology. The Commission should not make too many alterations to the text of the draft articles at the current stage, but should confine itself to making amendments to take account of Member States’ comments.

73. The Commission should bear in mind that armed conflict represented a stressful situation for a State. In such circumstances, States might be unable to comply with formalities but might have to take action to protect their interests and ensure their survival. For that reason the Commission should not be too formalistic, but should leave room for flexibility. It should be guided by the notion that a State should be allowed scope to take *bona fide* action—for example, to avoid obligations that might impede its fight for survival.

74. The Commission had decided after much discussion that internal conflicts should be included within the scope of the draft articles and, notwithstanding some Member States’ comments, there was no reason to depart from that position. If internal conflicts were excluded from the draft articles, the Commission’s work would be of limited usefulness, since inter-State conflicts were already rare, and it was to be hoped that they would become even rarer in the future.

75. Turning to draft article 1, he said that he supported the Special Rapporteur’s amendment of the phrase “at least one of the States” to read “at least one of these

¹⁴¹ J. S. Pictet (ed.), *The Geneva Conventions of 12 August 1949—Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, vol. I, Geneva, ICRC, 1952, p. 32.

States”. He also agreed with the Special Rapporteur that treaties between States and international organizations should be excluded from the draft articles. He endorsed the reasoning set out in paragraph 14 of the report and the conclusion that the Commission was at liberty to supplement the 1986 Vienna Convention with another draft text at some point in the future.

76. As for the definitions set out in draft article 2, Mr. Petrić believed that internal conflicts should, as he had just explained, be encompassed therein. It would, however, be better to deal with the issue of occupation in the commentary, because it posed problems that could not be resolved satisfactorily in the body of the draft article. Furthermore, if occupation was defined in the draft article, it might be necessary to include definitions of such concepts as “embargo” and “blockade” as well. He therefore agreed with the Special Rapporteur that it was better to tackle those matters in the commentary.

77. Turning to draft article 2, subparagraph (b), he endorsed the Special Rapporteur’s approach of building a definition based on the wording used in the *Tadić* case—a modern and appropriate definition. He had been concerned about the phrase “or between such groups within a State” and therefore welcomed its deletion. He was also concerned about the use of the word “protracted” in the phrase “protracted resort to armed force”, but believed nevertheless that an appropriate term was needed to convey the idea of situations lasting longer than a few days. He suggested that the Drafting Committee might wish to pursue the matter and that, in any event, some explanation be provided in the commentary to the draft article.

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

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

78. Mr. McRAE (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee on reservations to treaties (A/CN.4/L.760), said that it concerned 11 draft guidelines that had been provisionally adopted by the Drafting Committee during the second part of the sixty-first session, in the course of four meetings that had taken place on 23, 28 and 30 July 2009.

79. The first two draft guidelines, 2.6.3 and 2.6.4, related, respectively, to the freedom to formulate objections to reservations and the freedom for the objecting State or international organization to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation. Those two draft guidelines had been proposed by the Special Rapporteur in his eleventh report¹⁴² and had been referred to the Drafting Committee in 2007.¹⁴³

80. The other nine draft guidelines, namely guidelines 3.4.1 to 3.6.2, concerned the permissibility of reactions to reservations and the permissibility of interpretative

declarations and reactions thereto. The original proposals had been contained in the Special Rapporteur’s fourteenth report.¹⁴⁴ However, following the plenary debate in 2009, the Special Rapporteur had presented a revised version of those draft guidelines, with the exception of draft guidelines 3.5.2 and 3.5.3, which had been not revised.¹⁴⁵ The revised guidelines had been referred to the Drafting Committee at the sixty-first session.

81. Before introducing the details of the Drafting Committee’s report, he wished to pay a tribute to the Special Rapporteur, Mr. Alain Pellet, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the other members of the Drafting Committee for their active participation and essential contributions, as well as the Secretariat for its valuable assistance.

82. Turning to the substance of the report, he said that draft guideline 2.6.3. had been retitled “Freedom to formulate objections”. A discussion had taken place in the Drafting Committee on whether the draft guideline should refer to the “freedom” or to the “right” to formulate an objection; after careful consideration, the Committee had decided to retain the term “freedom” (“*faculté*” in French) which had appeared in the text originally proposed by the Special Rapporteur and referred to the Drafting Committee. It had been observed in particular that the term “right” might not be appropriate in the current context because, unlike the freedom to formulate an objection, a right could be regarded as implying the existence of a correlative obligation and, possibly, of a remedy in the event of its violation. Furthermore, in order to harmonize the text and the title of the draft guideline, the word “make” in the title had been replaced by the word “formulate”.

83. That said, the main change introduced into the text referred to the Drafting Committee had been the replacement of the expression “for any reason whatsoever” by the expression “irrespective of the permissibility of the reservation”. During the debate in plenary at the fifty-ninth session, the expression “for any reason whatsoever” had been criticized by some members who had been of the view that the formulation needed to be qualified, at least by a reference to the 1969 and 1986 Vienna Conventions and to general international law.¹⁴⁶ Similar concerns had been raised in the Drafting Committee, particularly with respect to the limitations on the freedom to formulate objections that would arise, according to some members, from *jus cogens* norms.

84. Moreover, some members had been of the view that objections to reservations expressly authorized by the treaty were not allowed.¹⁴⁷ After extensive discussion, and on the basis of a revised text proposed by the Special Rapporteur, the Drafting Committee had agreed on wording that had been deemed to convey, in a more accurate manner, the original intent of the draft guideline as proposed by the Special Rapporteur. That original intent

¹⁴⁴ See footnote 9 above.

¹⁴⁵ *Yearbook ... 2009*, vol. II (Part Two), chap. V, p. 80, para. 60 and p. 83, para. 82.

¹⁴⁶ *Yearbook ... 2007*, vol. II (Part Two), p. 19, para. 74.

¹⁴⁷ *Ibid.*, para. 75.

¹⁴² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

¹⁴³ *Yearbook ... 2007*, vol. II (Part Two), p. 16, para. 45.

had been to state that, in contemporary international law, and contrary to what had been suggested by the ICJ in its advisory opinion of 28 May 1951 on the question concerning *Reservations to the Convention on Genocide*, the freedom to formulate objections to reservations was not limited to the case of impermissible reservations, such as reservations incompatible with the object and purpose of the treaty. The commentary would provide the necessary explanations regarding that point while also indicating that, according to some members, the freedom to formulate objections had been subject to certain limitations, such as those arising from *jus cogens* norms and certain general principles such as good faith and non-discrimination. Lastly, the Drafting Committee had not considered it necessary to repeat in the draft guideline that the freedom to formulate an objection should be exercised in accordance with the provisions of the Guide to Practice.

85. Draft guideline 2.6.4 was entitled “Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation”, as originally proposed. As in the case of draft guideline 2.6.3, several members of the Drafting Committee had expressed concerns about the expression “for any reason whatsoever”, which they had regarded as too broad or excessively strong. After careful consideration, and on the basis of a revised text proposed by the Special Rapporteur, the Drafting Committee had opted for simplified wording that established the freedom of a State or an international organization that formulated an objection to oppose the entry into force of the treaty as between itself and the author of the reservation. The commentary would clarify that, as similarly provided in draft guideline 2.6.3 dealing with the freedom to formulate objections, the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation was not limited to those cases in which the reservation was incompatible with the object and purpose of the treaty or was regarded as such by the objecting State or international organization. Furthermore, as in draft guideline 2.6.3, the Drafting Committee did not deem it necessary to repeat that the freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation was to be exercised in accordance with the provisions of the Guide to Practice.

86. Turning to the set of draft guidelines dealing with the permissibility of reactions to reservations and the permissibility of interpretative declarations and reactions thereto, he drew attention first to the two guidelines on reactions to reservations, which would constitute section 3.4 of the Guide to Practice, entitled “Permissibility of reactions to reservations”. Draft guideline 3.4.1 had been retitled “Permissibility of the acceptance of a reservation”. It stated that the express acceptance of an impermissible reservation was itself impermissible.

87. The text referred to the Drafting Committee had been introduced in the plenary by the Special Rapporteur at the sixty-first session in 2009¹⁴⁸ in an effort to address the concerns expressed by some members who had felt that, contrary to what the Special Rapporteur had suggested in his fourteenth report, issues of permissibility did arise with respect to the acceptance of an impermissible reservation.

88. The Drafting Committee had adopted the text referred to it with some linguistic changes. Pursuant to a decision taken by the Commission at its fifty-eighth session, which had been reflected in the general commentary to the third part of the Guide to Practice,¹⁴⁹ the Drafting Committee had replaced the terms “substantive validity” and “validity” in the English text of the draft guideline with the word “permissibility”, while in the French text the expression “*validité matérielle*” had been replaced by “*validité substantielle*”. Those changes had been also introduced, as appropriate, in the other draft guidelines contained in the report before the Commission. He recalled in that connection that “permissibility” (“*validité substantielle*”) referred to the substantive conditions for the validity of a reservation set forth in article 19 of the 1969 and 1986 Vienna Conventions and mentioned also in draft guideline 3.1, as opposed to the formal and procedural requirements, which had been addressed in article 23 of the Vienna Conventions and in the second part of the Guide to Practice. Furthermore, in the English text of draft guideline 3.4.1, the word “explicit”, used to qualify “acceptance”, had been replaced by the word “express”.

89. Draft guideline 3.4.2 had been retitled “Permissibility of an objection to a reservation”. He recalled that in his fourteenth report the Special Rapporteur had taken the position that objections to reservations were not subject to any conditions for permissibility. However, during the plenary debate in 2009, some members had argued that such conditions did exist with respect to the so-called objections “with intermediate effect”—in other words, objections purporting to exclude the application of provisions of the treaty to which the reservation did not relate.¹⁵⁰ The Special Rapporteur had then submitted a new draft guideline,¹⁵¹ which the plenary Commission had referred to the Drafting Committee, establishing two conditions for the permissibility of an objection by which the objecting State or international organization purported to exclude, in its relation with the author of the reservation, the application of provisions of the treaty not affected by the reservation.

90. The text provisionally adopted by the Drafting Committee was based largely on the text that had been referred to the Committee by the plenary. Some minor changes had nevertheless been introduced. Thus, the term “permissibility”, rather than “substantive validity” or “validity”, had been inserted both in the title and in the text. Also, in order to follow more closely the terminology employed in article 21, paragraphs 1 (a) and 3, of the 1969 and 1986 Vienna Conventions, the Drafting Committee had preferred to refer in the draft guidelines text to an objection purporting to exclude the application of “provisions of the treaty to which the reservation does not relate” rather than “provisions of the treaty not affected by the reservation”.

91. The first condition for the permissibility of an objection with intermediate effect, as stated in the first subparagraph of draft guideline 3.4.2, concerned the required link between the provision to which the reservation related and the additional provisions that the objection with

¹⁴⁸ *Yearbook ... 2009*, vol. II (Part Two), p. 83, para. 82, footnote 371.

¹⁴⁹ *Yearbook ... 2006*, vol. II (Part Two), pp. 143–145.

¹⁵⁰ *Yearbook ... 2009*, vol. II (Part Two), p. 82, para. 76.

¹⁵¹ *Ibid.*, p. 83, para. 82, footnote 372.

intermediate effects purported to exclude. After extensive discussion regarding the nature of that link, the Drafting Committee had decided to retain the expression “sufficient link”, which had been proposed by the Special Rapporteur. It had been felt in particular that this wording would accommodate the two different views expressed in the Drafting Committee: the view that the link between the provisions concerned should be particularly strong, or even inextricable, and the view that an adequate link was sufficient and that no substantive relationship between those provisions was required. It had also been felt that the use of flexible terminology such as “sufficient link” was particularly appropriate in view of the fact that the condition probably pertained to the progressive development of international law.

92. The second condition for the permissibility of an objection with intermediate effect, enunciated in the second subparagraph of draft guideline 3.4.2, was that such an objection must not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection. The wording of that subparagraph had been based largely on the text proposed by the Special Rapporteur; however, the beginning of the sentence had been simplified by using the words “would not defeat the object and purpose of the treaty”.

93. Turning to the draft guidelines dealing with the permissibility of interpretative declarations, he said that draft guideline 3.5, which had been retitled “Permissibility of an interpretative declaration”, provided that a State or an international organization might formulate an interpretative declaration unless the interpretative declaration was prohibited by the treaty or was incompatible with a peremptory norm of general international law. The first exception to the freedom to formulate interpretative declarations had already appeared in the text originally proposed by the Special Rapporteur. The second exception had been included by the Special Rapporteur following the plenary debate at the sixty-first session, in the revised text of the draft guideline that had subsequently been referred to the Drafting Committee.

94. The Drafting Committee had adopted the text that had been submitted to it, although it had been hesitant to accept the replacement of the words “substantive validity” by “permissibility” in the title or the deletion of the adjectives “express or implicit” before the word “prohibited”¹⁵² because it wished to ensure consistency with the text of the other draft guidelines. The commentary would explain that a prohibition of interpretative declarations that might be contained in a treaty could be either explicit or implicit.

95. Draft guideline 3.5.1 had been retitled “Permissibility of an interpretative declaration which is in fact a reservation”. It stated that if a unilateral statement that purported to be an interpretative declaration was in fact a reservation, its permissibility must be assessed in accordance with the guidelines relating to the permissibility of reservations.

96. The text referred to the Drafting Committee had been a revised version submitted by the Special Rapporteur in

the light of the plenary debate at the sixty-first session,¹⁵³ the title of which referred explicitly to the recharacterization of an interpretative declaration as a reservation. While preserving the substance of the original text, the Drafting Committee had nevertheless introduced a number of changes. Apart from the replacement of the word “validity” with “permissibility”, the Committee had opted for a reformulation in which the text would begin with a conditional sentence introduced by “If”. In addition, the words “recharacterized as a reservation” in the title had been replaced by the phrase “which is in fact a reservation”. Those changes had been intended to make it clear that the recharacterization of an interpretative declaration could not in itself change the nature of the declaration—in other words, make it into a reservation—and that the determination of whether a statement was by nature an interpretative declaration or a reservation must be made on the basis of objective criteria.

97. The view had been expressed in the Drafting Committee that a draft guideline addressing those situations should also be included in the second part of the Guide to Practice which dealt with the procedure for the formulation of reservations and interpretative declarations.

98. Draft guideline 3.5.2 had been retitled “Conditions for the permissibility of a conditional interpretative declaration”. It stated that the permissibility of conditional interpretative declarations must be assessed in accordance with the guidelines relating to the permissibility of reservations. That guideline complemented draft guideline 2.4.7, relating to the formal requirements for the formulation of a conditional interpretative declaration.

99. During the plenary debate at the sixty-first session and also in meetings of the Drafting Committee, the point had been made that if a conditional interpretative declaration provided the correct interpretation of the treaty or was to be accepted by the contracting States or international organizations, such a declaration should not be treated as a reservation for permissibility purposes. However, the opposite view had been also expressed, according to which the nature of a conditional interpretative declaration would not depend on the correctness of the interpretation formulated therein.¹⁵⁴ It had been also observed in the Drafting Committee that the issue could be revisited in the light of the Commission’s consideration of the effects of reservations, interpretative declarations and reactions thereto. Furthermore, some doubts had been raised in the Drafting Committee as to the appropriateness of a complete alignment of the legal regimes of reservations and conditional interpretative declarations.

100. The Drafting Committee had nevertheless decided to retain the text proposed by the Special Rapporteur, although using the term “permissibility” instead of “substantive validity” in the title and in the text of the draft guideline; it had also corrected a typographical error in the cross reference to the relevant draft guidelines. He noted, however, that draft guideline 3.5.2 should be placed in square brackets pending a final decision by the Commission regarding the treatment of conditional interpretative declarations in the Guide to Practice.

¹⁵² *Ibid.*, footnote 373.

¹⁵³ *Ibid.*, footnote 374.

¹⁵⁴ *Ibid.*, p. 82, para. 77.

101. Draft guideline 3.5.3, which had been retitled “Competence to assess the permissibility of a conditional interpretative declaration”, stated that the provisions of guidelines 3.2 to 3.2.4, relating to the competence to assess the permissibility of reservations, applied *mutatis mutandis* to conditional interpretative declarations. It had been well received during the plenary debate at the sixty-first session; consequently, apart from the replacement of the word “validity” with “permissibility”, as in the previous guidelines, and a few editorial changes, the text adopted by the Drafting Committee corresponded to the text originally proposed by the Special Rapporteur.

102. Regarding the set of draft guidelines dealing with permissibility of reactions to interpretative declarations, he said that draft guideline 3.6, which had been adopted by the Drafting Committee on the basis of a new text submitted to it by the Special Rapporteur,¹⁵⁵ was entitled “Permissibility of reactions to interpretative declarations”. It stated the principle according to which an approval of, an opposition to, or a recharacterization of an interpretative declaration should not be subject to any conditions for permissibility, subject to the provisions of draft guidelines 3.6.1 and 3.6.2.

103. Draft guideline 3.6.1, which was entitled “Permissibility of approvals of interpretative declarations”, stated that an approval of an impermissible interpretative declaration was itself impermissible. The substance of the draft guideline corresponded to that of the first paragraph of the revised text of draft guideline 3.6, which had been submitted to the plenary by the Special Rapporteur at the sixty-first session in the light of comments made during the debate and had subsequently been referred to the Drafting Committee. It would be recalled that the Special Rapporteur had initially proposed a draft guideline indicating that reactions to interpretative declarations were not subject to any conditions for permissibility. While some members had supported that position, others had been of the view that, in certain circumstances, an approval of, or opposition to, an interpretative declaration could be impermissible. Accordingly, at the 3025th meeting the Special Rapporteur had submitted to the plenary a revised text indicating that a State or an international organization might not approve an interpretative declaration that was expressly or implicitly prohibited by the treaty.

104. While retaining the substance of that proposal, the Drafting Committee had opted for simpler wording, stating more directly the impermissibility of an approval of an impermissible interpretative declaration. In order to ensure consistency with the text of other draft guidelines, the words “expressly or implicitly”, used to qualify the prohibition of an interpretative declaration that might be contained in a treaty, had been omitted from the text. The possibility of express or implicit prohibitions of interpretative declarations in a treaty would be referred to in the commentary.

105. Lastly, draft guideline 3.6.2 was entitled “Permissibility of oppositions to interpretative declarations”. It stated that an opposition to an interpretative declaration

was impermissible to the extent that it did not comply with the conditions for permissibility of an interpretative declaration set forth in draft guideline 3.5.

106. It should be recalled that in the second paragraph of the revised version of draft guideline 3.6 that had been referred to the Drafting Committee in 2009, the Special Rapporteur had maintained his position that an opposition to, or a recharacterization of, an interpretative declaration was not subject to any condition for permissibility. Later, however, in order to accommodate some concerns that had already been expressed during the debate in plenary and which had been reiterated by some members in the Drafting Committee, the Special Rapporteur had submitted to the Drafting Committee a new text that had now become draft guideline 3.6.2.

107. The draft guideline purported to indicate that, in certain circumstances, an opposition to an interpretative declaration might itself be impermissible to the extent that it would not comply with the conditions for permissibility of an interpretative declaration. Thus, in the event that a treaty prohibited an interpretative declaration, as contemplated in draft guideline 3.5, the prohibition would also cover an opposition to that declaration if the opposition suggested an alternative interpretation.

108. The Drafting Committee recommended to the Commission that it adopt the set of draft guidelines he had introduced.

109. The CHAIRPERSON invited the Commission to adopt the draft guidelines contained in document A/CN.4/L.760.

110. Mr. CANDIOTI observed that there were many inconsistencies in the way that the term “permissibility” had been translated in the Spanish version of document A/CN.4/L.760 and said that they must be rectified lest they give rise to substantive problems.

111. Mr. McRAE (Chairperson of the Drafting Committee) said that the language groups would meet later in the week to deal with the type of concern raised by Mr. Candiotti.

Draft guidelines 3.4.1 to 3.5.1

Draft guidelines 3.4.1 to 3.5.1 were adopted.

Draft guideline 3.5.2

112. Mr. HASSOUNA requested clarification of the status of draft guideline 3.5.2 and asked whether it would be subject to further review.

113. Mr. McRAE (Chairperson of the Drafting Committee) said that draft guideline 3.5.2 should be left in square brackets and adopted provisionally, pending a final decision on the treatment of conditional interpretative declarations in the Guide to Practice.

On that understanding, draft guideline 3.5.2 was provisionally adopted.

¹⁵⁵ *Ibid.*, p. 83, para. 82, footnote 375.

Draft guidelines 3.5.3 to 3.6.2

Draft guidelines 3.5.3 to 3.6.2 were adopted.

The draft guidelines contained in document A/CN.4/L.760 were adopted.

Organization of the work of the session (continued)*

[Agenda item 1]

114. Mr. NOLTE (Chairperson of the Study Group on treaties over time) announced that at the next meeting of the Study Group on treaties over time, to be held that afternoon, he would summarize the discussion that had taken place at the Study Group's previous meeting and would introduce the next part of the report to be considered.

The meeting rose at 1.05 p.m.

3052nd MEETING

Thursday, 27 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, 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.

Effects of armed conflicts on treaties (continued) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the agenda item devoted to effects of armed conflicts on treaties.

2. Mr. PELLET congratulated the Special Rapporteur on his excellent, very painstaking report and said that he would confine his comments to points where he was uncertain whether he was entirely of one mind with the Special Rapporteur, or which seemed to require some clarification. He broadly agreed with the Special Rapporteur's positions on the whole, but the argument for excluding agreements to which international organizations were parties was still rather weak. One aspect of the subject could not be dismissed by pleading the need for further research—which would probably not be that discouraging—and, above all, it would not be good practice for the Commission always to accompany draft texts on

inter-State relations by draft texts on institutions or organizations. Previous experiences with the law of treaties, the law of responsibility or the law of immunities had been rather unsatisfactory, because when specific issues raised by international organizations were addressed separately from those posed by purely inter-State relations, it had proved very difficult to identify distinctive features and to examine them without reference to the provisions concerning inter-State relations. He therefore regretted the Special Rapporteur's position on that point and hoped that, at the next session, he would present an additional clause that would not prevent the adoption of the draft articles, but would include the requisite amendment of the wording of draft articles 1 and 2 to encompass international organizations. With that reservation, he approved of the proposed wording for draft article 1. Notwithstanding his intention to refer only to points of disagreement, he wished to express his admiration for the Special Rapporteur's endeavours to find an elegant definition of armed conflict that was suited to the purposes of the draft articles. He had been completely won over by those efforts, especially by paragraph 29 of the report because it included the vital subject of occupation, which was one of the real problems that made the subject worthwhile.

3. On the other hand, the current title of draft article 3 not only lacked elegance, as the Special Rapporteur had said, it was also vague and did not mean much. Draft article 3, which did not establish a presumption but noted a general principle, should be entitled "*Principe général d'extinction ou de suspension*" (General principle of termination or suspension), the expression "*principe général*" (general principle) having been used by the Special Rapporteur in paragraph 79. By definition, a general principle presupposed clarification, or exceptions which were in fact set forth in the subsequent articles. In draft article 4, a much discussed and extremely debatable provision, he still had his reservations about exclusively focusing subparagraph (a) on the intention of the parties, which was a pure fiction. Generally speaking, States did not contemplate the possibility of an armed conflict arising between them and he saw no point in claiming that they had any intention to do so. He was likewise doubtful that the general rule of interpretation taken from article 31 of the 1969 Vienna Convention should serve to determine the parties' intention. That would be using article 31 the wrong way round for, on the contrary, the parties' intention had to serve to interpret the treaty. The spirit of article 31 clearly required that the text take precedence over intention, as was demonstrated by the very subsidiary role that the Vienna Convention assigned to preparatory work, although it was the best means of ascertaining intention. A more minor consideration was that he was against having one convention refer to another when that could be avoided and even more so when that must be avoided, as was the case in that context. Above all, he still thought that the true indicium—which was almost a criterion—of susceptibility to termination, withdrawal or suspension of the operation of a treaty was not the fictional intention of the parties, but the nature, object and purpose of a treaty, or its subject matter. But since the latter was not covered by draft article 4, but by draft article 5, that raised the fundamental problem of the linkage between those two draft articles, a problem that had to be solved. Undoubtedly the simplest solution would be to merge them and to mention the object and subject

* Resumed from the 3040th meeting.

matter of the treaty as the primary indicium of whether a treaty could be suspended or denounced in the event of armed conflict. Moreover, in the introduction to draft article 5, the Special Rapporteur consciously or unconsciously tended towards that view, because he repeatedly stressed the need to read draft articles 4 and 5 together in order to decide whether a treaty could be suspended or denounced. He therefore proposed that those two draft articles should be merged into one, since that would mirror reality much better. On the other hand, he had no problem with subparagraph (b) of draft article 4; the Special Rapporteur was absolutely right in wishing to limit one draft article's reference to another, because the text in question was not a guide to practice, but a relatively short holistic set of provisions, each of which had to be read in the light of the others. In respect of draft article 5, he was distinctly less unenthusiastic than the Special Rapporteur about the proposal by Switzerland to add the paragraph reproduced in paragraph 61 of the report, provided that the phrase "as well as the Charter of the United Nations" was deleted from it and border treaties were included, to which the Special Rapporteur agreed, if he had understood him correctly. In other words, he very much liked the wording proposed in paragraph 62 of the report and he hoped that the Commission meeting in plenary session would expressly refer that provision to the Security Council, for the Drafting Committee would be far overstepping the limits of its competence if it were to make a decision on that point. It was, however, within the powers of the Drafting Committee to study in detail the list annexed to draft article 5, if it were retained. Even if the second paragraph that he had just mentioned were added to that provision, he wondered whether that non-exhaustive explanatory list should really be incorporated into the draft text and, on reflection, he shared the viewpoint of China and the Nordic States in that respect (see paragraph 64 of the report). First, the Special Rapporteur said that the current solution offered "a greater degree of normativity", which was correct and the reason why it would be better to put the list in the commentary (*ibid.*). Formally annexing the list to draft article 5 would make it more rigid and would detract from the flexibility and pragmatism so convincingly championed elsewhere by the Special Rapporteur. Secondly, speaking both generally and as a matter of principle, he was not a proponent of the hybrid solution which always consisted in including examples, or a non-exhaustive list, in a codification exercise. The latter had to remain general and non-subjective, especially as such texts were, by definition, accompanied by commentaries that made it possible to add details which should not figure in the draft article itself. Thirdly, it was clear that even if the list was only indicative, there was far from unanimous agreement on it. Some States proposed that it should be shortened, while others, sometimes the same ones, suggested that it should be lengthened. Since it was controversial, at times justifiably so, it would be preferable not to cast it in stone in the text, especially if there were plans to turn it into a "hard" law instrument, a separate convention or a protocol to the Vienna Conventions. He would therefore not add to the cacophony by commenting on the proposed list. It should become part of the commentary and, if necessary, he would then adopt a position on it.

4. With regard to draft article 6, he endorsed the proposal by Switzerland, to which reference was made in

paragraph 74, that this provision should have made it clear that it was without prejudice to the duty of belligerent parties to comply with the rules of international law to which they were subject independently of the treaty between them. Even if that went without saying, that clarification was sufficiently important to require inclusion in the draft articles. Since, however, it already appeared in draft article 9, he wondered about the linkage between the latter and the additional paragraph to draft article 6. While he fully agreed with the beautifully Cartesian structure proposed by the Special Rapporteur in paragraph 79 of the report, which directly influenced the positioning of current draft article 7 in the set of draft articles, he had difficulty in understanding the passions that draft article 8 seemed to have aroused. He was sceptical about the additional paragraph suggested by the Special Rapporteur in paragraph 87 and reproduced in paragraph 5 of draft article 8, as it seemed both complicated and self-evident. On the other hand, he agreed with the suggestion by China that was contained in paragraph 92 of the report. It would be logical and useful if notification under draft article 8 were to be sent to all the parties to the treaty, as provided for in the first paragraph.

5. He did not like the idea expressed in brackets in the title of draft article 11 that a State would lose an "option". That was not a term of art. In law, a right could be lost or won. Even if the text did not expressly say so, State parties could indeed assert such a right if the conditions set out in the draft article were met. Moreover, the Drafting Committee should thoroughly rework draft article 11 whose two subparagraphs should be merged harmoniously in order to avoid ambiguity. While he was in favour of merging former draft articles 12 and 18, he was unconvinced by the somewhat esoteric title of that provision and the wording of paragraph 2. In the title, so as not to confuse the lay reader, it would be preferable to speak more generally of the "*Reprise des relations conventionnelles après un conflit armé*" (Resumption of treaty relations subsequent to an armed conflict). In paragraph 2, he had great difficulty in understanding the reference to draft article 4 and why it differed in wording, and even spirit, from paragraph 1.

6. In conclusion, he recommended referral to the Drafting Committee of draft articles 1 to 18. The Special Rapporteur had already considerably improved a draft which had scarcely filled him with enthusiasm at first reading. He greatly hoped that the Commission would send to the Drafting Committee the text of additional draft paragraph 2 to draft article 5, as proposed by the Special Rapporteur in paragraphs 62 and 70 of the report.

7. Mr. CANDIOTI, noting that Mr. Pellet had proposed that draft article 3 be entitled "General principle of termination or suspension", drew attention to the fact that the text dealt more with the general principle of the continuity of treaties and asked for some clarification on that point.

8. Mr. DUGARD agreed with Mr. Pellet that it would be unwise to omit a reference to international organizations in draft article 1 for reasons of convenience or propriety. However, if international organizations were to be included, it would be necessary to explore the nature of an armed conflict to which an international organization

was party. That would require the Special Rapporteur to reconsider other provisions as well, such as the definition of armed conflict in draft article 2. The task would not therefore be easy, because it would probably entail a complete revision of all the draft articles. As for draft article 4, where the Special Rapporteur referred to the need to consider the intention of parties to the treaty, Mr. Pellet was right to say that the intention of parties was a fiction, but it was a fiction that was well known in both municipal and international law systems, because in some respects law was based upon fictions. He did not see why that fiction should not be included in draft article 4, subparagraph (a). Mr. Pellet's suggestion that the items listed in the annex to draft article 5 be placed in the commentary raised the question of whether it was appropriate to leave important issues of that kind to the commentary. The Commission seemingly had a tendency, when it wished to avoid dealing properly with issues, to relegate them to a commentary, but many people read only the text and not the commentary. The Commission should therefore decide whether it preferred the formulation proposed in paragraph 62 to an indicative list, but in either case its choice should be placed in the text itself rather than in the commentary.

9. Mr. CAFLISCH (Special Rapporteur) said that, as Mr. Dugard had rightly pointed out, inclusion of international organizations would entail reconsideration of all the draft articles and it was far from certain that the requisite support for that would be obtained.

10. He recognized that the title of draft article 3 was far from satisfactory and he therefore invited Commission members to follow Mr. Pellet's example by proposing alternatives. However, there must be no reference to a presumption, because that would be incorrect.

11. Mr. VÁZQUEZ-BERMÚDEZ said that draft article 3 did contain a general principle, as Mr. Pellet had stated—that of the stability and continuity of treaties. In 2007, he himself had proposed that the draft article should be entitled “Principle of continuity”.¹⁵⁶ Of course, that general principle admitted exceptions that had to be determined in the light of the indicia set forth in draft article 4, but in that case it would then be necessary to ascertain, not whether the treaty continued to apply, but whether, having regard to the principle of continuity, it was susceptible to termination or suspension. Draft article 5 established that the subject matter of some treaties meant that they remained unaffected by armed conflicts.

12. Sir Michael WOOD agreed that draft article 3 laid down a general principle, but the title must accurately reflect the gist of the provision, which was that the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. That general principle was not one of continuity.

13. Mr. HMOUD shared Mr. Dugard's opinion with regard to the need to retain the criterion of parties' intention in draft article 4. During the first reading, the Working Group had ultimately decided on the compromise of not employing the term “intention”, even if reference were made to it in articles 31 and 32 of the 1969 Vienna

Convention. However, a treaty had to be interpreted in the light of the parties' intention; if the latter was unclear, it had to be worked out from the content of the treaty. The previous Special Rapporteur had already made it clear that case law had held that, for the purposes of deciding on the termination or suspension of a treaty, the parties' intention always had to be examined in the light of the articles of the Vienna Convention.

14. Mr. PELLET, replying to Mr. Candioti, explained that he had meant to speak of a “general principle” of the absence of a rule entailing termination or suspension in the title of draft article 3. That would make it possible to delete the words “*ipso facto*”. The expression was used by the Special Rapporteur himself in paragraph 79 of the report. It would also be possible to speak of a “general principle of the continuity of the treaty” if some members preferred that formulation. The main thing was to make it clear that what was concerned was a general principle to which exceptions could be made. On the other hand, as the Special Rapporteur had said, no reference should be made to a presumption.

15. He still thought that the practice of drawing a distinction between international organizations and States had never produced very convincing results and that leaving them out would complicate work at a later stage. Having said that, the annex to draft article 5 remained the main problem. It had to be solved by the inclusion of rules in the article itself and not by means of a list, even an annexed one. Giving examples was tantamount to commenting and that was not the purpose of a legal text. Above all, the Commission should avoid drawing up another list like the one that had been contained in article 19, paragraph 3, of the draft articles on State responsibility adopted by the Commission on first reading.¹⁵⁷ That was why the solution proposed by Switzerland for draft article 5 seemed appropriate.

16. Lastly, turning to the criterion of the parties' intention, he emphasized that trying to ascertain that intention was not the same thing as trying to determine the purpose of the treaty. The former consisted in trying to reconstruct what the parties had had in mind, at a time when their relations were harmonious, should an armed conflict occur—in other words, a situation which they were not then contemplating. That was not therefore a feasible test. Moreover, article 31 of the 1969 Vienna Convention indicated that, when interpreting a treaty, it was necessary to begin by disregarding the parties' intention and to abide by the text. The Commission was therefore in the process of reinventing that article. Reference could certainly be made to it as one of several indicia, but that would probably complicate, rather than simplify matters. The real, reliable, objective indicia were those mentioned in draft article 5, in other words the subject matter, nature and object of the treaty which, of course, had to be interpreted.

The meeting rose at 11 a.m.

¹⁵⁶ *Yearbook ... 2007*, vol. I, 2927th meeting, p. 78, para. 29.

¹⁵⁷ *Yearbook ... 1976*, vol. II (Part Two), pp. 95 *et seq.*, especially pp. 120–121, paras. (65)–(71) of the commentary.

3053rd MEETING

Friday, 28 May 2010, at 11.05 a.m.

Chairperson: Ms. Hanqin XUE

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

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/620 and Add.1, sect. I, A/CN.4/L.775¹⁵⁸)

[Agenda item 12]

1. Mr. DUGARD (Chairperson of the Planning Group) said that at its second meeting, the Planning Group had considered the proposed strategic framework for the period 2012–2013.¹⁵⁹ It had recalled the decision taken by the Commission at its fifty-second session that unless significant reasons related to the organization of its work otherwise required, the length of the sessions during the initial years of each quinquennium should be of 10 weeks and, during the final years, of 12 weeks.¹⁶⁰ It had also recalled that in 2012–2013, following the usual pattern of its sessions, the Commission was to hold split sessions for a total duration of only 10 weeks per year, since those sessions would take place at the beginning of the next quinquennium. He recommended that the Commission should take note of the proposed strategic framework for the period 2012–2013.

It was so decided.

Effects of armed conflicts on treaties (continued) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. The CHAIRPERSON invited the Commission to continue its consideration of the first report on the effects of armed conflicts on treaties (A/CN.4/627 and Add.1), in particular draft articles 1 and 2.

3. Mr. HASSOUNA thanked the Special Rapporteur for his clear and comprehensive introduction of his first report on the effects of armed conflicts—a report built on the outstanding work of the late Sir Ian Brownlie. He commended the Special Rapporteur on his pragmatic approach of avoiding major changes or the reopening of debate on controversial doctrinal issues. One thing in

which the report was somewhat lacking, however, was State practice to substantiate its findings. In the commentaries to the draft articles, some reference to State practice, such as national legislation, and to relevant Security Council decisions would be useful.

4. He welcomed the Special Rapporteur's wise decision to rely mainly on the views of Member States on the draft articles as adopted on first reading. Having assessed and analysed those views, he had adjusted the original draft articles accordingly.

5. Turning to draft article 1, he agreed with the Special Rapporteur that the scope of the text should be broad enough to cover the effects of armed conflicts involving only one State—for example, internal conflicts. However, he disagreed that the draft articles should not cover the effects of armed conflict on treaties to which international organizations were parties. The involvement of an international organization in an armed conflict was no longer an academic proposition, it was a contemporary reality. Reviewing the whole set of draft articles from that perspective was not a practical option, but the matter needed to be addressed briefly in order to highlight the difference between States and international organizations. That could be done in the draft articles themselves, in an addendum or in the commentary.

6. With regard to draft article 2, the majority of members of the Commission and of the Sixth Committee had indicated that they were in favour of including situations of non-international conflict in the definition of armed conflict. Most contemporary conflicts were non-international or mixed in nature. Any definition of armed conflict referring to “war”, “declared war” or “state of war” would be obsolete nowadays, in view of the new legal order established under the Charter of the United Nations. He therefore supported the comprehensive definition used by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case.

7. The issue of occupation was of great importance and should be specifically referred to in the draft articles. The issues of Palestine and the Western Sahara had been raised during the discussion, yet the ICJ had taken a different approach in each of them. While it had dwelt on the consequences of occupation in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it had framed its advisory opinion concerning Western Sahara in a historical context. The two conflicts thus raised different legal issues.

8. As to whether it was necessary to define the “outbreak” of an armed conflict, it was often difficult to determine that moment owing to the subjective positions of the parties to international conflicts. The situation was even more difficult in the case of an internal conflict that tended to escalate over time. The term “incidence” as used in draft article 5 seemed therefore more appropriate than “outbreak”.

9. Mr. SABOIA commended the Special Rapporteur on his clear and well-thought-out report, which would greatly facilitate the Commission's task of considering the draft articles on second reading. The Working Group on

¹⁵⁸ Mimeographed; available on the Commission's website.

¹⁵⁹ A/65/6 (Prog. 6).

¹⁶⁰ *Yearbook ... 2000*, vol. II (Part Two), p. 132, para. 735.

effects of armed conflicts on treaties had made a significant contribution, working with the late Sir Ian Brownlie on a coherent and accurate text for first reading. The Special Rapporteur had carefully examined the comments and suggestions from States. He had adopted a rigorous but flexible approach so as to avoid a complete revision of important parts of the original draft articles while still being able to incorporate suggestions or indicate where comments would be covered in the commentaries. In general, he himself endorsed the draft articles.

10. The text of draft article 1 was basically the same as the one adopted by the Commission at its sixtieth session in 2008.¹⁶¹ The Special Rapporteur's arguments for not altering it seemed convincing, such as the argument that treaties to which international organizations were parties should not be included. Some members of the Commission had argued in favour of their inclusion, but as the Special Rapporteur had indicated, a revision of all the draft articles seemed unrealistic. Perhaps problems relating to fulfilment of obligations by a State member of an international organization as a consequence of armed conflict could be addressed in the light of the rules of the organization and the decisions of its political bodies, or by reference to the pertinent rules of the current draft. To his recollection, that matter had not been discussed in plenary at the Commission's sixtieth session or by the Working Group.

11. Regarding draft article 2, he endorsed the Special Rapporteur's view that the definition of the term "treaty" should not be extended to treaties concluded between States and international organizations and that the notion of non-international armed conflicts should be retained. As the Special Rapporteur had observed in paragraph 16 of his report, the definition of armed conflict in draft article 2, subparagraph (b), was adapted to the specific needs of the draft articles, but it would be detrimental to the unity of the law of nations to use a definition that was completely different from those used in other fields of international law. The Special Rapporteur had reformulated the subparagraph based on the definition given in the *Tadić* case, which was also applicable to non-international conflicts and was more contemporaneous than the definition in the Geneva Conventions for the protection of war victims. He himself supported the result, which was more readable than the previous version.

12. After reviewing the comments of States and other issues, the Special Rapporteur proposed amendments to draft article 3. In subparagraph (b), the addition of the phrase "in relation to the conflict" with reference to "a third State" required some clarification as to the link between a third State and a conflict to which it was not party. Perhaps the matter could be clarified in the commentary. As for the title, he endorsed the proposal that it should be reworded to read "General principle of absence of *ipso facto* termination or suspension", but would also be in favour of a more positive title, such as "General principle of continuity of treaties".

13. Draft article 4 read clearly and had been improved by the explicit reference to the intention of the parties to

the treaty. Concerning draft article 5, he endorsed the proposal to add a second paragraph referring to certain categories of treaties for which there was a strong assumption of continuity and to amend the indicative list contained in the annex accordingly.

14. He endorsed the idea of placing draft article 7 immediately after draft article 3. The Special Rapporteur had proposed important additions to draft article 8, many of them prompted by comments from States. The text now comprised five paragraphs making the regime applicable to treaty termination in the event of conflict subject to conditions that ensured compliance with the legal obligations contracted between States and including an explicit reference to seeking peaceful solutions to disputes.

15. Lastly, he expressed support for the suggestion to merge draft articles 12 and 18.

16. Mr. HMOUD commended the Special Rapporteur on his well-researched first report. The Special Rapporteur had taken into account the views of States and had advanced sound arguments in favour of certain positions, resulting in amendments to the draft articles, or had explained thoroughly why other positions had not been accepted. That was crucial given that international practice on the effects of armed conflict on treaties was often scarce or contradictory. It was to be hoped that the adoption of the draft articles on second reading would gain the acceptance required to provide an effective legal framework. He paid tribute to the late Sir Ian Brownlie for his work on the topic, which had culminated in the draft articles now before the Commission.

17. As far as the scope of the topic was concerned, the Commission had debated extensively the question of whether to include two elements: treaties to which international organizations were parties and non-international armed conflicts. There was no doubt that more and more treaties had international organizations as parties and that such treaties would be affected by an armed conflict involving one or more of their States parties. However, to include such treaties would be to broaden the scope of the topic and would lead the Commission to delve into more complicated and uncertain areas of law, owing to the nature of organizations and their rights and obligations under international law. It was therefore prudent not to include such treaties in the scope of the topic.

18. The situation was totally different with respect to non-international armed conflicts. Most conflicts today were non-international in nature, and the Commission would be excluding a broad spectrum of situations, thereby limiting the usefulness of the draft, if it omitted them. They should come under the scope of the topic, provided that the definition of armed conflicts as including non-international ones received wide acceptance. The definition considered on first reading had been meant to be an operational one, without prejudice to definitions of armed conflict under international humanitarian law. It contained some substantive elements, such as the references to state of war and armed operations, both of which were covered under international humanitarian law by the definition of armed conflict.

¹⁶¹ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, pp. 46–47.

19. Another substantive element mentioned in the definition was whether the nature and intensity of the conflict might affect the application of a given treaty. That element was meant to determine the scope of application of the articles without prejudging whether a certain conflict was an armed conflict under international humanitarian law. In the version proposed for consideration on second reading, the Special Rapporteur had opted to use the substantive definition adopted in the *Tadić* case by the International Tribunal for the Former Yugoslavia, over a combination of those in the Geneva Conventions for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). That raised two issues. First, what was the added value of including a substantive definition that was not to be found in international humanitarian law? Second, the text was being considered on second reading, and to suggest a very broad definition without the certainty that it would be well received could jeopardize its acceptance. The *Tadić* definition was an important and broad one—perhaps too broad. The Commission must resolve the two issues before definitively adopting a definition, bearing in mind that the term “armed operations” was sufficient to encompass non-international armed conflicts. Another point was that the *Tadić* definition mentioned resort to armed force between organized armed groups, but the scope of the draft covered armed conflict where at least one State was a party to the conflict, not conflicts between armed groups within a State. That part of the definition should therefore not be included.

20. Regarding draft article 3, he recalled that the Commission had decided against referring to the presumption of continuity of treaties during armed conflict for several reasons, including that it was neither found in international law nor realistic.¹⁶² The Special Rapporteur had quite rightly pursued that approach, retaining the previous version of draft article 3. It simply established the principle that the incidence of armed conflict did not in itself terminate or suspend treaties. In order to determine the nature and extent of the effect of an armed conflict on a treaty, a set of indicia and criteria, as listed in articles 4, 5 and 7, must be used.

21. With regard to the Special Rapporteur’s proposal to replace the word “necessarily” by “*ipso facto*”, he said that he preferred the words “in itself”. Additional clarification had been brought to draft article 3 by specifying the types of actors involved.

22. On draft article 4, he welcomed the addition of a key criterion, namely the intention of the parties to the treaty, which was to be determined or interpreted in accordance with articles 31 and 32 of the 1969 Vienna Convention. According to the draft article, if the negotiating parties had not manifested an intention in relation to the effect of an armed conflict on a treaty, the presumed intention—a valid approach in treaty interpretation recognized by jurisprudence and international judicial bodies—could be determined through the criteria in articles 31 and 32, including the object and purpose. Concerning the removal

from subparagraph (b) of the reference to the subject matter of the treaty, he said that despite the danger of overlap with draft article 5, his preference was to retain it. It did not add much to refer to the intensity and duration of the conflict, as that aspect was encompassed by the words “nature” and “extent”.

23. On draft article 5, he said the fact that categories of treaties were listed therein did not mean that they continued to apply in all circumstances. The presence of a treaty in the list was indicative, not conclusive. Other factors needed to be taken into account: for example, examination according to the indicia set out in draft article 4 was crucial. As noted by the Special Rapporteur, some provisions of a treaty in a certain category might not be susceptible to continuation, some treaties might fall into a number of categories and for others, only a small aspect of their subject matter might be covered in the list. Nevertheless, it seemed preferable for the indicative list to be included in the annex so that the draft articles would not be viewed as an abstract exercise.

24. Concerning draft article 5, paragraph 2, which cited specific categories of treaties that continued to be operational during an armed conflict, he said he was not in favour of that approach, for several reasons. First, it would create a category of treaties that were deemed to apply during an armed conflict, irrespective of other factors that might rule out a specific treaty in whole or in part. Second, it defeated the purpose of the article, which stipulated that an armed conflict *as such* did not affect the operation of certain treaties, because of their subject matter. Such treaties might still cease to operate as a result of the conflict, yet according to paragraph 2, certain categories of treaties had to remain in operation. Third, draft article 5 said too many things at once. It set out a rule for a certain category of treaties and another for another, and it had an annex of treaty categories to which one rule applied.

25. On draft article 7, he agreed with the Special Rapporteur that it was preferable to place it after draft article 3, but he thought the wording used in the first reading text had been simpler.

26. Draft article 8 was important in that it set out the obligation to give notification of the intention to terminate, suspend or withdraw from a treaty if the State was going to carry out that intention. He supported the idea of setting a time limit for objection, although incorporating a given numerical figure in the text would be artificial. The important point was that the objecting State should act in good faith and provide notification of its objection as early as possible. He also agreed that provisions on dispute settlement, insofar as they remained applicable during an armed conflict, should be activated in the event of a dispute over the continuation of application of a particular treaty. There was no real need for paragraph 5, but he did not see any harm in its inclusion.

27. Paragraph 4 was a different matter, however. While the premise that notice did not itself terminate or suspend the operation of a treaty was correct, the paragraph not only stated that fact but added an obligation to seek a solution through the means indicated in Article 33 of the

¹⁶² See *Yearbook ... 2005*, vol. II (Part Two), pp. 34–35, paras. 172–173.

Charter of the United Nations. It was important to clarify treaty relations when they were frozen as a result of an armed conflict, but the Commission should also be realistic, especially when the parties to the conflict were parties to the treaty. The same obligation should not be imposed in all situations. For example, if a State party to the treaty notified its ally, which was a party to the same treaty, of its intention to suspend, and the latter State objected, there should be a stronger obligation to seek a peaceful solution to the dispute than when the two parties to the treaty were adversaries in the conflict. A distinction should be made in terms of the content and extent of the obligation under paragraph 4, depending on the situation.

28. Mr. VÁZQUEZ-BERMÚDEZ, referring to draft article 1 and the proposal to replace the words “apply to” with “deal with”, pointed out that draft articles adopted on a number of other topics used such a phrase. He saw no reason to adopt a different approach in the current case: to do so would pose problems of interpretation in respect of the current draft articles and of other draft articles that had already been adopted. Regarding the issue of whether to include, in the scope of the draft, treaties to which international organizations were parties, he noted that the Commission had not decided to do so. However, if the Special Rapporteur thought it would be worthwhile to prepare a report on the implications of the inclusion and the changes that would be needed so that the draft articles could be considered at the next session, he himself would see it as a useful step, as long as it did not entail postponing the adoption of the draft articles beyond 2011.

29. The phrase “where at least one of these States is a party to the armed conflict” was clearer than the earlier wording. Taken together with draft article 2, it would include armed conflicts that were not international in nature and international armed conflicts which had an effect on a third State, one that was a party to the treaty but not a party to the conflict. He was in favour of including non-international armed conflicts in the scope of the draft, and it would appear that most States agreed. However, account must be taken of the comments made by China, Romania and Switzerland to the effect that, if the draft articles were to cover both international and internal conflicts, it would be necessary to consider whether the two categories of conflict had the same effects on treaties (para. 23 of the report). Internal armed conflicts should be included because otherwise the draft articles would be of limited use, but that did not mean that their effects on treaties were the same as the effects of armed conflicts involving two or more States that were also parties to a treaty. When only one State was a party to the armed conflict, the conflict should not in principle produce effects on the treaties to which that State was a party. He agreed with Mr. Gaja that if only one State was involved in an armed conflict, it was difficult to see how the armed conflict could affect the application of a treaty. That aspect should be resolved in the text of the draft articles, and not simply in the commentaries. When the Commission had discussed the inclusion of internal armed conflicts, Sir Ian Brownlie had warned of the potential damage to contractual rights and obligations and to treaty relations and of the danger that the relevant provision might be used as a pretext to justify the suspension or termination of treaties.

30. With regard to draft article 2, subparagraph (b), he supported the Special Rapporteur’s proposal to define the concept of armed conflict on the basis of the modern, simple and comprehensive wording used in the *Tadić* case.

31. Ms. JACOBSSON asked whether a treaty to which both an international organization and a number of States were parties, such as the United Nations Convention on the Law of the Sea, would be excluded from the scope of the draft articles. She requested the Special Rapporteur to confirm that the debate was not about cases in which an international organization was a party to the conflict, but in which it was a party to the treaty.

32. Mr. VASCIANNIE said, with respect to draft article 1, that the responses of States suggested that two substantive issues required particular review: whether the draft articles should be restricted to inter-State treaties in which more than one State party was involved in the armed conflict, and whether they should apply to the effects of armed conflicts on treaties to which international organizations were parties.

33. He endorsed the Special Rapporteur’s conclusion that the draft articles should apply to treaties in which one of the States was involved in the armed conflict. Clearly, there would be more armed conflicts in which one State party to a treaty would be involved than conflicts with more than one. Unless there was a good reason of principle to restrict the applicability of the draft articles, he supported the approach that would give them greater scope.

34. One argument for the two-State requirement pertained to article 73 of the 1969 Vienna Convention, which indicated that its provisions “shall not prejudice” any treaty question that might arise from the outbreak of hostilities between States. That meant that the Vienna Convention did not apply in that particular situation, but it had no bearing on the scope of draft article 1 of the current project. Perhaps one could squeeze out the following *a contrario* argument, however: article 73 did not prejudice situations when two States were involved in an armed conflict, but it did prejudice situations in which one State party to a treaty was involved in an armed conflict. That would mean, at most, that the 1969 Vienna Convention governed situations in which one State party to a treaty was involved in an armed conflict, the relevant rules being, for example, articles 61 and 62, but those rules did not expressly cover the situation of a State party involved in an armed conflict, and in any event they were not as specific as the Commission’s draft articles. Thus, even the *a contrario* argument did not rule out the possibility or desirability of developing specific rules concerning the situation of a single State party to a treaty which found itself involved in an armed conflict. In his view, the Special Rapporteur’s approach should be supported.

35. As to whether the scope should include treaties to which international organizations were parties, he also agreed with the Special Rapporteur, but with some reservation. He supported the approach of excluding treaties involving international organizations because the overall project to date had proceeded on the basis that only inter-State treaties would be within its scope. To change course

so far downstream would be to set the work back considerably, as noted by the Special Rapporteur in paragraph 8 of his report.

36. Moreover, considerations that might be applicable in respect of treaties involving international organizations could be different from those applicable to States alone. A State was usually in control of a fixed territory, and that had implications for its power and authority under treaties; an international organization was not likely to be in that situation very often, if at all. Furthermore, different international organizations might have divergent governance structures that determined issues concerning entry into armed conflict. Those issues might have a bearing on the way rules concerning the effects of armed conflicts on treaties were applied. Thus, the rules for States *inter se* might not be readily applied to treaties with international organizations. It would take time to examine the various possibilities that might arise from a change to incorporate treaties including international organizations.

37. On the other hand, as noted by China (see A/CN.4/622 and Add.1), international organizations were increasingly involved in international relations and entered into treaty commitments such as those pertaining to host State agreements that might well be affected by an armed conflict. In draft article 20 of the text on the responsibility of international organizations, the Commission had accepted the possibility that international organizations might act in self-defence and thus might be involved in an armed conflict, albeit in limited circumstances. That position should not be completely disregarded in the current project.

38. It also seemed a bit extreme to exclude major treaties from the scope of the draft articles simply because such treaties—which were predominantly between and among States—allowed an international organization to become a party. He had in mind the United Nations Convention on the Law of the Sea, which had been ratified by approximately 160 States and the European Union.

39. Perhaps the solution was to keep the scope limited to States alone, but for the commentary to suggest guidance as to possible ways in which the draft articles could be applied to treaties that included international organizations.

40. He had two minor comments on the drafting. First, in draft article 1, the Special Rapporteur had replaced the words “apply to” by “deal with”, in keeping with a proposal by the United Kingdom (para. 10 of the report). There was probably little in the change, but both Vienna Conventions on the law of treaties used the words “apply to” in their provision on scope. The change to “deal with” might be justified by the fact that the draft articles were addressing effects and not applying to treaties. The other small drafting point concerned the fact that generally one tended to speak of the effects of armed conflicts on treaties, as in the title of the report and of the topic, but draft article 1 switched to the effects of armed conflict “in respect of treaties”. The pedant might enquire whether “in respect of” should be used when a good old “on” might suffice.

41. The definition of the term “treaty” in draft article 2 (a) was acceptable—it mirrored the one in the 1969

Vienna Convention. For the definition of “armed conflict” in draft article 2 (b), the Special Rapporteur had invited views as to whether the approach taken in common article 2 of the Geneva Conventions for the protection of war victims and article 1, paragraph 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) was preferable to the definition in the *Tadić* case. He himself preferred the latter, for it captured the term concisely and was not much improved upon by the longer, slightly more ambiguous definition in the Geneva Conventions. If the *Tadić* definition was used, however, the phrase “or between such groups within a State” should be deleted. He also took it for granted that the term “armed conflict” applied to both international and non-international hostilities of a certain scale.

42. Concern had been expressed about the use of the term “protracted” in the *Tadić* definition, for it was inherently vague. Not every skirmish amounted to an armed conflict, but as the fighting was prolonged, it would begin to have an impact on treaty relations. However, the problem of grey areas would probably arise with most terms that might be used to distinguish minor outbreaks of violence from armed conflict on a significant scale. Hence, “protracted” seemed fine, *faute de mieux*.

43. As he read draft article 2, the existence of an armed conflict was what served as the threshold to bring the other rules into play—the trigger mechanism to which Mr. Murase had referred. For that reason, there must be a definition of armed conflict in the draft articles.

44. Mr. NOLTE said that the proposals made by the Special Rapporteur were a good mix between conservation of the groundwork that had been built under the able guidance of the late Sir Ian Brownlie and modifications resulting from comments by States and the Special Rapporteur’s own analysis. The Special Rapporteur’s work was a promising basis for successful completion of the project.

45. With regard to draft article 1, he agreed with the Special Rapporteur and a number of speakers that not only international but also non-international armed conflicts should be included in the scope of application. The practical importance of non-international armed conflicts today, the difficulty in distinguishing between international and non-international armed conflicts in some situations, and the Commission’s decision to include both in the text adopted on first reading, all spoke in favour of that approach, which also seemed to be accepted by a majority of States. It was true, however, that the effects on treaties would differ somewhat, depending on whether an international or a non-international armed conflict was involved.

46. He shared Mr. Gaja’s worries about whether it was appropriate for the scope of the draft to cover a treaty relationship between two States that were on the same side of an international armed conflict. A treaty would be affected by an international armed conflict for different reasons, depending on whether the parties stood on the same or opposing sides. Perhaps draft article 10 on separability of treaty provisions was the only possible answer, and it would be sufficient to include some criteria and references to practice in the commentary to draft articles 1 and 10.

47. With regard to draft article 2 (*b*), he supported the Special Rapporteur's proposal to adopt a definition of armed conflict based on the *Tadić* decision of the International Tribunal for the Former Yugoslavia. That definition had received wide support among States and had been incorporated verbatim in article 8, paragraph 2 (*f*), of the Rome Statute of the International Criminal Court. The definition that the Commission had adopted on first reading had been somewhat circular, mixing terminological and substantive elements, and a number of States had expressed reservations. There was thus good reason to take a fresh approach.

48. The first place to turn in search of a more substantive definition, of course, would be common article 2 of the Geneva Conventions for the protection of war victims and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). As the Special Rapporteur had pointed out, however, the definition in article 2 was not very clear, and the one in article 1 was too restrictive and not quite up to date. The *Tadić* decision was, in his view, the best definition available.

49. Draft article 2 (*b*) added clarity to the Commission's previous definition in that it focused on the actual use of armed force, explicitly mentioned armed groups and differentiated between the use of armed force in international as opposed to non-international armed conflicts, since in the latter, it needed to be "protracted", in other words, to cross a certain threshold of intensity. That requirement was important in that it would prevent the draft articles from being applied to short spasms of internal violence that should not be able to invite the reconsideration of international treaty relations.

50. The proposed definition also had the advantage of leaving room for interpretations and future developments in that difficult and sometimes contested field of law. He sympathized with Mr. Murase's desire for as much clarity as possible. It would indeed be a remarkable achievement if the Commission could resolve the age-old question of exactly when an armed conflict could be deemed to have broken out, but in the context of the current project, trying to do so might simply lead to fruitless argument. What was important was to give at least some indication of under which circumstances there was actually an armed conflict, regardless of when it started and who started it.

51. That brought up the question of whether it was appropriate to transpose a definition of armed conflict that had been formulated in the context of international criminal law into the context of treaty law. Such a transposition had been revealed as not always appropriate in the discussion of attribution of acts of non-State actors to States in *Military and Paramilitary Activities in and against Nicaragua*, the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and the *Tadić* case. In the present case, however, it was entirely appropriate to emphasize the unity of international law as the Special Rapporteur had done, although he might wish to explain in the commentary what the previous definition had said, namely

that armed conflict did not presuppose a declaration of war or any other declaration. As far as occupation was concerned, he shared the Special Rapporteur's view that it should be mentioned in the commentary, as it was an instance of armed conflict.

52. The question of international organizations needed to be handled carefully. It would require much research, yet the Commission's goal should remain to complete the project before the end of the current quinquennium. One problem was that some organizations played a role within certain treaties, like the European Union in respect of the United Nations Convention on the Law of the Sea. He agreed with Ms. Jacobsson that it seemed unlikely that the Special Rapporteur had intended to exclude the United Nations Convention on the Law of the Sea from the scope of the draft articles.

53. Mr. PERERA said he welcomed the pragmatic approach, described in paragraph 4 of the report, of not making drastic changes to the draft articles unless absolutely necessary. He was inclined to support the Special Rapporteur's position, detailed in paragraph 8, that the text should not cover the effects of armed conflicts on treaties to which international organizations were parties. As other speakers had suggested, it was perhaps an issue to be addressed in future, on the basis of emerging practice, and perhaps in the commentary, not in a draft article. The proposed replacement, in draft article 1, of the words "the States" by "these States" certainly added clarity to the text, which would nevertheless need further examination in the light of the outcome of discussion on draft article 2 (*b*).

54. The key issue to be addressed with respect to draft article 2—one which had given rise to a sharp divergence of views—was whether it should cover internal as well as international conflicts. He had doubts about that. While he was fully aware of the prevalence of internal conflicts in the contemporary world, he was concerned over the possible impact an internal conflict might have on treaties between States, specifically whether it might affect the ability of the affected State to fulfil its treaty obligations. The nature or extent of an internal conflict thus became a critical factor in determining the scope of the draft.

55. In paragraphs 18 to 21 of the report, the Special Rapporteur presented several options for the definition of armed conflict in draft article 2 (*b*). While the definition provided by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case deserved careful examination, it lacked a key element that had been in the draft article as adopted on first reading, namely the phrase "armed operations which by their nature or extent are likely to affect the application of treaties". That phrase was preferable to the reference to "protracted resort" in the current version of the text, as it set a threshold, thereby excluding situations like internal disturbances. The Drafting Committee should consider reinstating the earlier wording. The Commission was formulating a definition of armed conflict, not in a vacuum, but with reference to its effects on treaties. He endorsed Mr. Hmoud's warning that a very broad definition could prejudice the adoption of the draft articles by the Sixth Committee.

56. As to whether occupation should be mentioned in the definition of armed conflict, he agreed with the Special Rapporteur that it was something that occurred during armed conflicts—an approach that was consistent with that in the Geneva Conventions for the protection of war victims—and that the matter was best left to be dealt with in the commentary.

57. He had no objection to the referral of draft articles 1 and 2 to the Drafting Committee.

58. Mr. CAFLISCH (Special Rapporteur) said that the question of the effect of internal, as opposed to international, conflicts on treaties, to which several speakers had adverted, would be dealt with in the addendum to his report. He therefore requested the Commission to leave it to one side for the time being.

59. Mr. GALICKI said that the report before the Commission was a perfect continuation of the work done by the late Sir Ian Brownlie on the topic: it combined British accuracy with Swiss precision. The content and form of the draft articles adopted on first reading had been retained to a great extent, yet some corrections and improvements had been made on the basis of comments by States.

60. There was general agreement that the topic was situated in the realm of the law of treaties, the focal point of which was the 1969 Vienna Convention. Its article 73 provided the impetus for dealing with the effects of armed conflicts on treaties and should be kept in mind as general guidance when drafting the relevant rules, particularly with respect to the scope of the topic.

61. Turning to draft article 1, he noted that, after summing up the various opinions expressed by States, the Special Rapporteur had decided to retain the title, “Scope”, and most of the substance. Changing the words “apply to” to “deal with” seemed more of a cosmetic than a substantive amendment.

62. On the other hand, the modifications proposed by the Special Rapporteur for draft article 2 did have a more serious, albeit indirect, impact on the substance of the provision. In subparagraph (a), the Special Rapporteur had retained the traditional definition of the word “treaty” contained in the 1969 Vienna Convention, yet in subparagraph (b), his approach to the definition of “armed conflict” was completely different. In response to States’ opinions, the Special Rapporteur had departed from the text approved on first reading, which had been drawn from the resolution adopted in 1985 by the Institute of International Law,¹⁶³ and had based the latest version on the “more modern, simple and comprehensive wording” used in 1995 in the *Tadić* case.

63. The alternative definition certainly covered a wider range of situations than the one proposed on first reading, insofar as it encompassed internal and non-international armed conflicts. Since reference was made to “armed conflict” in draft article 1, the definition of that term had a bearing on the scope of application of all the draft articles. It was open to question, however, whether, for the

purpose of the current exercise, the Commission should apply the notion of “armed conflict” so widely, extending it to “protracted resort to armed force ... between organized armed groups ... within a State”. Although the phrase “protracted resort” had been borrowed from the judgement in the *Tadić* case, it sounded rather artificial, and the very idea of expanding the concept of “armed conflict” to take in purely internal conflicts was debatable, since the treaties that could be affected by such non-international conflicts were clearly of an international character.

64. That matter required very careful consideration and the possibility of limiting the definition of “armed conflicts” and the scope of the draft articles to international armed conflicts should be re-examined. Perhaps it might be advisable to follow article 73 of the 1969 Vienna Convention and to refer to the “outbreak of hostilities” instead of “armed conflict”, since that would also make it possible to define the term more precisely and in such a way as to include occupation.

65. On draft article 3, he thought that the presumption of the continuous operation of treaties was a welcome notion, consonant with the 1969 Vienna Convention and consistent with the principle of *pacta sunt servanda*. The title of the draft article had given rise to differing opinions, however. “Absence of *ipso facto* termination or suspension” was not a very elegant formulation and used a Latin expression, which United Nations usage tended to avoid. Perhaps the Latin term and the rigid principle of a presumption of continuity could be avoided by using the phrase “Absence of presumed termination or suspension”.

66. Mr. COMISSÁRIO AFONSO paid tribute to the memory of the late Sir Ian Brownlie, whose tragic death was a great loss to the Commission and to the cause of international law.

67. The Commission should retain the text of draft article 1 as adopted on first reading. Apart from the minor editorial correction suggested by the Special Rapporteur for the sake of clarity, no significant amendment appeared to be justified.

68. The draft articles should follow as closely as possible the provisions of the 1969 Vienna Convention, articles 1 (a) and 73 of which laid the foundations for the Commission’s work by clearly indicating that the core issue was treaty relations between States. That meant that the draft articles should not apply to the effects of armed conflicts on treaties to which international organizations were parties. His objection was not a matter of principle but of methodology. While he agreed with members who had held that the Commission should not perpetuate the approach of separating States and international organizations when engaging in the progressive development and codification of international law, at the current stage of the work on the topic it seemed inadvisable to change course, since that would call for radical amendment of the draft articles adopted on first reading. At some point in the future the Commission might, however, wish to draw up a text covering both States and international organizations. He therefore supported the wording of draft article 1 as proposed by the Special Rapporteur.

¹⁶³ See footnote 138 above.

69. As far as draft article 2 was concerned, he considered the definition contained in the resolution adopted in 1985 by the Institute of International Law, from which the definition in draft article 2 (b) as adopted on first reading had been drawn, to be the best model. It brought into play the crucial three concepts of the State, the treaty and armed conflict. The definition from the *Tadić* case did not include all those elements and was only a general one. However, paragraph (3) of the commentary to draft article 2 adopted on first reading stated that “[it] is not the intention to provide a definition of armed conflict for international law generally, which is difficult and beyond the scope of the topic”.¹⁶⁴ Paragraph (4) of that commentary explained in very clear terms that the definition applied to treaty relations between States and served to include within the scope of the draft articles the possible effect of an internal armed conflict on the treaty relations of a State involved in such a conflict with another State.¹⁶⁵ That was the correct approach to which the Commission should adhere. It was perfectly compatible with the 1969 Vienna Convention and would be useful for the legal interpretation of the whole text. He would therefore opt for a definition of armed conflict taken from the resolution of the Institute of International Law rather than for the definition deriving from the *Tadić* case. Different definitions for dissimilar purposes would not affect the unity of international law. The Commission should therefore retain the draft article 2 as adopted on first reading.

70. Mr. FOMBA endorsed the general methodological approach set out in paragraph 4 of the report.

71. For practical and legal reasons, no distinction should be drawn in draft article 1 between international and internal armed conflicts. An unduly simplistic or superficial conception of the scope *ratione personae* of treaties was to be avoided. To ignore treaties to which international organizations were parties would create a sizeable legal lacuna: they would have to be dealt with somehow, but the question was when and how. The Special Rapporteur was not in principle against doing so, despite the objective, convincing arguments he put forward regarding the impracticality of such an endeavour. There did not therefore seem to be any fundamental contradiction with Mr. Pellet’s position, especially as at the end of paragraph 8 of the report the Special Rapporteur did not rule out the possibility of adopting a new series of rules to be based on article 74, paragraph 1, of the 1986 Vienna Convention. He was in favour of replacing “apply to” with “deal with” and of employing the phrase “where at least one of these States is a party to the armed conflict”, since it was clearer.

72. In draft article 2, the Special Rapporteur was rightly reluctant to combine texts from the Geneva Conventions for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), in order to define the scope *ratione materiae* of the notion of “armed conflict”. The proposal to opt for wording similar to that used in the *Tadić* case was justified. The proposal to retain paragraph (6) of the commentary to draft article 2, which expressly stated

that the definition included the occupation of territory, even in the absence of armed resistance, was acceptable.

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

[Agenda item 1]

73. Mr. CANDIOTI (Chairperson of the Working Group on shared natural resources) said that the Working Group would be composed of the following members: Mr. Caflisch, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie (Rapporteur), *ex officio*, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue.

74. Other members of the Commission were welcome to join the Working Group.

The meeting rose at 1.05 p.m.

3054th MEETING

Tuesday, 1 June 2010, at 10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Murase, 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.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue the debate on the first report on the effects of armed conflicts on treaties, beginning with draft articles 1 and 2.

2. Mr. WISNUMURTI said that he appreciated the Special Rapporteur’s decision not to make drastic changes to the draft articles adopted on first reading, not to focus excessively on doctrinal considerations and to take into account the comments of Member States. Draft article 1 had raised a number of important issues that were carefully analysed in paragraphs 6 to 12 of the report. It was clear that the inclusion of international organizations in the scope of the topic would require substantial adjustments

¹⁶⁴ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, p. 47.

¹⁶⁵ *Ibid.*

* Resumed from the 3051st meeting.

that would delay the Commission's work. Furthermore, as aptly stated by the Special Rapporteur, "international organizations as such do not wage war". In the context of the topic on responsibility of international organizations, the Commission had already had a similar debate on their right to self-defence. The inclusion of international organizations in the topic under consideration would thus have wider implications.

3. With regard to draft article 1, he recognized that treaties applied provisionally on the basis of article 25 of the 1969 Vienna Convention should continue to be applied provisionally at the time of the outbreak of armed conflict, but he did not think it necessary to include a reference to article 25. It was also proposed to say that the draft articles "deal with" rather than "apply to", as in the earlier version, but that was not specific enough, especially since draft article 1 concerned the scope "of application". It would be preferable to retain the original formulation and to give it a more legalistic drafting with the words "shall apply".

4. On draft article 2, subparagraph (b), the Commission should maintain the decision taken in 2008¹⁶⁶ and adopt a definition of armed conflict that was broad enough to cover non-international conflicts without it being expressly enunciated.

5. The Special Rapporteur had sought to improve the definition of armed conflict by drawing on various legal instruments and decisions, in particular the wording used by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadić* case. However, unlike the Tribunal, the draft article referred to situations in which "there has been" a resort to armed force, which excluded any protracted situation, even though the word "protracted" was used in the second part of the sentence. The word "protracted" had given rise to a mini-debate, but did not pose a problem as such, apart from giving the impression that it placed the resort to armed force by governmental authorities and by organized armed groups on an equal footing, which was inappropriate. On the other hand, a reference was needed, either in the commentary or in a "without prejudice" clause, to international humanitarian law as a *lex specialis*.

6. Sir Michael WOOD also welcomed the Special Rapporteur's pragmatic approach. He agreed with the Special Rapporteur—and the majority of Member States seemed to have done so as well—about not extending the draft articles to treaties to which international organizations were parties. Mr. Dugard had already explained the complexities that such an undertaking would entail.

7. He did so with some regret, since such treaties played an ever increasing role in international relations, to which the extensive treaty relations of the European Union testified. Moreover, he was not sure that international organizations could not become parties to armed conflicts: that did not necessarily follow from article 74, paragraph 1, of the 1986 Vienna Convention, nor was it the case in practice. However, he was not in favour either of the Commission taking up the matter subsequently and separately.

The best solution would be to add an article 2 *bis*, based on article 3, subparagraph (b), of the 1969 Vienna Convention, which would read:

"The fact that the present draft articles do not apply to international agreements concluded between States and other subjects of international law, or to international agreements not in written form, shall not affect the application to them of any of the rules set forth in the present draft articles to which they would be subject under international law independently of the draft articles."

8. The suggestion by the United Kingdom to replace "applies" by "deals with" was not an improvement. Despite the somewhat different context, the Commission should not depart from the language of the Vienna Conventions.

9. The Special Rapporteur's suggestion for the definition of armed conflict to follow the *Tadić* formula was entirely satisfactory, because it was based on a careful and convincing analysis. If the Commission decided to include non-international armed conflicts in the draft articles, it would have to consider the differences between the effect in practice, if any, of such armed conflicts on treaties and the effect of armed conflicts between States. Draft article 2 made clear that the definition of armed conflict was solely "[f]or the purposes of the present draft articles", but that definition might nevertheless influence the interpretation of treaties that were not directly affected by the outbreak of armed conflict because of their subject matter. Some treaties contained derogation clauses applicable in time of armed conflict which might be interpreted in the light of the definition of armed conflict decided by the Commission. Thus, a broad definition of armed conflict might inform the understanding of what constituted a permissible derogation under article 4 of the International Covenant on Civil and Political Rights or the interpretation of necessity clauses in bilateral or multilateral investment treaties.

10. In his view, draft articles 1 and 2 could be referred to the Drafting Committee.

11. Mr. CANDIOTI recalled that the topic under consideration was particularly complex due to existing uncertainties in sources and doctrine, the great diversity of State practice and new forms of armed conflict. It had thus been necessary for the Commission to undertake to clarify and codify law in the area. The starting point of its work was clearly the law of treaties as defined in the 1969 Vienna Convention, which regulated treaty relations both in time of peace and in time of war. The objective was not to establish a list of all possible effects of an armed conflict on treaties. In general, a conflict did not produce any significant effect on treaties: practice showed that treaties usually remained in force in most conflicts. Thus, the draft articles focused on the exceptional effects that a conflict could have on a treaty, namely its termination or the suspension of its operation. The case in which a conflict could have the effect of modifying a treaty without necessarily resulting in its termination or suspension had not yet been envisaged, and it should perhaps be mentioned, for example in draft article 6, paragraph 2, adopted on first reading.¹⁶⁷

¹⁶⁶ Yearbook ... 2008, vol. II (Part Two), chap. V, sect. C.2, p. 47.

¹⁶⁷ Ibid., p. 59.

12. The form of the draft articles still had to be decided: draft convention, protocol to the Vienna Convention or declaration of principles, for example. To start with a declaration enunciating rules would leave open the possibility of subsequently elaborating a binding instrument. Moreover, a preamble should be added which recalled the objectives of the draft articles and their underlying principles. There was no need for the Commission to do so at the current stage, but it should bear those tasks in mind; that would help in deciding what direction to take. One of the chief objectives of its work was respect for the prohibition on the use of force as regulated by the Charter of the United Nations and the principle of *pacta sunt servanda*. The draft articles should therefore exclude the possibility for a State that illegally made use of force to take advantage of the armed conflict to stop complying with its treaty obligations. At the same time, the draft articles must aim to protect and promote the stability and continuity of legal treaty relations in the event of armed conflict. As to its final structure, it could be based on paragraph (5) of the commentary to article 1 approved on first reading¹⁶⁸ and could be made up of a preamble followed by an introductory chapter covering scope and definitions (arts. 1 and 2), a chapter on general provisions, a chapter containing special or ancillary provisions and a chapter on “without prejudice” clauses.

13. With regard to the text of the draft articles, he approved the definition of scope in draft article 1. However, if the exclusion of the effects of armed conflicts on treaties to which international organizations were parties was maintained, it would need to be explained in the commentary. It was useful to make it clear that the scope of the draft articles extended to all armed conflicts involving at least one State party to the treaty. Article 2, paragraph 1, did not call for any remarks, because it reproduced the classic definition of a treaty from the Vienna Conventions. Paragraph 2 defined the term “armed conflict”, thereby clarifying the scope. It was appropriate to draw on the definition used in the *Tadić* case, but the commentary should explain why the report made the subtle and perhaps unnecessary distinction between “*recours à la force armée*” for armed conflicts between States and “*recours aux armes*” for conflicts between governmental authorities and organized armed groups (“resort to armed force” in both cases in the English version). He also wondered why such resort was termed “protracted” only in the latter case. On a final point, he said that other definitions might need to be added later. For the moment, draft articles 1 and 2 could be referred to the Drafting Committee.

14. Ms. JACOBSSON welcomed the Special Rapporteur’s decision, despite the avalanche of comments triggered by draft article 1, not to modify the text adopted in 2008, apart from a minor change of form. However, as noted in paragraph 8 of the report, the difficult question remained of whether or not the draft article should also “cover the effects of armed conflicts on treaties to which international organizations are parties”. She had already expressed her opposition in 2007 to the introduction of a provision along those lines, because it would complicate and delay the work of the Commission. Moreover, the issue could be addressed separately at a later stage. In

any event, the question as posed was not clear. Was the point to exclude from the scope all treaties of which one party was an international organization, such as the case of the United Nations Convention on the Law of the Sea and treaties to which the European Union was a party? It would be unfortunate if such treaties were excluded simply because the Commission had not considered the question. It was true that an instrument such as the United Nations Convention on the Law of the Sea might also be excluded under article 5 and its annex, but that was far from clear and had to be clarified before the draft articles were referred to the Drafting Committee.

15. Nor was it clear that “armed conflict” in draft article 2 needed to be defined. There were far too many definitions of “armed conflict” and similar concepts, which were always given for the sole purposes of a particular convention, but she failed to see how they made the application of the article in question more predictable and lucid. However, if a definition was needed, she agreed with the Special Rapporteur that, as pointed out in paragraph 16 of the report, it would be detrimental to the unity of the law of nations to apply a given definition in the field of international humanitarian law and a completely different definition in the field of treaty law. The question was: would the *Tadić* definition do the trick? Admittedly, the tendency in the development of international law had been to do away with the distinction between international and non-international armed conflicts, a circumstance which the *Tadić* definition took into account, the aim being to ensure that the law of war, and in particular international humanitarian law, applied as equally as possible to all situations of armed conflict, irrespective of its nature. That was a development in the context of *jus in bello*, but the question was whether it would have as positive an effect in the case of treaty law. Would the positive effect be welcome if emphasis was placed on the rule (the continuity of the treaty) rather than on the exception (its termination or suspension)? She hoped so, but was not entirely convinced. However, given the Commission’s view that international law was and should remain a unified whole, that was the only possible approach. Thus, irrespective of whether a definition of armed conflict was included, the draft articles on the topic must cover all conflicts, both international and non-international.

16. Another question was whether occupations and blockades should be included. As she saw it, the latter had no place in the draft articles. A blockade had no separate standing from other measures taken during an armed conflict and thus was subject to the law of war. The question might arise as to whether it could be used in an internal armed conflict, but that was a different issue. On the other hand, the question of occupation was regulated under a special branch of the law of war. If the Commission explicitly included occupation in the scope of the draft articles, it would avoid a discussion of whether occupation constituted an armed conflict as defined in draft article 2 (b). If the Commission decided to maintain the definition in its current wording, it should expressly include occupation. Clearly, there were other situations of occupation in addition to those cited. An occupation could be temporary or geographically limited. The same area could be occupied successively by different parties to the conflict. However, since the Commission was considering

¹⁶⁸ *Ibid.*, p. 47.

a situation in which the occupation prevented the parties to the conflict from fulfilling their treaty obligations, it would be preferable to say so clearly.

17. She was in favour of referring draft article 1 to the Drafting Committee. Although reluctant to have a definition of armed conflict in draft article 2, she would bow to the majority view on that question.

18. The CHAIRPERSON, speaking as a member of the Commission, expressed appreciation to the Special Rapporteur for his careful analysis and consideration of each of the issues raised by Member States. An examination of State practice was also important in order to ascertain the legal effects of armed conflicts on treaties. The main aspects of the topic were treaty relations between States and the operation of treaties in time of armed conflict. The starting point was the assumption that treaty relations should not necessarily be considered to cease in the event of an armed conflict. At the same time, it must be borne in mind that situations of armed conflict were very complex and varied. Any sweeping conclusions drawn on the basis of that assumption might not be able to stand the test of State practice. For that reason, the Special Rapporteur had rightly stressed that many of the elements contained in the draft articles must be examined in the particular circumstances of each case. Thus, the general approach followed on first reading should be retained.

19. The question of whether to include international organizations in the scope of the draft articles had become a matter of convenience rather than principle, because of the delay that such a review would entail. The fact that the Special Rapporteur was working on the basis of article 73 of the 1969 Vienna Convention but not article 74, paragraph 1, of the 1986 Vienna Convention should not prevent the Commission from taking up the issue. Technically, however, she understood that substantial research should be conducted before any decision on that point was taken.

20. With regard to draft article 2 (Use of terms), the change made to subparagraph (b) was substantial. The Special Rapporteur had proposed the definition used by the International Tribunal for the Former Yugoslavia in the *Tadić* case, but the point needed to be examined more closely. If the object and purpose of the draft articles was to maintain the stability and continuity of treaty relations as well as the treaty rights and obligations of States in the event of an armed conflict, the scope of the articles should perhaps be directly linked to treaties. That meant that the draft articles did not deal with any situation in which there was resort to armed force if such resort did not reach a level, intensity and duration likely to affect the application of treaties between States. However, the current revised wording of subparagraph (b) could be interpreted as including any type of use of armed force, regardless of whether such use had an impact on the application of treaties.

21. The concern expressed by a number of members about the word "protracted" was justified, since it was not clear how long an event had to last for it to be so qualified, and it opened the door to subjective decisions. The original wording ("a state of war or a conflict which

involve armed operations") provided a higher threshold than the phrases "resort to armed force" and "protracted resort to armed force". Adding the condition that such a situation was likely to affect the application of treaties between States would make the scope of the draft articles more manageable: only when an armed conflict, either international or internal, was likely to have effects on the application of treaties would those effects be considered in the context of the law of treaties. Otherwise, such legal issues did not arise under the draft articles.

22. Another point in favour of a more strict scope was that nowadays, when the traditional distinction between the law of peace and the law of war had become blurred, general international law, in the current case the 1969 Vienna Convention, should remain applicable to the extent possible, because it was in the general interest of States to maintain the normal legal order as far as necessary.

23. The view taken by some States, as set out in paragraph 6 of the report, that the scope of the draft articles should be restricted to treaties between two or more States of which more than one was a party to the armed conflict, was interesting, but it was tenable only to the extent that armed conflicts to be excluded from the scope were unlikely to produce effects on the application of treaties between States parties. Otherwise, the States concerned, whether engaged in the armed conflict or affected by it, should be able to invoke the draft articles to determine their treaty relations.

24. Therefore, the question was not whether the current draft articles should only cover international armed conflicts or both international and internal armed conflicts, but what kind of armed conflicts should be considered to be excluded from the scope of the Vienna Conventions under article 73 and what should be left to the domain of domestic law. The revised version of draft article 2 (b) could be given a very broad interpretation to include domestic demonstrations and riots that eventually resulted in the resort to armed force or became protracted and continuous events. Under such circumstances, if the government concerned claimed that there was a supervening impossibility to perform some of its treaty obligations, the matter should come under articles 61 and 62 of the Vienna Convention rather than the draft articles. She did not see any contradiction if such situations were excluded from the scope.

25. She could fully understand the policy consideration of the International Tribunal for the Former Yugoslavia in adopting a broad definition of armed conflicts, the aim having been to prevent impunity. If the Commission adopted a stricter definition, it did not mean that more treaties would not operate in time of armed conflicts. On the contrary, treaties would continue to be governed by the 1969 Vienna Convention. She did not agree with the Special Rapporteur that the adoption of a definition of armed conflict different from the one applied by international criminal courts would be detrimental to the unity of the law of nations. First of all, it was questionable whether the Tribunal's definition of armed conflict in the *Tadić* case could be regarded as authoritative, replacing existing definitions, and as such applicable across the board in all areas of international law. The scope of application of treaties relating to international humanitarian law and

those applicable in time of armed conflict was determined by the terms of each convention as intended by the States parties and therefore should not and could not be changed by the scope of the draft articles. Moreover, a high threshold for the scope would mean that States would have less ground to terminate, suspend or withdraw from their treaty obligations, because the draft articles were meant to address exceptional circumstances resulting from the outbreak of armed conflict. Only when certain conditions were met would general treaty law not be applied in the event of armed conflict. Finally, the scope as proposed by the Special Rapporteur differed from that in the *Tadić* case because it excluded armed conflicts between organized armed groups. Those were different definitions that should not unduly affect the unity of the law.

26. Having carefully studied the report, she was inclined to retain the general elements of the original text of the first two draft articles. In her view, the proposed versions should be referred to the Drafting Committee.

27. Mr. MURASE said that, like a number of other members of the Commission and the Sixth Committee, he was troubled by the negative formulation of draft article 3. The article was supposed to be the “core provision” of the entire draft articles, and thus the Commission should adopt a more positive or affirmative formulation, stating first the general rule and then the exceptions to it. As currently worded, draft article 3 suggested that the Commission had not reached a consensus on first reading on a crucial point, namely which general rule had been adopted.

28. There were three schools of thought about the effects of armed conflicts on treaties: the theory of treaty termination by war; the theory of treaty continuity; and the theory of differentiation, or compromise theory. The Commission must take a clear position and decide where it stood. He agreed with Mr. Vázquez-Bermúdez and others that the Commission should clearly state in draft article 3 that the continuity of treaties was a general rule and then provide for the exceptions.

29. In his view, draft article 4 (*b*) was a tautology as long as it stipulated that resort was to be had to “the effect of the armed conflict on the treaty” to ascertain the effects of an armed conflict. It was appropriate to refer to the nature, extent, intensity and duration of the armed conflict, but the reference to the effect of the armed conflict on the treaty should be deleted (para. 51 of the report). The proper criterion seemed to be the compatibility of a treaty with a given armed conflict rather than the effect of the armed conflict on the treaty. Moreover, the elements for ascertaining such compatibility were the subjective elements of the intentions of the parties to the treaty and the objective elements of the nature, extent, intensity and duration of the conflict. He hoped that the commentary would elaborate on those four criteria.

30. Although he agreed with the Special Rapporteur’s approach of enunciating a general provision in draft article 5, he had reservations about having an annexed list of indicative categories of treaties. He doubted whether it would be possible to make such a simple, unqualified and sweeping enumeration of, say, commercial treaties,

human rights treaties or environmental treaties (para. 70). He would confine his remarks to subparagraph (*f*) of the annex, namely treaties relating to the protection of the environment. From the point of view of *jus in bello*, as long as the environmental damage was below the equilibrium point of military necessity and humanitarian considerations, they were permissible as “collateral damage”. It should be noted that article 35 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) prohibited the use of weapons and methods of warfare only if they caused “widespread, long-term and severe damage to the natural environment”. It was not inconceivable that a party might justifiably consider it necessary to suspend a bilateral or regional environmental treaty during an armed conflict. He did not believe that a treaty had to continue to be operative just because its subject matter was the environment. The same could be said with regard to other categories of treaties enumerated in the annex, and appropriate qualifications were needed. The list was problematic in its current form and should be moved to the commentary.

31. With regard to draft article 6 (Conclusion of treaties during armed conflict) (para. 76), he was in favour of deleting the phrase “in accordance with the 1969 Vienna Convention on the Law of Treaties” in paragraph 1. Under common article 6 of the Geneva Conventions for the protection of war victims, on special agreements, it was considered that States were not bound by the formal requirements of treaty-making, such as signature and ratification, since in wartime it was often necessary to take immediate steps under circumstances that made it impracticable to observe the formalities normally required. An armistice agreement was another typical example of a treaty concluded during an armed conflict. Armistice agreements were sometimes concluded *ultra vires* in violation of the internal law of a State, especially martial law. Article 46, paragraph 1, of the Vienna Convention provided that *ultra vires* treaties might lead to invalidity. During an armed conflict, however, ensuring international public order might prevail over the consideration of securing the internal order of a State. For those reasons, he suggested that the words “in accordance with the 1969 Vienna Convention on the Law of Treaties” be replaced by “in accordance with the rules of international humanitarian law”.

32. On draft article 6, paragraph 2, he understood why the Special Rapporteur was of the view that the word “lawful” was necessary. States were required to observe the rules of international humanitarian law and not to derogate from them by *inter se* agreements. However, the word “lawful” was inappropriate, and he proposed replacing it by the phrase “unless otherwise prohibited by international humanitarian law”.

33. Another question concerned the effect of a material breach on armistice agreements. In that connection, article 40 of the Regulations concerning the Laws and Customs of War on Land provided that “[a]ny serious violation by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately”. However, according to Professor Richard Baxter, that could no longer be said to be a rule of general application, because under the

Charter of the United Nations the parties to an agreement for suspension of hostilities could not lawfully denounce it or resume hostilities.¹⁶⁹ Already in 1951, the Security Council had stated in resolution 95 (1951) of 1 September 1951 on the Suez Canal conflict that “since the armistice regime ... is of a permanent character, neither party can reasonably assert that it is actively a belligerent”.

34. In that context, he drew attention to the current controversy between the Democratic People’s Republic of Korea and the Republic of Korea, both of which claimed violations of the 1953 Armistice Agreement.¹⁷⁰ There was nothing wrong with the two sides basing their claims on the Armistice Agreement; on the other hand, it would be quite another matter if one or the other party referred to its suspension or termination.

35. On 27 May 2009, the Democratic People’s Republic of Korea had announced that it would no longer be bound by the 1953 Armistice Agreement, since the Republic of Korea, in violation of the Agreement, had joined the Proliferation Security Initiative¹⁷¹ created by the United States of America and that since the Agreement had lost its binding force, the Korean Peninsula was bound to immediately return to a state of war *from a legal point of view*. The example demonstrated that the question of the suspension of an armistice agreement was a real and serious problem in international relations. He hoped that in the commentary to draft article 6, the Commission would make it clear that armistice agreements could no longer be so easily abrogated.

36. Mr. VÁZQUEZ-BERMÚDEZ said that, as recalled by the Special Rapporteur, draft article 3 was derived from article 2 of the 1985 resolution of the Institute of International Law, which read: “The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.”¹⁷²

37. Following comments made by States as to the use in the previous version of the draft article of the word “necessarily”, the Special Rapporteur had reverted to “*ipso facto*”, as in the 1985 resolution. Personally he did not think it appropriate to use Latin expressions, since everyone did not necessarily attribute the same meaning to a given expression. He therefore suggested replacing “*ipso facto*” by words that reflected its meaning and scope and proposed the following formulation for draft article 3: “The outbreak of an armed conflict does not, in itself, terminate or suspend the operation of treaties.”

¹⁶⁹ R. R. Baxter, “Armistices and other forms of suspension of hostilities”, *Collected Courses of the Hague Academy of International Law*, vol. 149 (1976), pp. 357–390, at p. 382.

¹⁷⁰ “Letter dated 7 August 1953 from the Acting United States Representative to the United Nations, addressed to the Secretary-General, transmitting a special report of the Unified Command on the armistice in Korea in accordance with the Security Council resolution of 7 July 1950 (S/1588)”, p. 20 [reproduced in English in *Treaties Governing Land Warfare*, Department of the Army, Washington, D.C., pamphlet 27-1 (7 December 1956), appendix B, p. 197].

¹⁷¹ See the media note by the United States Department of State of 26 May 2009, “ROK endorses proliferation security initiative principles”, available from www.state.gov/r/pa/prs/ps/2009/05/123842.htm.

¹⁷² Institute of International Law, *Yearbook*, vol. 61 (1986), Part II (see footnote 138 above), p. 200.

38. As stressed many times by the first Special Rapporteur, Sir Ian Brownlie, draft article 3 was of primary importance, because it posed the fundamental principle of stability and legal continuity by reaffirming the continued operation of treaties in the event of an armed conflict. Although not absolute, the principle responded to the need to safeguard the stability of treaty relations and legal certainty, and it clearly constituted a corollary of the principle of *pacta sunt servanda*. In paragraph 33 of the report, the current Special Rapporteur noted that “[n]o State has objected to the basic idea that the outbreak of an armed conflict involving one or more States parties to a treaty does not, in itself, entail termination or suspension”. Many States, including Austria, China, the Islamic Republic of Iran, Poland, Portugal and Switzerland, had expressly indicated that in their view, draft article 3 enunciated a principle.

39. It should also be recalled that the reasoning of the Institute of International Law and the text of the article on which draft article 3 had been based referred to treaties in operation between two States that were both parties to an armed conflict. The version adopted on first reading and the one proposed by the Special Rapporteur at the current session also envisaged the case, evoked in subparagraph (b), of treaties in operation as “[b]etween a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict”.

40. For all those reasons, draft article 3 must be regarded as enunciating the principle of the continuity of the operation of treaties. He reiterated his proposal that this principle be stated in the title of the draft article.

41. With regard to draft article 4 (Indicia of susceptibility to termination, withdrawal or suspension of treaties) (para. 51 of the report), subparagraph (a) of which read: “the intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties”, he noted that the intention of the parties had been reintroduced, as originally proposed by the previous Special Rapporteur but rejected by the majority of members.¹⁷³

42. He pointed out in that connection that, in the event of an armed conflict, it was extremely difficult to ascertain the intention of the States parties to the treaty, because they usually did not contemplate the eventuality of an armed conflict and the effects that it might have on the treaty. Consequently, in virtually every case an obstinate search would only lead to a fictive, non-existent intention. In other words, it was not appropriate to apply a legal fiction in the vast majority of cases.

43. He was in favour of maintaining draft article 4 (a), which referred to the application of articles 31 and 32 of the Vienna Convention, without an express mention of intention, in order to ascertain the susceptibility of a treaty to termination, suspension or withdrawal. With regard to subparagraph (b), he agreed with the Special Rapporteur’s proposal to add the criteria of the intensity and duration of the armed conflict, which earlier had been implicit in the words “the nature and extent of the armed conflict”. The

¹⁷³ See *Yearbook ... 2007*, vol. II (Part Two), p. 73, paras. 293–295.

meaning of the phrase “the effect of the armed conflict on the treaty” should be made clear.

44. Draft article 5 (Operation of treaties on the basis of implication from their subject matter) provided for the case of treaties whose subject matter implied that they continued in operation, in whole or in part, during an armed conflict. The criterion of the subject matter or content had been chosen by the Commission on the basis of a proposal that he had made to add the “nature” of the treaty to intention as a fundamental element for ascertaining whether the treaty continued in operation. When he had made that proposal, he had drawn on the Vienna Convention itself, in which the concept of the “nature of the treaty” was used specifically in the context of the termination or suspension of treaties. He had argued in favour of applying the two criteria set out in article 56, paragraph 1, of the Convention, which read:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

45. It should be noted, however, that in the case of denunciation or withdrawal, intention in fact played a more important role, but the point of the provision above all was that the Vienna Convention acknowledged that, even in those cases, it was not always possible to determine the intention of the parties, and it was necessary to refer to another criterion, namely the nature of the treaty.

46. If the Drafting Committee decided to reconsider draft articles 4 and 5, it must maintain the fundamental criterion of the subject matter or nature of the treaty. If draft article 5 was retained, he would not object to the deletion, as the Special Rapporteur had done, of the reference to the subject matter of the treaty in draft article 4 (b). In the draft approved on first reading, the words “subject matter of the treaty” had been used instead of “nature of the treaty”, chiefly in order to be able to employ the latter wording in draft article 4 to designate one of the indicia for ascertaining the nature and extent of the armed conflict. However, if that was the sole argument, reference could very well be made to the character and extent of the armed conflict, on the one hand, and the nature of the treaty, on the other: in international humanitarian law it was a question of armed conflicts of a non-international “character”, and not “nature”.

47. If the Commission decided to keep draft articles 4 and 5 separate, the logical order of application of a specific case should begin with draft article 3, concerning the general principle of continuity, followed by the current draft article 5, on treaties regarding which the principle of continuity was self-evident because of their nature or subject matter and, lastly, if it proved necessary, the current draft article 4, which contained indicia or indicators for ascertaining exceptions to the general principle.

48. He agreed with the Special Rapporteur that the indicative list should be kept in the annex and that broad

reference should be made to it in the commentary to the current draft article 5. The list might be enlarged through suggestions from States, for example by including treaties that reflected rules of *jus cogens* and treaties concerning international criminal justice. On the other hand, the suggestion by Switzerland to give absolute protection to treaties relating to the protection of the human person would pose problems; instead, the second paragraph that it had proposed for addition to draft article 5 should be incorporated into the annex (para. 61 of the report) as a first category of treaties, following the reference to *jus cogens*, and the commentary should focus on the continuity of human rights treaties. Switzerland had cited other criteria that should be taken into account when modifying the indicative list (A/CN.4/622). Draft article 5 and the indicative list made reference to categories of treaties whose subject matter clearly implied that they continued to be in operation in whole or in part during an armed conflict. Those categories were well identified in both practice and doctrine.

49. Draft article 7, as amended by the Special Rapporteur, was acceptable, although there was no need for the word “express”. Draft article 7 could be placed after draft article 5.

50. He disagreed with the Special Rapporteur’s assertion in response to a Member State that “no treaty is untouchable” (para. 80 of the report). One need only think of the Charter of the United Nations and treaties relating to international humanitarian law.

51. On draft article 8 relating to notification of termination, withdrawal or suspension, the time limit set for objecting to notification should not be less than six months, since a State engaged in armed conflict had many other priorities.

52. Lastly, with regard to the point raised in paragraph 92 of the report, a State that was not a party to the conflict but was a party to the treaty should not have the possibility of terminating or withdrawing from the treaty or suspending its operation: it was difficult to see how a treaty relation could be affected by an armed conflict to which a State was not a party.

53. Mr. NOLTE said that draft article 3 appropriately expressed an important general principle which, as the Special Rapporteur noted, was not a presumption. It provided a necessary clarification before draft article 4 set out the most important fundamental rule: the continuation of treaty obligations depended on more specific circumstances than the outbreak of an armed conflict, namely the nature of the specific treaty, its obligations and its relation to the armed conflict. He agreed with those speakers who would like the term *ipso facto* to be replaced by a non-Latin wording.

54. With regard to draft article 4, he endorsed the remarks of those who were in favour of deleting the reference to the intention of the parties. The Commission had already examined the question and had decided not to include intention, not because it was very often a fiction, but because neither in article 31 nor anywhere else in the 1969 Vienna Convention was there any reference to it,

and because the omission had been a conscious decision on the part of the drafters of the Convention, namely the Commission and the States parties.

55. He agreed with the other explanations provided by the Special Rapporteur on draft article 4, with the exception of his comments in paragraph 48 of the report on why he had not specifically mentioned the subject matter of the treaty as one of the *indicia*. He did not think that draft article 5, which dealt with certain aspects of subject matter, was a sufficient reason not to include a general reference to it in draft article 4. As the title of draft article 5 indicated, the subject matter served to establish the circumstances in which a treaty continued in operation, but draft article 4 enunciated a more general norm, namely that the subject matter of the treaty, together with other factors, determined whether it could be concluded that the treaty continued in operation. Although the Special Rapporteur indicated in paragraph 48 that draft article 4 (*b*), mentioned the subject matter, it should be spelled out more clearly. The Drafting Committee should also replace “*indicia*” by “*factors*” or some other more common word.

56. He supported the compromise solution proposed by the Special Rapporteur to annex an indicative list of different categories of treaties. To place the list in the commentary would render the draft articles less useful in practice, whereas to incorporate them into the body of the text might soon make the articles seem outdated.

57. Draft article 5 should include a reference to draft article 10 (Separability of treaty provisions), which embodied a particularly important principle in the current context. It would be preferable to be somewhat more cautious and to include in the indicative list only those categories of treaties for which it could be said with a degree of certainty that practice or their nature and subject matter clearly implied that they continued in operation in the event of an armed conflict. The longer the list, the more important it became to emphasize the separability of the respective treaties. As to the sequence of the various categories of treaties, it should follow, if possible, a visible logic. One possibility would be to arrange the treaties depending on the extent to which they reflected choices of international public policy, such as treaties on international humanitarian law and borders, or the degree to which they protected private interests.

58. He agreed with the Special Rapporteur that treaties concerning international criminal jurisdiction should be added to the indicative list. However, the Drafting Committee should ensure that only those international criminal jurisdictions were included which actually applied international criminal law. After all, it could not be ruled out that international criminal courts or tribunals would be established in the future whose task would be to apply national criminal law as well.

59. On draft article 6, he wondered whether the unclear reference to “*lawful*” agreements could not be replaced by a reference to article 41 of the 1969 Vienna Convention. He agreed with the Special Rapporteur concerning the substance of draft article 7 and had no objection to it being moved forward so that it followed draft article 3.

60. The notification procedure set out in draft article 8 was convincing (apart, of course, from the reference to “*intention*”), and the requirement to raise an objection within six months would constitute an appropriate progressive development of international law, for the reasons given by the Special Rapporteur.

61. As to draft article 11, he shared the concern of those who thought that, given that it was virtually impossible to foresee how an armed conflict would unfold, and in particular in view of the innumerable possibilities for escalation, it was difficult to accept such a strict rule on the loss of the right (or possibility) to terminate or suspend a treaty. A reference—*mutatis mutandis*—to article 62 of the 1969 Vienna Convention would take due account of any fundamental change of circumstances.

62. He thanked the Special Rapporteur for his clear and balanced report and hoped that the draft articles introduced therein could be referred to the Drafting Committee.

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

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL
RAPporteur (*concluded*)**

63. The CHAIRPERSON invited the Special Rapporteur to continue the debate on the draft guidelines contained in the sixteenth report on reservations to treaties (A/CN.4/626 and Add.1).

64. Mr. PELLET (Special Rapporteur) thanked the members of the Commission who had made the effort to read and comment on his sixteenth report, which touched on very technical questions, and he was pleased that they had been in favour of referring the 20 draft guidelines contained therein to the Drafting Committee.

65. A number of interesting remarks had been made during the debate, the first one by speakers who, proceeding on the principle that it was not logical to begin with the situation of newly independent States, were of the view that the order of the draft guidelines in the fifth part of the Guide to Practice should be changed. He wished to make his position clear on that point, which did not appear to go beyond one of form and could therefore be dealt with by the Drafting Committee.

66. He was opposed, for a number of reasons, to any half-measures that would lead solely to a “*relegation*” of the case of newly independent States to a later place in the Guide to Practice. Before explaining why, it would be useful to recall that he had proposed, without being contradicted, to follow the definitions and rules of the 1978 Vienna Convention, not only when they were directly relevant for the Guide to Practice, which was only the case for article 20, but also to embody in law the situations envisaged by the Convention. Moreover, it was

* Resumed from the 3051st meeting.

** Resumed from the 3050th meeting.

important to dispel any uncertainty about the definition of newly independent States, because some members of the Commission did not appear to have a clear idea of what was meant by the term, which was in fact deceptive. Article 2 (f), of the 1978 Convention gave the following definition:

“newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

In contemporary diplomatic language, a dependent territory was a colony. He fully agreed with a number of members of the Commission that States formed from a secession or dissolution of States were new States, but it happened that, rightly or wrongly, the drafters of the 1978 Convention had reserved a separate fate for decolonized States, which he urged the Commission, as the vigilant guardian of the Vienna Conventions on the Law of Treaties, not to reconsider, because if it did, it would call into question the entire 1978 Convention.

67. For the same reason, he was hostile to the proposal of some speakers to “declassify” newly independent States. First, the predecessors of the Commission in that area had wanted to reserve a special fate for newly independent States as they were defined, namely States emerging from decolonization, and he did not see why the Commission should make any changes in that regard. Secondly, the Commission was on relatively solid ground there, whereas, as rightly noted, the practice followed for separation—or for secession—of States (notably in the Balkans) and for a merging—or unification—of States fluctuated, as did the vocabulary employed. Rules concerning succession in respect of treaties for newly independent States were reasonably stable and constituted a starting point for articulating other situations that must be taken into account by comparison—either *a fortiori* or *a contrario*. Thirdly, he was not convinced by the argument that colonization was a thing of the past and that therefore the fate of treaties in relation to decolonized States was of no interest. To start with, he was not certain that there was no place for decolonization in the future. Moreover, decolonization had been such a vast, important movement which had affected so many States—and continued to make its effects felt—that he had difficulty seeing how it could be relegated to the past. Since they continued to produce effects, the rules applicable to reservations and to objections to and acceptances of reservations in the case of decolonized States continued to be of great practical importance.

68. That all appeared to argue in favour of maintaining the order of the draft guidelines in the sixteenth report (and not the numbering, which should be changed). However, if there really was strong opposition to doing so, he would then prefer a more radical reorganization, which seemed to have been suggested by some of the participants in the debate and which would entail regrouping the rules applicable to reservations and related declarations (objections and acceptances) no longer as a function of the type of succession concerned (decolonization, separation or unification of States), but as a function of the mechanism of succession, which would amount to distinguishing automatic successions from accepted successions, in other words, successions resulting from a voluntary acceptance

of the treaty concluded by the predecessor State, a mechanism that had an impact on the regime of reservations and related declarations.

69. That proposal was more attractive than a simple “downgrading” of decolonization, but it had two drawbacks. First, even if it was feasible, the Drafting Committee, by proceeding in that manner, would take on an enormous amount of work, and it was not certain that the issue was so important. Secondly, the Commission would be calling into question, albeit indirectly, the framework chosen by the 1978 Vienna Convention, and he feared that it might be opening a Pandora’s box, making it possible to challenge the cases individually defined by the Convention. As several members had stressed, by redrafting the fifth and final part of the Guide to Practice, the Commission was not contesting the rules of State succession, but was merely applying them to reservations to treaties. Like the majority of speakers, he was not in any case convinced by the “invention” of a new category of succession resulting from the exercise of the right to self-determination, which he did not think was so special—the creation of a State in the context of decolonization was a classic way for a colonial people to exercise that right, of which separation and unification were other manifestations.

70. In sum, he was not opposed to the Drafting Committee trying to reconstruct the draft guidelines along the lines that he had indicated, provided it did not call into question the wording of the 1978 Vienna Convention and the distinctions which it made between various forms of State succession. On the other hand, he saw no point in simply moving draft guideline 5.1: all that could be done would be to reverse the order of draft guideline 5.2 and draft guideline 5.1, although no one had provided a convincing explanation of why that was necessary. In particular, he failed to see why the case of newly independent States should be regarded as an “exception”. Decolonization was not an exception, and notwithstanding the importance of the cases of secession and dissolution of States in Europe and in the former Soviet Union in the past two decades, most States today had emerged from decolonization and thus were newly independent States within the meaning of the 1978 Vienna Convention. Consequently, the fate of treaties concluded by a predecessor State and any reservations made to those treaties continued to be a contemporary problem.

71. Some speakers had also argued that draft guideline 5.1 did not address the important question as to when the reservation formulated by a newly independent State became an established reservation, in other words, able to produce effects. As he saw it, however, draft guideline 5.8, which stipulated that a reservation formulated by a successor State, when notifying its status as a contracting State, became operative as from the date of such notification, and draft guideline 5.1, paragraph 3, which referred to the relevant rules set out in draft guideline 5.8, sufficed to reply to the question. For the sake of convenience, however, some speakers had wanted the idea included in draft guideline 5.1 itself. He had no objection to that suggestion.

72. His remarks on draft guideline 5.1 also applied to draft guideline 5.2, concerning which he agreed with the comment that the conditions of permissibility should be mentioned in paragraph 3.

73. Some speakers had maintained that draft guideline 5.3 was too “dogmatic” or “rigid”, although he did not see why. It merely specified that when a treaty had not been in force with regard to one of the predecessor States, it did not come into force in the case of a unification of States, and any reservations disappeared with it. That seemed logical rather than dogmatic, but he would have no objection if the Drafting Committee wished to soften the text and could find a good way to do it.

74. Some speakers had also contended that draft guideline 5.3 would not address a more serious problem: what if the reservations of the predecessor States of a newly unified State formed by a merging of States were not compatible? The answer to that question was to be found in draft guideline 5.2, paragraph 1, which admittedly did not resolve the problem completely, because it might happen that, although it could put an end to such a situation, a successor State formed in such a manner might not denounce any of the incompatible reservations. However, even if it seemed somewhat convoluted, draft guideline 5.6 made it possible to avoid that situation by indicating that incompatible reservations applied only to the territories to which they applied prior to unification.

75. A number of speakers found draft guideline 5.4 difficult to understand. He did not see why, but if that was the opinion of the Drafting Committee, he would be happy to simplify it. That was all the more true for draft guideline 5.5, which really was complicated, but difficult to simplify, because it addressed a number of diverse and complex cases.

76. Those few members who had referred to the square brackets in draft guidelines 5.7 and 5.8 had called for their removal and were in favour of maintaining the phrase within. He was inclined to agree, but the Drafting Committee should perhaps decide the question on the basis of comparable draft guidelines. He saw no reason why the Drafting Committee should not merge draft guidelines 5.7 and 5.8, as suggested, if it was considered to be a more elegant solution. The proposal by one speaker that the wording in article 20, paragraph 4 (b), of the Vienna Conventions be used in draft guideline 5.8 was of a more fundamental nature. He had no objection, but disagreed with the comment that draft guidelines 5.8 and 5.9 implied that successor States were always required to indicate their status. What the draft guidelines said was that when succession was not automatic, the successor States must make either a global notification of succession or a notification of succession to the treaty. That was essential, but it was not an “invention” of the draft guidelines: it was part of the logic of optional succession.

77. He was pleased that no one had had anything to say about draft guideline 5.9, which was along the lines of guideline 2.3.1, and he would be very reluctant to reconsider it.

78. Draft guideline 5.10 had given rise to more comments, in particular by speakers calling for the deletion of the final phrase “at the time of the succession”, which he had himself proposed during his introduction. If the Drafting Committee endorsed the proposal, it would have to examine whether the deletion was consistent with the

definition of reservations and with the current wording of draft guideline 5.9.

79. He was pleased that draft guidelines 5.11, 5.12, 5.14 and 5.16 had not given rise to any remarks or objections. He accepted the criticism of draft guideline 5.13, which one speaker had deemed too strict because the proposed wording did not take into account the situation in which, in the case of unification, the maintaining of a reservation and its extension to the new State as a whole might make the reservation unacceptable for a State which until then had refrained from objecting to it. He did not know whether that exceptional case deserved the addition of a new paragraph or whether it should be covered in the commentary, but a new paragraph would probably be welcome.

80. Concerning draft guideline 5.15, it had been asked whether cases did not occur in which the successor State might object to a reservation of the predecessor State; in his opinion, they did not, but the example cited by the speaker who had raised the point, in which the predecessor State made a reservation concerning a territory which had become the territory of the successor State, did not seem to arise from the point of view of the objection to the reservation, but rather from the perspective of the territorial scope of the reservation.

81. As to the four draft guidelines proposed in the addendum to the sixteenth report (which should all be renumbered, because the first one should have been 5.17 and not 5.16), only draft guideline 5.19 had given rise to constructive criticism. One of the few members to speak on the question had argued that it was necessary to go further and to pose the principle that, in the absence of a repudiation by the successor State, the latter should be deemed to have accepted the views of its predecessor. As a long mini-debate had taken place on another point following that comment, which no one had contested and with which he had agreed, he supposed that it should be assumed that the Drafting Committee could include an explanation to that effect in draft guideline 5.19.

82. He had three final remarks. First, several members had stressed that, even more than elsewhere, it should be understood that the guidelines in the fifth and last part of the Guide to Practice were merely indications to be followed in the absence of an intention to the contrary expressed by the States concerned. It was true that, as their name indicated, the guidelines did not by any means claim to be binding, and even less to be legally obligatory for the States concerned. However, that was true for the entire Guide to Practice, which he did not want to strengthen *a contrario* by placing too much emphasis on the fact that the fifth part was not obligatory.

83. Secondly, it had been pointed out, and rightly so, that practice was uncertain. That meant that the part of the Guide under consideration was more *de lege ferenda* than a reflection of *lex lata*. However, for reasons analogous to those just evoked concerning the binding nature of the Guide to Practice in general, that uncertainty should be reflected in the commentary, because it was not a reason for the wording of the Guide to be particularly “soft”. On the contrary: as practice was uncertain, it was preferable

to give it relatively stable points of reference, from which States could depart if they wished to do so.

84. Thirdly, as he had said several times and as some members had also stressed, in his enthusiasm for the admirable memorandum by the Secretariat on reservations to treaties in the context of succession of States,¹⁷⁴ he had lost sight of the numbering of the guidelines in the Guide to Practice, which the numbering of the draft guidelines in the sixteenth report did not follow. He would address that matter without delay if, as he hoped, the Commission agreed to refer the 20 draft guidelines contained in his sixteenth report to the Drafting Committee.

85. The CHAIRPERSON said that if she heard no objection, she would take it that the members of the Commission wished to approve the Special Rapporteur's proposal to refer draft guidelines 5.1 to 5.20 to the Drafting Committee.

It was so decided.

Protection of persons in the event of disasters¹⁷⁵
(A/CN.4/620 and Add.1, sect. D, A/CN.4/629,¹⁷⁶
A/CN.4/L.776¹⁷⁷)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

86. The CHAIRPERSON invited the Special Rapporteur, Mr. Valencia-Ospina, to introduce his third report on the protection of persons in the event of disasters (A/CN.4/629).

87. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, although his third report had recently been distributed in the six official languages, the original version, which he had drafted in English in order to facilitate its consideration, had been made available to the members of the Commission much earlier, which should make it possible to conclude the debate in plenary by the last meeting of the first part of the current session.

88. The third report built on the second report, which the Commission had considered at its 2009 session.¹⁷⁸ The second report contained the first three draft articles, which had set the scope and purpose of the draft articles, defined the word “disaster” and its relationship to armed conflicts, and established the principle of cooperation. It had been referred to the Drafting Committee, which had increased the number of draft articles to five, its reasoning being that the three draft articles that he had proposed concerned five distinct concepts which should be addressed separately. Thus, the five draft articles, approved by

consensus in the Drafting Committee,¹⁷⁹ dealt with scope, purpose, definition of disaster, relationship with international humanitarian law and duty to cooperate. The Drafting Committee had stated in a footnote that draft article 5 had been adopted on the understanding that a provision on the primary responsibility of the affected State would be included in the set of draft articles in the future. Accordingly, he had elaborated draft article 8, to which he would return in greater detail later. On 30 July 2009, the penultimate day on which the Commission had been able to consider in plenary questions of substance other than the adoption of its annual report to the General Assembly, the Drafting Committee had submitted the five draft articles to the Commission, which had approved them.¹⁸⁰ As there had not been enough time to draft and approve the corresponding commentary, and in keeping with the Commission's practice, the text of the five draft articles had not been included in the report of the Commission on the work of its sixty-first session. The accompanying commentary would be submitted to the Commission for approval in August 2010, when the report of the Commission on the work of its current session was adopted. As indicated in the summaries of the discussions in the Commission and the Sixth Committee in 2009, the members of the Commission and delegations had considered that the third report should focus on two aspects of particular importance for the study of the topic: the responsibility of the affected State to protect persons within its jurisdiction—which, given the fundamental principles of sovereignty and non-intervention, was a primary responsibility; and a group of principles more directly concerning the human person, in particular the humanitarian principles of neutrality, impartiality and humanity. He had taken those two aspects into consideration in his third report, within the limits of the number of pages allowed for United Nations documents. On the first point, he intended to propose in his fourth report, which he would submit in 2011, one or more provisions specifying the scope and limits of the exercise by a State of its primary responsibility as affected State. As to the second point, given that the Commission had entitled his topic “Protection of persons”, he had deemed it appropriate to add to the three humanitarian principles of neutrality, impartiality and humanity covered in draft article 6 the principle of dignity as a guiding principle from which the human rights recognized by international law stemmed, and to devote a separate provision to it, namely draft article 7. Thus, as indicated in paragraph 71 of the second report,¹⁸¹ the third report would aim to identify “the principles that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection”.

89. Draft article 6 (Humanitarian principles in disaster response), proposed in paragraph 50 of the third report, provided that “[r]esponse to disaster shall take place in accordance with the principles of humanity, neutrality and impartiality”. As indicated in paragraph 11 of the memorandum by the Secretariat,¹⁸² distributed at the sixtieth session

¹⁷⁴ See footnote 12 above.

¹⁷⁵ At its sixty-first session in 2009, the Commission discussed draft articles 1 to 3, introduced by the Special Rapporteur in his second report (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615), and took note of draft articles 1 to 5 provisionally adopted by the Drafting Committee (*Yearbook ... 2009*, vol. II (Part Two), chap. VII, *passim* and especially paras. 159–183).

¹⁷⁶ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

¹⁷⁷ Mimeographed. See the 3067th meeting below, paras. 40–65.

¹⁷⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

¹⁷⁹ A/CN.4/L.758 (mimeographed; available on the Commission's website).

¹⁸⁰ *Yearbook ... 2009*, vol. I, 3029th meeting, pp. 200–204, paras. 1–33.

¹⁸¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

¹⁸² A/CN.4/590 and Add.1–3 (mimeographed; available on the Commission's website, documents of the sixtieth session).

in 2008, the three principles covered by draft article 6 were “core principles regularly recognized as foundational to humanitarian assistance efforts generally”. That had been highlighted, for example, during the recent panel discussion in the Economic and Social Council on guiding principles of humanitarian assistance¹⁸³ and in paragraph 23 of the report of the Secretary-General for 2009 entitled “Strengthening of the coordination of emergency humanitarian assistance of the United Nations”, according to which “[r]espect for and adherence to the humanitarian principles of humanity, neutrality, impartiality and independence are ... critical to ensuring the distinction of humanitarian action from other activities, thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need”.¹⁸⁴ Those three humanitarian principles, which had originally been found in international humanitarian law and in the Fundamental Principles of the Red Cross,¹⁸⁵ were widely used and accepted in a number of international instruments in the context of response to disasters. He referred in that connection to General Assembly resolutions 43/131 of 8 December 1988, 45/100 of 14 December 1990 and 46/182 of 19 December 1991, the above-mentioned report of the Secretary-General and the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief.¹⁸⁶ Those three principles were essential to maintaining the legitimacy and effectiveness of disaster response. The principle of neutrality, which presupposed abstention, referred to the apolitical nature of disaster response. It implied that assisting actors refrained from committing acts likely to constitute interference in the internal affairs of the affected State. Respect for that principle facilitated an adequate and effective response to disasters, as set out in draft article 2, and ensured that the needs of the persons affected by the disaster were the primary concern of the assisting actors. Neutrality was not impracticable. As such, the principle of neutrality provided the operational mechanism to implement the ideal of humanity.

90. With regard to the principle of impartiality, any response to disasters should be aimed at meeting the needs and fully respecting the rights of those affected and giving priority to the most urgent cases of distress. The principle of impartiality was commonly understood as encompassing three distinct principles: non-discrimination, proportionality and impartiality proper. The modern origins of the principle of non-discrimination could be found in international humanitarian law; it had developed not only there but also in international human rights law,

where it had become a fundamental provision. It was also enshrined in Article 1, paragraph 3, and Article 55, subparagraph (c), of the Charter of the United Nations. The prohibited grounds for discrimination had been expanded and made non-exhaustive. They included non-discrimination based on ethnic origin, sex, nationality, political opinions, race or religion. In certain circumstances, however, preferential treatment could, and indeed must, be granted to certain groups of victims, depending on their special needs. In accordance with the principle of proportionality, the response must be consistent with the degree of suffering and urgency: it could and must be proportionate to the needs in scope and in duration, as set out in article II, paragraph 3, of the resolution adopted in Bruges in 2003 by the Institute of International Law, which referred to the “needs of the most vulnerable groups”.¹⁸⁷ Lastly, the principle of impartiality in the narrow sense was the obligation not to make a subjective distinction between individuals in need, necessity being the criterion which must guide relief operations.

91. The third and last principle was the principle of humanity, to which Jean Pictet, drawing on resolution VIII of the twentieth International Conference of the Red Cross, held in Vienna in 1965, had attributed three constituent elements: to prevent and alleviate suffering, to protect life and health and to assure respect for the human being.¹⁸⁸ Humanity was a long-standing principle in international law. In its contemporary sense, it was the cornerstone of the protection of persons in international law, as it was at the point of intersection between international humanitarian law and international human rights law. It was, in that sense, a necessary source of inspiration in the development of mechanisms for the protection of persons in the event of disasters. The principle of humanity had gained its central status in international law with the development of international humanitarian law. It had been expressed in the Declaration of Saint Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime¹⁸⁹ and in the Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land, from which the Martens clause had been derived, and it was also one of the founding principles of the ICRC and the IFRC. Moreover, many international conventions, to which paragraph 39 of the report referred, set forth the obligation of humane treatment. The principle of humane treatment as established in common article 3 of the Geneva Conventions for the protection of war victims was an expression of general values that guided the international legal system as a whole both in war and in peace. That had been confirmed by the ICJ and other international tribunals in their jurisprudence, as explained in paragraphs 40 to 46 of the report. As the principle of humanity was an established principle of international law that was applicable both in time of armed conflict and in time of peace, and was a pivotal principle of international humanitarian law that explained the application of human rights law in an armed conflict, it had its place in the draft

¹⁸³ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 3 (A/64/3/Rev.1)*, p. 42, paras. 4–7. See in particular the analytical summary of the panel discussion on “Respecting and implementing guiding principles of humanitarian assistance at the operational level: assisting the affected populations”, held on 20 July 2009 (E/2009/SR.29), *passim*.

¹⁸⁴ A/64/84–E/2009/87, para. 23.

¹⁸⁵ *International Review of the Red Cross*, No. 56 (November 1965), Resolution VIII, adopted by the twentieth International Conference of the Red Cross, entitled “Proclamation of the Fundamental Principles of the Red Cross”, pp. 573–574.

¹⁸⁶ *Ibid.*, No. 310 (January–February 1996), The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, adopted by the twenty-sixth International Conference of the Red Cross and Red Crescent (Geneva, 3–7 December 1995), annex VI, p. 119. Available from www.ifrc.org/Global/Publications/disasters/code-of-conduct/code-english.pdf.

¹⁸⁷ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 269.

¹⁸⁸ J. Pictet, *The Fundamental Principles of the Red Cross: Commentary*, Geneva, Henry Dunant Institute, 1979, p. 21.

¹⁸⁹ *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., Geneva, ICRC and the International Federation of Red Cross and Red Crescent Societies (IFRC), p. 331.

articles, because cases of disaster contained the same elements that served as the basis of its application in other contexts. It must be borne in mind that it was the widespread loss of life, great human suffering and distress, and large-scale material and environmental damage that justified the Commission's inclusion of the topic in its programme of work, as he had noted in his preliminary report to the Commission in 2008¹⁹⁰ and in the definition of the word "disaster" in draft article 3, which had been provisionally adopted by the Drafting Committee.¹⁹¹ Although, under draft article 4, the draft articles did not apply to situations in which the rules of international humanitarian law were applicable, the principle of humanity required that persons must be protected in the event of disasters, as proclaimed by the General Assembly in a number of resolutions, in particular resolution 46/182.

92. Draft article 7 (Human dignity), which was set out in paragraph 62 of the third report, specified that "[f]or the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect human dignity". At the current session, the members of the Commission had had the opportunity to continue the debate, both in plenary and in the Drafting Committee, on the concept of human dignity, which had begun at the previous session in connection with draft article 10 (Obligation to respect the dignity of persons being expelled) during consideration of the topic on expulsion of aliens.¹⁹² In the light of that debate, at the current session, the Special Rapporteur on expulsion of aliens had proposed a revised draft article 9,¹⁹³ which had been referred to the Drafting Committee following consideration in plenary.¹⁹⁴ He hoped that he was not divulging a secret when he said that the Drafting Committee had approved a restructured draft article relating to the obligation to respect the human dignity and human rights of persons being expelled. As the Drafting Committee had not yet officially submitted the draft article to the Commission in plenary,¹⁹⁵ there was no need to go into the details, apart from simply noting the decision to include a separate article on respect of human dignity in the draft articles on expulsion of aliens. With regard to the subject under consideration, although draft article 7 was closely linked to draft article 6, the principle of human dignity differed from that of humanity, which was why they were the subject of two separate draft articles. Unlike the principle of humanity, whose origins were to be found in international humanitarian law, the concept of human dignity, although recognized in common article 3, paragraph 1 (c), of the Geneva Conventions for the protection of war victims, articles 75 and 85 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and article 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international

armed conflicts (Protocol II), was interpreted as providing the ultimate foundation of human rights law since the Charter of the United Nations, which reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person". It had also inspired the Universal Declaration of Human Rights,¹⁹⁶ international and regional human rights covenants and other instruments, as well as decisions of the ICJ and other international tribunals. Moreover, many countries recognized in their constitutions that human dignity was a fundamental element of human rights protection, to which the importance attached to it by the international community also testified. The central role played by the principle of human dignity in international human rights law was sufficient to warrant its inclusion in the draft articles under consideration, not as a human right in the strict sense, but as a principle for guiding action to be taken in the event of disasters. Like the concept of humanity, the concept of human dignity was a basic principle rather than an enforceable right. It had served as a source of inspiration for many international human rights instruments, and it should also do so in the framework of the protection of persons in the event of disasters, because it was at the core of many instruments elaborated by the international community to guide humanitarian relief operations. Suffice it to refer in that regard to the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies¹⁹⁷ and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,¹⁹⁸ adopted in 2007 by the thirtieth International Conference of the Red Cross and Red Crescent. In order to ensure the protection of human beings, which was the purpose of the topic under consideration, the provisions of draft article 7, together with the humanitarian principles enunciated in draft article 6, constituted a complete framework for the protection of the human rights of affected persons and made superfluous a detailed enumeration of those rights. Moreover, as the principle of human dignity was recognized in international law, there was no need to define it in draft article 7, not even for the purposes of the draft articles.

93. Draft article 8 (Primary responsibility of the affected State), which was set out in paragraph 96 of the third report, read:

"1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.

"2. External assistance may be provided only with the consent of the affected State."

¹⁹⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, paras. 1–8.

¹⁹¹ A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

¹⁹² *Yearbook ... 2009*, vol. II (Part Two), p. 129, para. 96.

¹⁹³ See footnote 19 above.

¹⁹⁴ See the 3036th meeting above, paras. 21–43.

¹⁹⁵ See the 3068th meeting below, para. 5.

¹⁹⁶ See footnote 22 above.

¹⁹⁷ J. M. Ebersole, "The Mohonk Criteria for humanitarian assistance in complex emergencies: task force on ethical and legal issues in humanitarian assistance", *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192–208.

¹⁹⁸ *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, IFRC, 2008, p. 8. Available from www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf (accessed 15 January 2016).

94. As he had pointed out earlier, draft article 8 was in response to the wish expressed by the Drafting Committee for the inclusion in the draft articles of a provision on the primary responsibility of the affected State. Its wording implied the reaffirmation of two fundamental principles of international law: sovereignty and non-intervention. Although he had not deemed it necessary to expressly reformulate those universally accepted principles for the purposes of the draft articles, he had analysed them in detail in paragraphs 64 to 75 of his third report so that the provisions of draft article 8 were perfectly understood. In conformity with the principle of State sovereignty, which stemmed from the fundamental notion of sovereign equality, every State was free and independent and could, within its own territory, exercise its functions to the exclusion of all others. Thus understood, sovereignty was a fundamental principle in the international order, and its existence and validity had been enshrined in Article 2, paragraph 1, of the Charter of the United Nations and in many international instruments, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970. International courts and tribunals had considered that sovereignty was a principle of general law, and the ICJ had made it clear that State sovereignty was also part of customary international law. The concepts of sovereign equality and territorial sovereignty were widely invoked in the context of disaster response, notably in General Assembly resolution 46/182. It was also worth noting that the Commission, in its work on the non-navigational uses of international watercourses, had set forth in general terms the relationship between sovereignty and the duty of cooperation among States,¹⁹⁹ which was enunciated in draft article 5 provisionally adopted by the Drafting Committee.²⁰⁰ Closely linked to the principle of sovereignty, the principle of non-intervention by a State in the affairs of any other State served to ensure that the sovereign equality of States was preserved. There again, both Article 2, paragraph 7, of the Charter of the United Nations and General Assembly resolution 2625 (XXV) referred to the principle of non-intervention, although only the United Nations was explicitly concerned by the prohibition on intervention in the Charter of the United Nations. The principle had likewise been recognized as a rule of customary international law by the ICJ. In view of those firmly established principles of international law, it was clear that a State affected by a disaster was free to adopt whatever measures it saw fit to ensure the protection of persons within its territory. Consequently, third parties, whether States or international organizations, could not legally intervene in the process of response to a disaster in a unilateral manner and must act in accordance with draft article 5 on the obligation to cooperate. That did not mean that the sovereign authority of the State, which was based on the two correlated principles of sovereignty and non-intervention and remained central to the concept of statehood, was absolute. When it came to the life, health and physical integrity of the individual person, areas of law such as international minimum standards, international humanitarian law and

international human rights law demonstrated that the principles of sovereignty and non-intervention constituted a starting point for the analysis, not a conclusion. As noted by the eminent Latin American jurist Alejandro Álvarez in his separate opinion in the *Corfu Channel* case, “[s]overeignty confers rights upon States and imposes obligations on them” [p. 43].

95. With regard to the primary responsibility of the affected State, international law had long recognized that the Government of a State was best placed to gauge the gravity of emergency situations and to implement policies in response. Examples could be seen in the “margin of appreciation”, given by the European Court of Human Rights to domestic authorities in determining the existence of a “public emergency”, and the law of internal armed conflicts, in particular the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), governing situations of non-international armed conflict, which recognized “the principle that States are primarily responsible for organizing relief”. As far as disasters were concerned, the General Assembly had reaffirmed the primacy of the affected State in disaster response numerous times, notably in resolution 46/182. Two general consequences flowed from the primacy of the affected State in disaster response. First was the recognition that the affected State bore ultimate responsibility for protecting disaster victims on its territory and had the primary role in facilitating, coordinating and overseeing relief operations on its territory. The other general conclusion was that international relief operations required the consent of the affected State. Many international instruments—multilateral and bilateral conventions, draft principles and guidelines elaborated by humanitarian organizations and independent experts—recognized explicitly or implicitly, bearing in mind the principles of sovereignty and non-intervention, the fundamental role played by the primary responsibility of the affected State, as illustrated in paragraphs 79 to 89 of the third report. The relevant provisions cited were clear proof that States and humanitarian organizations had incorporated the principle of the primary responsibility of the affected State.

96. Whereas the foregoing discussion had focused on the “internal” aspects of the State’s primary responsibility, the requirement of State consent was of a primarily “external” character, because it governed the affected State’s relations with other actors—States, international organizations or other humanitarian organizations. The consent of the affected State was a necessary consequence of the principles of sovereignty and non-intervention. It must be given before the initiation of relief operations and was needed for the duration of the operations. The consent requirement also appeared in the provisions of international instruments governing the primary responsibility of the affected State, as indicated in paragraphs 91 to 94 of the report. In its current wording, draft article 8 recognized the responsibility of the affected State with regard to the population on its territory and covered both the “internal” operational aspects and the “external” aspect, namely consent. It thus incorporated mutually reinforcing elements in the same provision. Paragraphs 97 to 100 of the report provided a detailed analysis of the form of the two paragraphs of draft article 8.

¹⁹⁹ See *Yearbook ... 1994*, vol. II (Part Two), pp. 105–107 (article 8 of the draft articles on the law of the non-navigational uses of international watercourses).

²⁰⁰ A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

97. Draft articles 6, 7 and 8 proposed in the third report highlighted the two aspects which he envisaged, namely the relations of States *vis-à-vis* each other and their relations *vis-à-vis* individuals. They contained provisions which were indispensable in order for the Commission to continue its work, because they placed the human being at the centre of the draft articles but did not leave out the role of States providing assistance. Needless to say, consideration of those two aspects had not yet been completed and would be continued in his future reports, but the draft articles that he had presented should be able to meet the concerns expressed by the members of the Commission and several delegations in the Sixth Committee of the General Assembly.

The meeting rose at 1.10 p.m.

3055th MEETING

Wednesday, 2 June 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Murase, 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.

Mr. Dugard, Vice-Chairperson, took the Chair.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FOMBA, commenting on draft articles 3 to 12, said that paragraphs 31 and 32 of the Special Rapporteur's report (A/CN.4/627 and Add.1) provided a lucid comparison of the current draft article 3 with the previous version based on article 2 of the resolution adopted in 1985 by the Institute of International Law.²⁰¹ Although he did not believe that the terms "automatically" and "necessarily" were really ambiguous, he agreed that it would be advisable to return to the expression "*ipso facto*", since the subject was being approached from a factual standpoint. Nonetheless, the Latin term might be more readily understood if it was translated.

2. The wording of draft article 3 should reflect the fact that conflicts might well have a variety of effects on treaties depending on the different situations covered by the article. It was therefore vital to clarify terminology as

far as possible. With regard to the draft article's title—and thus its subject matter—it was plain that what was involved was not a presumption but a general principle. Accordingly, the title could be amended to read "General principle of continuity", as suggested by Mr. Vázquez-Bermúdez. Furthermore, as currently worded, the draft article did not exclude cases in which two States that were parties to a treaty were on the same side in an armed conflict. However, there was no reason for specifically mentioning such an eventuality unless it could be legitimately established that an armed conflict might alter the operation or pattern of treaty relations *inter se* and with regard to third parties, in which case more thought should be given to the matter.

3. Turning to draft article 4, he said that he had initially seen little justification for retaining intention as a criterion, but Mr. Pellet's arguments had persuaded him otherwise. On the other hand, the true indicia of susceptibility to termination, withdrawal or suspension of treaties were those listed in subparagraph (b) of that article. He concurred with Mr. Murase that the phrase "the effect of the armed conflict on the treaty" was tautological. There was nothing, however, to prevent the Commission from examining such practice as might exist in order to make sure that intention was not a fiction.

4. He approved of the new paragraph 2 in draft article 5 and the inclusion of an annex containing an indicative list of treaties. However, the list ought to be placed in the commentary in order to preserve the normative value of the draft articles. He agreed that the two paragraphs of draft article 6 should be linked by specifying in the commentary that paragraph 2 was without prejudice to the rule embodied in draft article 9. The term "lawful agreements" in paragraph 2 should be retained, and its meaning should be explained in the commentary.

5. From a logical standpoint, it would be preferable to place draft article 7 after draft article 3. The new wording of draft article 7 was acceptable, but it would be a good idea, albeit not essential, to retain the word "express" in the body of the text in order to harmonize it with the title.

6. He agreed with the suggestion made with regard to draft article 8 that all States parties to a treaty should be notified of the intention of a State engaged in armed conflict to terminate, withdraw from or suspend the operation of a treaty, whether or not they were parties to the conflict. He wondered what justification there was for including the phrase "unless it provides for a subsequent date" in paragraph 2 of that article and how it would operate in practice: would the instrument of notification itself specify the date on which notification took effect? The time limit for raising an objection to such terminations, withdrawals or suspensions should be the three months stipulated in article 65, paragraph 2, of the 1969 Vienna Convention, notwithstanding the Special Rapporteur's preference for a longer period of time to take account of the context in which that legal rule would apply. The new paragraph 5, a safeguard clause whose wording was drawn mainly from article 65, paragraph 4, of the 1969 Vienna Convention, was vital, because every effort should be made to apply that principle of customary international law in all circumstances.

²⁰¹ See footnote 138 above.

7. Draft article 9 should be retained as it stood, but the word “trite” in the commentary should be replaced with “self-evident”, as the Special Rapporteur had proposed. There was no need to revise the structure of draft article 10, as it was based on article 44 of the 1969 Vienna Convention. Although the United Nations Conference on the Law of Treaties had offered no guidance as to the meaning of the word “unjust” in 1968 and 1969, the Special Rapporteur’s interpretation of that term seemed to be correct.

8. Turning to draft article 11, he endorsed the view that a minimum of good faith must remain in times of armed conflict. In view of the somewhat ambivalent arguments put forth by China, to which reference was made in paragraph 104 of the report, it would indeed be wise to explain the exact meaning of the draft article in the commentary. With regard to the proposal to examine the relationship between draft articles 11 and 17, he suggested that the relationship seemed somewhat contradictory, since draft article 11 dealt with the maintenance of a treaty, while draft article 17 referred to situations in which it was not maintained.

9. Referring to the question raised in paragraphs 107 and 108 of the report as to whether termination of, withdrawal from or suspension of the operation of a treaty was a right or an option, he felt that it would be logical in that context to view the State’s conduct as a right, and he therefore endorsed the subtle argument put forward by the Special Rapporteur in paragraph 108. Accordingly, he was in favour of deleting the phrase in square brackets from the title of draft article 11. That deletion would not affect the *chapeau* of the article, since it was couched in negative and imperative terms.

10. Draft articles 12 and 18 seemed to be closely related, and it would therefore be better to merge them than to place them one after the other. He supported the proposal to amend the title of the new draft article 12 to “Resumption of treaty relations subsequent to an armed conflict”. The wording of the draft article would benefit from revision that made it clearer and highlighted the link between paragraphs 1 and 2.

11. He was in favour of referring all the draft articles to the Drafting Committee.

Ms. Xue resumed the Chair.

12. Mr. PERERA said that draft articles 3, 4 and 5, which formed the core of the draft articles on the effects of armed conflicts on treaties, were interlinked, as the Special Rapporteur explained in paragraph 59 of his report. Draft article 3 had been well received by States, and its importance for maintaining the stability of treaty relations, in keeping with the principle of *pacta sunt servanda*, had been recognized. The majority of States which had expressed an opinion on that issue had indicated a preference for the term “*ipso facto*” rather than “necessarily”, the word used in the draft article adopted on first reading. He also agreed with the Special Rapporteur that the term “*ipso facto*” captured more precisely the cardinal principle underlying the draft article, namely the continuity of treaties. Nevertheless, the title “Absence of

ipso facto termination or suspension” struck a somewhat discordant note and lacked elegance. More importantly, as several previous speakers had already noted, the title should reflect the thrust and substance of the draft article itself. The suggestion that the title should read “General principle of continuity” was thus a step in the right direction and should be given further consideration in the Drafting Committee.

13. He welcomed the proposed changes to draft article 4, namely the inclusion of an express reference to intention in subparagraph (a) and the addition of the phrase “intensity and duration of the armed conflict” to subparagraph (b). The lengthy debate surrounding the inclusion of intention as one of the indicia in the draft article had essentially been prompted by the difficulty of ascertaining the parties’ true intention when they concluded the treaty—in other words, prior to the outbreak of hostilities. The particular merit of the reformulated paragraph was that it sought to address that concern by stipulating that the intention of the parties was to be derived from the application of articles 31 and 32 of the 1969 Vienna Convention. Furthermore, the reformulation made the parties’ intention one of several indicia, but not the predominant factor for determining a treaty’s susceptibility to termination, withdrawal or suspension. In order to counter the impression that the current format of the draft article gave prominence to intention by devoting a separate paragraph to it, the Drafting Committee should examine the feasibility of formulating a composite draft article without separate paragraphs. The insertion of the phrase “intensity and duration of the armed conflict” in subparagraph (b) was welcome because it reinforced the idea that the treaty was not susceptible to termination, withdrawal or suspension unless the conflict was so intense that it interfered with the performance of treaty obligations.

14. The Special Rapporteur’s approach to draft article 5 and the annex thereto was entirely consistent with the underlying rationale of the draft article adopted on first reading. The form and content of the current text, which consisted of a statement of principle in the article itself, followed by an annex containing an indicative list of categories of treaties referred to in the article, essentially constituted a compromise between listing treaties in the text of the article, which introduced an element of selectivity, or consigning the list to the commentary, which would not offer the same degree of normativity as the current text. Although Switzerland had put forward a cogent argument for a separate paragraph 2 containing an express reference to specific treaties and the retention of a truncated list in an annex (para. 61 of the report), the crucial question was whether those arguments were strong enough to warrant a departure from the neutral approach adopted in the current text. Should it do so, the Commission would enter difficult and uncertain terrain, since any such choice would imply selectivity and might create the impression that different treatment was being given to different categories of treaties.

15. Quite apart from the substantive issues that would be raised by the approach outlined in paragraph 61 of the report, enhancing the status of specific treaties, no matter how important they might be, by transferring them from an indicative list in an annex to the operational part

of the text would create insurmountable difficulties that might impede the progress of work. The range of views expressed by States with regard to the list would only grow broader if any category of treaty was moved from an indicative list to an operational article (see A/CN.4/622 and Add.1). For instance, given the current importance of environmental protection, some States might wish to see an express reference to treaties on that subject in paragraph 2 rather than have it covered by a generic phrase. Similar situations might arise in respect of other categories of treaties.

16. The particular virtue of the annex was that, while it contained an indicative list of the categories of treaties referred to in draft article 5, it also gave some indication of the relative importance of their subject matter. He therefore supported the retention of the current text of draft article 5 and the annex as adopted on first reading, although he was not opposed to reconsidering it after further analysis of State practice.

17. He had no specific comments to make on draft article 6. As far as draft article 7 was concerned, he agreed with the Special Rapporteur's suggestion in paragraph 79 of his report that a logical order be imparted to the entire set of provisions dealing with the issues in question by placing draft article 7 immediately after draft article 3.

18. Although several interesting proposals had been made concerning draft article 8, the Commission must still be guided by the reasons that had originally led it to adopt a minimalist approach. While the draft article preserved the essence of article 65 of the 1969 Vienna Convention, it avoided a detailed enumeration of the dispute settlement procedures that would apply under normal circumstances. It would indeed be "unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict", as the Commission had found in 2008.²⁰² He concurred with Mr. Petrič that States had to be given the flexibility they needed to take the necessary action under the circumstances.

19. To promote the peaceful settlement of disputes, the Special Rapporteur proposed *inter alia* a new paragraph 5 for draft article 8 in the form of a "without prejudice" clause. While he had no strong reservations regarding the statement of principle set forth in that paragraph, he did have reservations about the stipulation of time limits in the addition to paragraph 3 and the new paragraph 4. Such time limits would tilt the careful balance that had been maintained in the draft article thus far. He supported the retention of the text of draft article 8 as adopted on first reading with the addition of the proposed new paragraph 5, which would become new paragraph 4 if the current paragraph 4 was deleted, as he hoped.

20. He agreed that draft articles 3 to 12 should be referred to the Drafting Committee.

21. Mr. PETRIČ said that draft article 3 did not raise any substantial difficulties; the terminological problems

posed by the title and the text were matters which could be resolved by the Drafting Committee. There was nothing wrong with using the Latin phrase "*ipso facto*", given that other Latin expressions such as "*jus cogens*" "*bona fides*" or "*mutatis mutandis*" were part of the *lingua franca* of international forums.

22. Two years earlier, he had already expressed some reservations concerning draft article 4, for although the draft article spoke of "indicia", it in fact established what might become legal criteria if the articles ever took the form of a convention, an optional protocol or guidelines for States. When establishing the indicia of susceptibility to termination, withdrawal or suspension of treaties, it was necessary to bear in mind that an armed conflict represented an exceptionally stressful situation for a State, given that its security and even its survival might be at stake. Under those circumstances, State organs might have to react quickly to terminate, suspend or at least modify a treaty which a State deemed to be no longer in its interest. That was why the Commission should not be overly prescriptive in establishing criteria or indicia in that draft article. That was all the more true since draft article 3 clearly established the principle of the continuity of treaties, draft article 5 specified the treaties which continued in operation and draft article 8 laid down rules for the termination of, withdrawal from and suspension of the operation of treaties in the event of an armed conflict.

23. The indicia in draft article 4 should not only be limited in number but should also be clear. Draft article 4 referred to the nature of a treaty, whereas draft article 5 spoke of the subject matter of a treaty. Both concepts were hard to define and should be dealt with either in draft article 4 or, preferably, in draft article 5, but not in both. It was debatable whether including a reference to articles 31 and 32 of the 1969 Vienna Convention was the best way to handle indicia in draft article 4, since those two articles of the Convention concerned the interpretation of treaties in what were basically normal circumstances rather than in a situation of armed conflict. Since the draft articles under consideration were supposed to constitute a kind of *lex specialis*, it was questionable whether they should mention the general rules for interpreting treaties, which would in any case still apply as *lex generalis*.

24. Similarly, the criteria of extent, intensity and duration of a conflict were somewhat arbitrary and vague. A State might wish, for good reasons and in good faith, to notify the termination or suspension of a treaty immediately after the outbreak of an armed conflict that might subsequently prove to be neither extended, intense nor of long duration. At the outbreak of a conflict, a State could hardly be expected to foresee the course that it would ultimately take. He was also unsure whether the number of parties to a treaty was of sufficient relevance to be included among the indicia. Furthermore, post-conflict situations could vary greatly, and thus the ways in which States dealt with terminated or suspended treaties might also be very different. Calling States to account for non-compliance with the terms of draft article 4 might make it more difficult for States to re-establish their treaty relations after a conflict. He asked the Special Rapporteur whether he thought that the draft articles should cover the modification of treaties in the case of an armed conflict.

²⁰² *Yearbook ... 2008*, vol. II (Part Two), p. 60, para. (1) of the commentary to draft article 8.

25. His remarks regarding draft article 4 should not be viewed as categorical opposition to it, but as an appeal to the Drafting Committee and to the Special Rapporteur to consider whether and to what extent draft articles 4 and 5 could be combined and whether draft article 4 could be confined to indicia that were really relevant. All the requisite explanations should be placed in the commentary.

26. Without prejudice to the remarks he had just made, he wished to commend the Special Rapporteur's approach to draft article 5. The addition of paragraph 2 was a significant improvement. Human rights treaties should be included in that paragraph as a matter of principle, but since "treaties for the protection of human rights" was a far-reaching concept that could encompass the protection of such diverse rights as economic, social or cultural rights, minority rights, rights under the conventions of the International Labour Organization, procedural rights in criminal proceedings and the rights of aliens, the Drafting Committee should endeavour to formulate draft article 5, paragraph 2, more precisely and clarify it in the commentary. Most human rights instruments allowed States to limit or suspend human rights that were not part of *jus cogens* when national security or public order was in danger. The outbreak of an armed conflict was a prime example of a threat to national security.

27. He agreed with the indicative list contained in the annex to draft article 5, but he was not in favour of consigning that list to the commentary or of transferring parts of it to paragraph 2 of the draft article while deleting the remainder. The list should remain an annex, but it could be modified by additions or deletions after consideration by the Drafting Committee.

28. Article 7 should be placed immediately after draft article 3. Draft article 8 did not pose any difficulties that could not be resolved by the Drafting Committee. The Commission should not, however, try to bind States by too many formalities because armed conflicts placed a great strain on States, and he agreed with what Mr. Perera had said on that point. He was unsure whether it was necessary to mention Article 33 of the Charter of the United Nations in the draft article, but those matters could be resolved by the Drafting Committee.

29. He had no objections to draft articles 9, 10 and 11 and agreed with the Special Rapporteur's basic approach to draft article 12. When treaties had been terminated or suspended as a result of an armed conflict, States should be given as much freedom as possible to revive them at the earliest opportunity in peacetime, if that was in their common interest.

30. All the draft articles presented in the report could be referred to the Drafting Committee, since States had not requested any major amendments. The Drafting Committee should recast some provisions and include some explanations in the commentary but should not reopen any basic issues.

31. Sir Michael WOOD said that although draft articles 3, 4 and 5 formed the core of the set of draft articles, the relationship between them was not entirely clear. Mr. Pellet had suggested that the Drafting Committee

clarify the articulation of those provisions: that, however, needed to be done in the commentary. The relationship between the three draft articles was currently addressed in various places in the commentary adopted on first reading and in the Special Rapporteur's first report, but not always in precisely the same terms. As a newcomer to the project, he would personally find it helpful to have a clear statement of that relationship in one place in the commentary.

32. Draft article 3 was a key provision, and he agreed with other members that as currently worded it struck a careful balance: the Commission needed only to state that the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties; it was not seeking to formulate any kind of presumption. He did not interpret the statements made by Member States in the Sixth Committee as objecting to the current draft. If the Commission found a better title, as the Special Rapporteur had requested, it must ensure that the new title did not distort the substance and the nature of the provision; the words "General principle of continuity" did not capture the essence of the draft article.

33. The version of draft article 4, subparagraph (a), adopted on first reading, had not made any reference to the intention of the parties but had simply cited articles 31 and 32 of the 1969 Vienna Convention. He agreed with those members who felt that it was neither necessary nor desirable to refer to the intention of the parties, as it seemed unlikely that the negotiating States would have considered the effect an armed conflict might have on a treaty at the time they had negotiated it. Had they done so, however, they would probably have dealt with the matter expressly, and draft article 7 would then apply.

34. Having carefully considered the Special Rapporteur's explanation of his new draft of article 4, subparagraph (a), and listened attentively to the views of other members, particularly Mr. Hmoud, he had concluded that the draft conflated two distinct matters: the intention of the parties to a treaty and the interpretation of a treaty in accordance with articles 31 and 32 of the Vienna Conventions. Like Mr. Gaja, Mr. Pellet and others, Sir Michael considered it strange to refer to articles 31 and 32 of the Vienna Conventions for the purpose of ascertaining the intent of the parties, rather than as a tool for determining the objective nature of the treaty with respect to armed conflict. Articles 31 and 32 set out rules for treaty interpretation that did not necessarily establish what the parties had subjectively intended; rather, they established what the parties had actually agreed.

35. Turning to draft article 5, he agreed that if the work of the Commission was to be of practical use, it was important to retain the list of categories of treaties that appeared in the annex. He did not agree with Mr. Pellet that to do so would be inappropriate in a legal text or share Mr. Murase's concern about the list, since it was illustrative and not mandatory. He endorsed the proposal to add to the list a reference to treaties establishing international organizations and suggested that the wording used should be based on the language of article 5 of the 1969 Vienna Convention and should read "treaties which are the constituent instruments of international organizations". He also hoped that the Special Rapporteur would consider

Mr. Gaja's suggestion to support the list by including further references to practice, including case law, in the commentary.

36. He was not convinced that it was necessary to add a second paragraph to draft article 5, for the reasons given by the Special Rapporteur in paragraph 61 of his report. However, if the Commission should decide to follow that suggestion, perhaps the new provision should take the form of a separate article, although that would entail defining with precision the categories of treaties concerned. He wondered what was meant by the category "treaties relating to international humanitarian law", and he shared the view of Mr. Petrič that the categories "treaties for the protection of human rights" and "treaties relating to international criminal justice" were also vague. In short, he was not in favour of the additional provision, which would amount to a fundamental change in the Commission's approach to the draft articles between first and second reading, something the Special Rapporteur rightly wished to avoid.

37. A less ambitious approach that would nevertheless address the main concern of some States would be to include an article reflecting article 11, subparagraph (a), of the 1978 Vienna Convention, indicating that an armed conflict did not as such affect a boundary established by a treaty. Failing that, the point should at least be highlighted in the commentary.

38. With regard to the drafting of draft article 5, Sir Michael insisted that it should be clearly spelled out, at least in the commentary, but also in the annex or the text of the draft article if possible, that the list of categories of treaties was non-exhaustive. The Special Rapporteur had explained that the list was "illustrative", but that term seemed to cover a number of different ideas. He also believed that there should be a cross reference to the annex in the text of the draft article itself.

39. Turning to draft article 6, he suggested that it would be more accurate to refer in paragraph 1 to concluding treaties "in accordance with international law" rather than "in accordance with the 1969 Vienna Convention on the Law of Treaties". As one member had observed at a previous meeting, cross references to other instruments that might not be applicable were best avoided where possible.

40. Notwithstanding the Special Rapporteur's stout defence of the word "lawful" in paragraph 2 and Mr. Murase's comments on the matter, he still considered the word to be out of place. It might be better to replace the expression "lawful agreements", which begged many questions, with the words used in paragraph 1, namely "in accordance with the 1969 Vienna Convention on the Law of Treaties" or, alternatively, "in accordance with international law".

41. Draft article 8 had been the subject of heated debate: its detailed provisions might be unduly formalistic for States engaged in armed conflict, who might simply not find it practical to fulfil the notification requirements during a conflict. Such difficulties had been acknowledged by the Special Rapporteur in paragraph 89 of his report but had not been reflected in the revised draft article. The

Drafting Committee might wish to consider wording to cover that situation.

42. In conclusion, he endorsed Mr. Candiotti's suggestion that the set of draft articles should be divided in accordance with the structure recommended by the Commission in paragraph (5) of the commentary to draft article 1, as adopted on first reading. That would be consistent with practice and would make the draft articles easier to follow. He was in favour of referring draft articles 3 to 8 to the Drafting Committee, together with draft articles 9 to 12, on which he had no substantive comments.

43. Mr. WISNUMURTI said that he wished to make a few comments on draft articles 3 to 12. Regarding draft article 3, he agreed that the words "*ipso facto*" in the *chapeau* of the draft article should replace the word "necessarily" adopted on first reading. However, he disagreed with the suggestion from a Member State that a reference be included in the draft article to treaties establishing or modifying land and maritime boundaries. While he recognized the importance of that category of treaties and their continuity in armed conflicts, he objected to the suggestion from a substantive point of view for reasons he would explain when discussing draft article 5. Furthermore, from a drafting standpoint, such a reference would disrupt the balance of the draft article, which dealt with a general principle on termination and suspension of a treaty in an armed conflict, and not on the continued operation of treaties dealt with in draft article 5. He was not comfortable with the title suggested by the Special Rapporteur: the use of the word "absence" was both unusual and unclear. Although various other suggestions had been made in the report and during the debate in plenary, his preference was for a shorter title, such as "Termination or suspension" or "General rule on termination or suspension of treaties".

44. The Special Rapporteur had improved on the text of draft article 4, in particular by adding a reference in subparagraph (a) to the intention of the parties to the treaty—an important criterion missing from the text adopted on first reading—which brought greater clarity. He endorsed the retention of the *chapeau* of the draft article and the reference to the nature and extent of the armed conflict in subparagraph (b), contrary to the suggestion of some Member States. He was also in favour of including "intensity" and "duration" as additional criteria for susceptibility to termination, withdrawal or suspension of treaties, since those criteria would reflect the reality of an armed conflict that might affect the continued performance of the treaty. However, he was not in favour of the suggestion to delete the criterion "subject matter" in subparagraph (b). The reason for the deletion, given in paragraph 48 of the report, was to avoid repetition of the words "subject matter", which also appeared in draft article 5, and might therefore lead to confusion. In his view, such repetition was necessary, as the words served different purposes in the two draft articles.

45. Draft article 5 had been the subject of lengthy discussions in the Commission and in the Sixth Committee, particularly with regard to the indicative list of categories of treaties that should survive armed conflicts because of their subject matter. He endorsed the current approach of

referring to such categories of treaties in an indicative list in an annex and rejected the idea of incorporating some or all of those categories in the text of the draft article. He therefore had difficulty with the suggestion made in paragraph 70 of the report to add a second paragraph to the draft article. While he recognized the importance of the treaties listed in the proposed new paragraph, he considered that the proposal would only reopen the long process of negotiations. More importantly, the proposed new paragraph did not go well with the current paragraph 1 of the draft article, which established a general principle. Furthermore, the Commission had already reached consensus on the idea that those categories of treaties should be included in an indicative list in annex.

46. He had no difficulty with draft article 6, since basically it retained the text adopted on first reading; however, he queried the addition of the phrase "During an armed conflict" at the beginning of paragraph 2. It seemed redundant, as a similar phrase—"during situations of armed conflict"—appeared at the end of the paragraph.

47. The revised version of draft article 7 proposed by the Special Rapporteur was clearer than the original draft article. His only suggestion would be to add the word "continued" before the word "operation". He also considered that the word "express" was unnecessary, both in the title and in the body of the provision. He agreed with the Special Rapporteur that draft article 7 should be placed after draft article 3.

48. He was not in favour of the suggestion to extend the scope of draft article 8 to States that were not parties to the conflict but were parties to the treaty, as he considered it would have broader implications than intended and would affect the other draft articles on the topic. His preference was therefore to retain paragraph 1 of the draft article as adopted on first reading. However, he had no difficulty with the proposed addition of a provision on the time limit for raising an objection to termination, withdrawal from and suspension of the operation of the treaty at the end of paragraph 3 of the draft article.

49. He recalled that, on the question of the settlement of disputes, the Commission had decided in the past not to include a draft provision corresponding to article 65, paragraph 4, of the 1969 Vienna Convention. He upheld that position and the view that providing a peaceful settlement of dispute regime during an armed conflict was unrealistic. However, he would not object if the Commission agreed to the Special Rapporteur's suggestion to add a new paragraph 5 concerning the peaceful settlement of disputes. Likewise, he would not object to the addition of the obligation in paragraph 4 for the States parties concerned to resort to Article 33 of the Charter of the United Nations if an objection to termination, withdrawal from or suspension of the operation of a treaty had been raised within the prescribed time limit. He also endorsed the suggestion to amend the title of draft article 8, as the new title was more accurate.

50. He endorsed the Special Rapporteur's suggestion to retain the text of draft article 9 as originally drafted and to replace the word "trite" with the word "self-evident" in paragraph (2) of the commentary to the draft article.

He also agreed to the retention of draft article 10 with the clarification given by the Special Rapporteur in paragraph 100 of his report concerning the use of the word "unjust" in subparagraph (c) of the draft article.

51. The use of the word "right" in the title of draft article 11 had been questioned, on the grounds that it was not mentioned in the other draft articles. That argument would become moot if the Commission accepted the additional paragraph 3 of draft article 8, in which the word "right" was used. Furthermore, the word "right" was also used in the title of article 45 of the 1969 Vienna Convention, which dealt with similar subject matter and on which draft article 11 was based. There were therefore no strong grounds for changing the title of draft article 11 by replacing the word "right" with the word "option", as the Special Rapporteur had proposed.

52. He commended the Special Rapporteur for his analysis of the close relationship between draft articles 12 and 18 as adopted on first reading and his proposal to merge the two, resulting in new draft article 12.

53. In conclusion, Sir Michael said that he was in favour of referring draft articles 1 to 12 to the Drafting Committee and reiterated his congratulations to the Special Rapporteur for a job well done.

54. Mr. VASCIANNIE said that his comments on the provisions in draft articles 3 to 12 were influenced to a considerable extent by the thought that the provisions were generally fit for their purposes. Had they constituted a first draft, he would have been willing to contemplate greater changes, but at the present stage he believed that the provisions should be submitted to the Drafting Committee. In other words, although some of the provisions merited further discussion, he was inclined to support them in principle.

55. Draft article 3 indicated that the outbreak of an armed conflict did not in itself terminate or suspend the operation of treaties between States that were parties to the conflict or between a State party to the treaty and the conflict and a treaty State not party to the conflict. The Special Rapporteur's formulation of the law in article 3 was sound and based on State practice.

56. The draft article was supported by the high authority of Lord McNair. In *The Law of Treaties*, McNair had considered, *inter alia*, the practice of Great Britain and other States concerning the Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land, various common-law decisions giving effect to those Conventions and the 1856 Declaration of Paris.²⁰³ McNair also quoted British authority, *contra proferentem*, to the effect that certain nineteenth century treaty obligations needed to be respected even though they were affected by war and had concluded: "It is thus clear that war does not *per se* put an end to pre-war treaty obligations in existence between opposing belligerents."²⁰⁴

²⁰³ A. D. McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 696.

²⁰⁴ *Ibid.*, p. 697.

57. McNair had adopted a similar, albeit strange position in respect of third States in a war when he wrote:

Distinct from the question of the effect of the outbreak of war upon treaties between opposing States is the effect of the existence of a state of war upon the operation of treaties between either of them and a third State. As a question of principle, there is no reason why such treaties should be affected in any way by the war; but, exceptionally, an implied condition may be found to exist.²⁰⁵

58. Thus there was, at the very least, an argument that draft article 3 represented codification, and the Special Rapporteur's perspective was reinforced by the fact that no State had openly challenged the idea in its comments on the provision. Variations on the wording had been proposed, with "*ipso facto*" being challenged by "automatically", "necessarily", "in itself" or "*per se*". He endorsed the Special Rapporteur's choice of "*ipso facto*", and would be prepared to use that term in the title of the draft article as well. The Drafting Committee would have great fun arguing over the felicity of the heading and the value of Latinisms versus Anglicisms in modern international law practice. In that connection, he wished to draw Mr. Petrič's attention to the fact that a number of international treaties used Latin words, including the United Nations Convention on the Law of the Sea ("*ipso facto*" in article 156) and the 1969 Vienna Convention ("*pacta sunt servanda*" in article 26). More importantly, however, the idea of a presumption of continuity was not clearly established in the *lex lata* insofar as treaty parties that were also parties to a conflict were concerned.

59. Draft article 4 retained the title that had been stoutly defended by Sir Ian Brownlie. The term "indicia of susceptibility" was not pervasive in the literature, but State practice did suggest that the law had ways of determining which treaties might be terminated or suspended and which would continue to apply during the course of an armed conflict. He supported the position taken by some States, including China, that the draft article should indicate that the list of indicia was not exhaustive. The Special Rapporteur did not seem to oppose that position in principle but feared that highlighting it in the text might weaken the normative value of the rule. Many rules drafted by the Commission carried an "*inter alia*" qualification, which seemed to be appropriate in the case at hand. It was a question of law whether there were other indicia, and if there were, the "*inter alia*" reference could be inserted at the end of the *chapeau* of the draft article, which would then read: "resort shall be had to, *inter alia*, the items listed in draft article 4, subparagraphs (a) and (b)".

60. As to draft article 4, subparagraph (a), he supported the insertion of the reference to the intention of the parties. It would give States a clear indication as to why they needed to look at articles 31 and 32 of the 1969 Vienna Convention: to find out what the parties might be deemed to have intended when they had entered into the treaty. It seemed unhelpful to state that the rules governing the interpretation of treaties should be examined in order to find out whether a treaty was to continue to apply during armed conflict.

61. Express reference to the intention of the parties in that context was well supported by doctrine. For example,

as Sir Ian Brownlie had noted in his first report on the topic,²⁰⁶ in the *British Yearbook of International Law* for 1921–1922, Sir Cecil Hurst had submitted that "the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded" (para. 32).²⁰⁷ Lord McNair, meanwhile, had submitted in *The Law of Treaties* that:

It is believed that in the vast majority of cases, if not in all, either of these tests (intention of the parties or nature of the treaty) would give the same result, for the nature of the treaty is clearly the best evidence of the intention of the parties. Thus, it is obvious that a convention for the regulation of the conduct of war is intended by the parties to operate during war.²⁰⁸ (para. 33)

62. There was thus an important doctrinal basis for retaining the reference to the intention of the parties in draft article 4. However, from McNair's perspective, which was built on State practice, there was also a strong case for including the nature of the treaty among the factors that would determine whether the treaty continued to operate. He believed that this consideration was fully incorporated into draft article 5 and the annex. The other factors mentioned as indicia of susceptibility in draft article 4, subparagraph (b)—the nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty—were also factors to be considered. He had cited Hurst and McNair partly because of their high authority, but also to address indirectly the point raised in some comments that aspects of the project did not take due account of State practice. McNair, in particular, had built his study of treaty law in time of war on the relevant State practice, and offered an approach similar to that taken in most of the draft articles submitted by the Special Rapporteur.

63. Draft article 4, contrary to draft article 3, mentioned withdrawal from treaties. That was not necessarily a contradiction, but the lack of symmetry between the two provisions made him wonder whether more needed to be said about withdrawal.

64. The relationship between draft articles 4 and 5 also gave rise to questions. At an earlier stage in the project, he would have supported a detailed review of the relationship between the two provisions. Taken together, however, the two draft articles addressed the main considerations that determined whether a treaty might or might not be suspended or terminated. He was therefore prepared to accept the current formulations, including the approach taken with respect to the annex, but there must be an express link between draft article 5 and the annex. He also supported the inclusion of a paragraph 2 and the removal of items (a), (b) and (c) from the list contained in the annex. However, the two paragraphs might have to be qualified, especially where the wide human rights guarantees contemplated therein were concerned, a point made by Mr. Petrič; some of the points made by Sir Michael in that connection should also be taken into account. He also supported the view that the reference to *jus cogens* was unnecessary. On the retention of the annex, he drew

²⁰⁵ *Ibid.*, p. 728.

²⁰⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552.

²⁰⁷ C. J. B. Hurst, "The effect of war on treaties", *BYBIL 1921–1922*, vol. 2, pp. 37–47, at p. 40.

²⁰⁸ McNair (footnote 203 above), p. 698.

attention in particular to the position of the Special Rapporteur and the arguments of Mr. Perera, among others.

65. He endorsed the Special Rapporteur's approach to draft article 6 and agreed to the placement of draft article 7, in its revised form, after draft article 3 for the reasons given by the Special Rapporteur.

66. He also endorsed draft article 8 as presented in the current report, but not the approach discussed in paragraph 92 of the report, which suggested that the scope of the draft article be extended to States that were not parties to the conflict but were parties to the treaty. The Special Rapporteur had noted that it would be easy to introduce such a reference. In his own view, the option of seeking to terminate, withdraw from or suspend the operation of a treaty should rest with the States engaged in the armed conflict; third parties to the conflict should not have that right. His perspective was based on the premise that it was the parties to the conflict that would be facing the exigencies that required them to consider whether a particular treaty rule should be applicable. That provision seemed to be presented for consideration *de lege ferenda* and thus admitted some scope for policy considerations. It might be important in that regard to reassure weak countries that happened to find themselves involved in an armed conflict, whether internally or externally propelled, that they would not be open to a raft of notifications in respect of treaty terminations from countries that had nothing substantial or direct to do with the armed conflict. One could argue that, as a matter of policy, the draft articles should be sensitive to the possibility of abuse by the powerful, and that therefore a high threshold was needed for determining the moment at which an armed conflict was actually taking place. Following that line of reasoning, it was again arguable that the *Tadić* approach did not set the threshold high enough. It seemed to him, however, that the way to safeguard against abuse was to maintain that non-parties to the armed conflict did not have the first option of withdrawing from their treaty commitments against a State that was involved in the armed conflict. Thus the wording in draft article 8 was an important safeguard to protect the interests of the vulnerable.

67. He was in general agreement with draft articles 9 to 12.

68. The CHAIRPERSON, speaking as a member of the Commission, said that a change of the title of draft article 3 needed to be carefully considered. "Non-automatic" termination or suspension was not the same as the "absence" of termination or suspension. The former implied that if certain conditions were met, treaties might be terminated or suspended; that was also in line with the provision that treaties were not necessarily terminated or suspended when there was an outbreak of an armed conflict. The latter term seemed to place more emphasis on the definitive nature of the continuity of treaties. Given the nature of armed conflicts, that conclusion was a bit too normative.

69. She believed that the Commission should try to avoid the use of such Latin terms as "*ipso facto*". However, having heard so many arguments in their defence, she had become somewhat flexible about their use.

70. Based on the presumption in draft article 3—and when she used the word "presumption", she took it to mean that the outbreak of armed conflict did not necessarily suspend or terminate a treaty—draft articles 4 and 5 were closely related. In draft article 4, the intention of the parties was a necessary element, and she agreed with the comment made in that regard by Mr. Vasciannie. Intention was also related to the subject matter of the treaty. The two elements set out in draft subparagraphs (a) and (b) of article 4, namely, the intention of the parties to the treaty and objective conditions such as the nature, extent, intensity and duration of the armed conflict, were relevant factors. She shared the view that draft article 3 did not in any way imply the automatic operation of a treaty, in whole or in part, in the event of an armed conflict, but it was clear that the question must be examined in the light of the criteria set forth in draft articles 4 and 5. To remove the reference to subject matter from draft article 4 would weaken, if not sever, the connection between the two draft articles. In general, she agreed with the comment that the relations between draft articles 3, 4 and 5 needed to be further clarified.

71. In draft article 5, the proposed additional paragraph would drastically change the approach originally taken by the Commission during first reading. She found it strange that certain types of treaties should be removed from the indicative list, as some of the conventions falling within those categories contained provisions that specifically addressed situations of armed conflict, for example article 29 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, relating to international watercourses and installations in time of armed conflict. In the *Oil Platforms* case, the ICJ had also invoked a treaty of friendship, commerce and navigation.²⁰⁹ The main problem with the current drafting was that to single out certain treaties would send a clear but misleading message that those treaties were definitely applicable in time of armed conflict. Yet the Commission's intention was to show that the list was merely indicative, and not exclusive. Furthermore, under international covenants on human rights, some rights were derogable in emergency situations. The proper approach, then, was to retain the indicative list without adding a second paragraph in article 5. The subject matter and the nature of the list could be further explained in the commentary.

72. She had no objection to the changes suggested for draft article 6, and she endorsed the proposal to replace the phrase "in accordance with the 1969 Vienna Convention on the Law of Treaties" with the words "in accordance with international law". With regard to draft article 7, she said that, given the emphasis placed on the connection between draft articles 3, 4 and 5, article 7 could be placed either after draft article 3 or after draft article 5; the matter could be further examined in the Drafting Committee.

73. Turning to draft article 8, she noted that in paragraph 42 of his report the Special Rapporteur had described a scenario in which a State party to a treaty notified the other parties of its intention to terminate or suspend the

²⁰⁹ Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (Tehran, 15 August 1955), United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

treaty under draft article 8, but the conditions under draft article 4 were not met. The question was whether the notifying State should be held accountable for non-compliance with its obligation in such a case. That was a typical example of treaty disputes that were likely to arise in practice. The procedural requirement of notification was desirable for the sake of stable treaty relations, but the more difficult part lay in determining whether there was a meeting of the minds of the States concerned.

74. With regard to dispute settlement, she said it was important that draft article 8 emphasize the obligations under Article 33 of the Charter of the United Nations and general international law. The wording of article 8, paragraph 5, however, was not clear: it could be interpreted to mean that even if an armed conflict had made it impossible for the treaty to remain in operation, the States concerned should nevertheless remain bound by the provisions on dispute settlement. If the obligation was defined in general terms, it would not be far from requirements of paragraph 4, but if it was defined in very specific terms with regard to procedural requirements, it would be difficult to invoke the terms by applying draft articles 4 to 7 under circumstances of armed conflict if the parties concerned did not intend to comply with those requirements. In other words, the question of dispute settlement would be determined on the basis of the intention of the parties rather than through the application of articles 4 to 7. Consequently, the draft articles should allow States a degree of flexibility as to the choice of means of a settlement. That was true in peacetime, and perhaps even more so in time of armed conflict.

75. Draft article 11 was quite strongly worded. Having carefully read the comments made by China, reflected in paragraphs 104 to 106 of the report, she said that three points needed to be made. First, loss of the right to terminate or suspend a treaty was not the consequence of an armed conflict, but of an express or implicit consent of the State concerned when it was clearly aware of the effects of the armed conflict. Secondly, such consent, whether expressed or construed from the State's conduct, should be given or taken into account after the armed conflict had begun. Thirdly, once such consent was given, if the armed conflict subsequently escalated in intensity and duration, fundamentally changing the circumstances, the State concerned should be allowed to reconsider its position on treaties. Those issues were difficult but not uncommon in practice, and they should be examined further, together with draft article 17.

76. Draft article 12, on resumption of suspended treaties, covered a narrow area. Nevertheless it should be considered together with draft article 18, on revival of treaty relations, to see whether the two articles could be combined into a single article so as to avoid any misunderstanding on the part of the reader.

77. Ms. Xue agreed that draft articles 1 to 12 should be referred to the Drafting Committee.

78. Ms. JACOBSSON, referring to draft article 3, said that she agreed with the approach that it should also cover situations involving a single State party to a conflict and third States, and she therefore welcomed the revised

formulation of the text, particularly the clarification of the meaning of the term "third State". She agreed that the title could be improved, and she endorsed the proposal by Mr. Vázquez-Bermúdez regarding the principle of continuity. If the reference to "principle" posed a problem, or if the Commission could not agree on whether it was talking about the principle of presumption, it could simply use the formulation "continuity" or "continuity of treaty relations". She had no objection to the use of the words "*ipso facto*", as long as they did not appear in the title, although they could be replaced by "in itself".

79. With regard to draft article 4, she agreed with those members who were in favour of including a reference to the intention of the parties as a way of ascertaining whether a treaty was susceptible to termination, withdrawal or suspension. It might be useful to attempt to merge the two subparagraphs.

80. Draft article 5 raised the crucial question of a possible differentiation among treaties. Such a differentiation obviously existed, with treaties on the laws of warfare, including humanitarian law, being obvious examples. The entire rationale of such treaties was that they were applicable in times of armed conflict. In the best of worlds, human rights treaties also continued to apply in parallel with the *lex specialis* of humanitarian law. Yet human rights treaties sometimes had a differentiation embedded in them, in that they allowed for certain provisions to be suspended in wartime. Border and boundary treaties were other examples, whereas common resource management treaties that might follow from a boundary agreement might be a totally different matter. She endorsed the Special Rapporteur's proposal to add a new paragraph to draft article 5. The list of categories in paragraph 2 served as good examples of treaties that should be subject to restrictions in situations of armed conflict. The wording of paragraph 2 and the content of the annex could be discussed further in the Drafting Committee.

81. Mr. Murase had made an interesting reference to armistice agreements and environmental treaties. His line of reasoning with regard to armistice agreements was very convincing, and the question could be discussed further in the Drafting Committee. She disagreed with him, however, on environmental treaties. It was true that the Geneva Conventions for the protection of war victims and the Protocols additional thereto afforded little protection for the environment. Other conventions might have stronger provisions, such as the Convention on the prohibition of military or any hostile use of environmental modification techniques. Mr. Murase had argued that military necessity implied that the environment could not be protected and that it was necessary to accept "collateral damage", although that was not exactly what treaties of international humanitarian law actually stated. He seemed to draw the conclusion that environmental treaties should not be included in the group of treaties in draft article 5 or its annex or in the commentary and that they might be suspended during an armed conflict. That view did not reflect the current state of international law. It was well known, for example, that one of the reasons why it had been so difficult to include environmental protection in the law of armed conflict had to do with nuclear weapons. Any rule that implied that nuclear weapons could not be used

because of their effect on the environment would not be acceptable to the nuclear Powers. Yet surely environmental protection had evolved beyond the stage it had been at when the Protocols—not to mention the Geneva Conventions for the protection of war victims themselves—had been concluded. If it had not, that would mean that those instruments had remained unaffected by developments in international law. That was obviously not the case, and the ICJ had made it very clear in paragraph 30 of its 1996 advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons* that:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

Thus a belligerent could not disregard the obligation to protect the environment. That did not mean that an act that would have been a violation of a provision of an environmental treaty in peacetime would be regarded as a violation in wartime. The exceptions provided for in articles 61 and 62 of the 1969 Vienna Convention would apply.

82. It would be wrong to conclude that environmental treaties should not continue to operate between non-belligerent States and a State that was a party to a conflict. It would send the wrong signal not to include environmental treaties in the annex. After all, the Commission's main objective was the continued application of a treaty in times of armed conflict. The Commission did not want to assume that the Convention on biological diversity, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes or other treaties would cease to operate or could be easily suspended, particularly since the Commission had expanded the categories of States to which the draft articles were applicable to include States that were not parties to the conflict.

83. With regard to draft article 6, she said that the phrase "in accordance with the 1969 Vienna Convention on the Law of Treaties" should be deleted, and she endorsed Sir Michael's proposal to replace it with "in accordance with international law".

84. Turning to draft article 8, she said that Mr. Vascianie's point on the interests of vulnerable States was well taken. She welcomed the improvements made to the draft article, and to paragraph 3 in particular, but was sceptical about the issue of a time limit and looked forward to discussing the matter in the Drafting Committee. She was in favour of retaining an obligation to continue to seek to resolve problems or disputes by peaceful means, either with a reference to Article 33 of the Charter of the United Nations or in an additional paragraph 5 to draft article 8. There was nothing in international law that relieved States of their obligation to try to settle conflicts by peaceful means, even in times of armed conflict. Any dispute that arose needed to be addressed in accordance with that basic principle.

85. Concerning draft article 10, she agreed with the Special Rapporteur that there was no need to replace the wording from the first reading in 2008.

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

87. Mr. VARGAS CARREÑO commended the Special Rapporteur on the high quality of his third report and said that, on the whole, he was in agreement with its summary of the discussion on the introductory articles. He would, however, like to make a comment about draft article 4. The original text of draft article 4 had excluded armed conflicts. That exclusion had prompted a debate between those in favour of such an exclusion and those who had maintained that an armed conflict could be regarded as a disaster in certain circumstances and might thus fall within the scope of the draft articles. The Drafting Committee had provisionally adopted a text which appeared to have been to everyone's satisfaction. According to the version of draft article 4 adopted, the draft articles did not apply to situations in which the rules of international humanitarian law were applicable—in other words, they would be applicable in the event of armed conflict in all cases not regulated by international humanitarian law. He believed it was important to make that point because in paragraph 47 of his report the Special Rapporteur had stressed that armed conflict was to be excluded from the subject matter to be covered in the Commission's current work. Personally, he did not think that that was entirely correct.

88. In his third report, the Special Rapporteur presented three new draft articles. With regard to draft article 6, on humanitarian principles in disaster response, he stated, in paragraph 15: "Response to disasters, in particular humanitarian assistance, must comply with certain requirements to balance the interests of the affected State and the assisting actors. The requirements for specific activities undertaken as part of the response to disasters may be found in the humanitarian principles of humanity, neutrality and impartiality." He fully agreed with the Special Rapporteur that the principle of humanity was the cornerstone of the protection of persons in international law, as it marked the point where international humanitarian law intersected with human rights law. Accordingly, it was a necessary element for the development of mechanisms for the protection of persons in the event of disasters. Moreover, the principle of humanity was enshrined in a number of important international instruments.

89. On the other hand, he had grave doubts about including the principle of neutrality as one of the humanitarian principles to be applied in the event of disasters, particularly if the disaster was not the result of an armed conflict. To describe the principle of neutrality, the Special Rapporteur cited the Fundamental Principles of the Red Cross, which stated that humanitarian response must be provided without engaging in hostilities or taking sides "in controversies of a political, religious or ideological

nature”.²¹⁰ However, a disaster that was not caused by an armed conflict did not involve hostilities or political, religious or ideological controversies; at most, there might be disagreement as to the causes of the disaster or the priorities for reconstruction, but an excessively rigid interpretation of the principle of neutrality might inhibit some actors who—in the case of an earthquake, for example—wanted their contribution to be used for rebuilding schools or housing, whereas some groups within the State might attach greater importance to the rebuilding of infrastructure. He understood the Special Rapporteur’s concern for protecting certain fundamental principles relating to State sovereignty and ensuring that those who responded to disasters refrained from engaging in conduct that might be considered interference in the interests of a State, but that legitimate concern was not covered by invoking the principle of neutrality, which might affect the authority of actors who, through dialogue and flexible cooperation with the State under the latter’s supervision, wanted actively to assist the victims of the disaster.

90. Perhaps that concern might better be addressed by the principle of impartiality, which, according to the Special Rapporteur, encompassed three distinct principles: non-discrimination, proportionality and impartiality proper. The principle of non-discrimination, which had been established in the most basic international instruments, beginning with the Charter of the United Nations, had acquired the status of a fundamental rule of international humanitarian law and international human rights law. There was no question that it also belonged in the set of draft articles, as there should be no discrimination of any kind in the provision of assistance to persons affected by a disaster. Given its importance, the principle of non-discrimination should be mentioned explicitly in draft article 6, in place of the principle of neutrality.

91. It did not, however, seem appropriate to include the principle of proportionality as a component of impartiality. The principle of proportionality in international law had been developed primarily in the writings of legal scholars and through the precedent-setting interpretations of the ICJ, such as the one relating to the right of self-defence, which was reflected in Article 51 of the Charter of the United Nations. In his view, the disadvantages of incorporating the principle of proportionality in the present set of draft articles outweighed the advantages, even if it was mentioned only in the commentary.

92. According to the Special Rapporteur, “[t]he principle of proportionality recognizes that the response must be proportionate to the degree of suffering and urgency. In other words, the response activities must be proportionate to the needs in scope and in duration”. He disagreed, at least partially, with that criterion: disaster response obviously did depend, in part, on the degree of suffering and urgency and on the needs of the affected State, but it also depended on such other factors as the economic capacity of the entity providing the assistance. To establish a relationship of proportionality between suffering and needs, on the one hand, and the provision of assistance, on the other, would mean excluding the relief that many States, international organizations and agencies were prepared to

provide, according to their ability to do so. In the case of the recent earthquake in Chile, which was the fifth most devastating in recorded history, it was estimated that reconstruction would cost billions of dollars. While foreign aid was certainly among the resources that would pay for the reconstruction, no State could be required to ensure that its response was proportionate to the needs of Chile. The President of the Plurinational State of Bolivia, one of the poorest countries in Latin America and one with which Chile did not have diplomatic ties, had offered to donate a day’s wages to the reconstruction effort, as had several of his Ministers. That assistance was completely disproportionate to the needs of Chile, yet it was a gesture that was much appreciated by Chileans.

93. With regard to the principle of impartiality proper, it should be included in the set of draft articles in its narrower sense, meaning—as the Special Rapporteur had proposed and as an excellent memorandum by the Secretariat²¹¹ had previously described it—the obligation to remove subjective distinctions between individuals based on criteria other than need.

94. In the light of those observations, he suggested that the term “neutrality” in draft article 6 be replaced by “non-discrimination”.

95. In draft article 7, the Special Rapporteur had proposed a provision concerning human dignity, a concept that was explicitly recognized in nearly all international and regional human rights instruments. While he personally would have preferred the inclusion of that necessary reference in the preamble, the Commission had already discussed the same issue under the topic of expulsion of aliens, and most members of the Commission and the Drafting Committee had favoured including a provision on the obligation to respect the dignity of persons being expelled in the body of the corresponding draft articles. He would not therefore insist on placing the reference to human dignity in the preamble of the current set of draft articles and could accept the text proposed by the Special Rapporteur for draft article 7. He wished to suggest, however, that an additional reference be included in the draft article, namely, to the obligation of States to respect fundamental human rights in accordance with the international instruments to which they were a party. Alternatively, such a reference could be set out in a separate draft article. In any case, such a reference was important because disasters generally affected human rights, both those of a general nature and those relating specifically to the most vulnerable categories of the population, such as children and disabled persons. Disasters inherently affected civil and political rights as well as economic, social and cultural rights. They affected non-derogable human rights and others that, under certain conditions, could be derogated from in an emergency and temporarily suspended. He therefore found it neither superfluous nor unnecessary to include such a general provision in the draft articles. On the contrary, it would strengthen the obligation to respect human rights, even in cases of emergencies, including disasters, and would authorize affected States to suspend the exercise of certain human rights temporarily, action that was contemplated in the

²¹⁰ See footnote 185 above.

²¹¹ A/CN.4/590 and Add.1–3 (see footnote 182 above), para. 15.

International Covenant on Civil and Political Rights and in some regional instruments, such as the American Convention on Human Rights: "Pact of San José, Costa Rica".

96. In draft article 8, the Special Rapporteur had based his proposed provisions on an interesting study he had prepared on the subject of sovereignty and non-intervention and the primary responsibility of the affected State (paras. 64–95), which contained many references to scholarly opinion, relevant treaties, international case law and precedents set by international organizations, particularly in resolutions adopted by the General Assembly. Of all the instruments cited by the Special Rapporteur, his own preference was for General Assembly resolution 46/182 of 19 December 1991, on the strengthening of the coordination of humanitarian emergency assistance of the United Nations, which contained the following in paragraph 4 of its annex:

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.

The language proposed by the Special Rapporteur in draft article 8 was similar to that used in the above-mentioned resolution, but he would have preferred for it to adhere even more closely to the wording of the resolution for two reasons: first, because it was language that had already been the subject of broad consensus and, secondly, because it was more suitable than the language contained in the Special Rapporteur's proposal. The General Assembly resolution referred to the affected State's primary—and therefore not sole or exclusive—role in the initiation, organization, coordination, and implementation of humanitarian assistance, whereas in the wording proposed by the Special Rapporteur, the State appeared to have a monopoly to direct, control, coordinate and supervise assistance.

97. He also had a problem with the wording of paragraph 2 of draft article 8, which stated that external assistance could be provided only with the consent of the affected State. Although no State was required to accept external assistance offered to it, the wording of paragraph 2 could be interpreted to mean that the affected State must give its prior and express consent before external assistance could be provided. That did not reflect State practice and might even hamper urgent disaster relief efforts. In the recent earthquake in Chile, medicine, food and other assistance had begun flowing into the country only hours after the event, without the prior or formal consent of Chile and merely upon receipt of the appropriate authorization for its entry into the country. In a disaster, what was important was adequate coordination between the affected State and the assisting parties, with the affected State playing the primary role in the initiation, organization and coordination of humanitarian assistance.

98. The issue of initiation was one that could potentially be of vital importance. Following the earthquake in Chile, people in large parts of the country were without electricity or telephone service for several hours and, in some places, several days. When the United States Secretary of State, Hillary Clinton, asked the Chilean authorities

what type of assistance the country needed, they replied that what Chile needed most were satellite phones. Those phones had proved to be crucial in re-establishing communication both within the country and with the outside world. He was citing that example in the hope that it might serve to supplement the excellent and well-documented report introduced by the Special Rapporteur.

99. He would be in favour of referring the draft articles, along with his comments and those of other Commission members, to the Drafting Committee.

100. Mr. HMOUD said that he agreed with the inclusion in the draft articles of the humanitarian principles of humanity, neutrality and impartiality because they constituted important safeguards for relations between actors in the event of a disaster while also ensuring that the needs of affected persons were given priority. Furthermore, they were well established in the field of humanitarian relief. Neutrality guaranteed that humanitarian assistance was not used as a means of interfering in the internal affairs of an affected State and that aid was used only for humanitarian, and not political, purposes. States were at their most vulnerable in a disaster situation, and to exploit that vulnerability as well as the people's needs for political ends not only defeated the humanitarian goal of disaster relief but also had a negative impact on other humanitarian actors. It was thus in the interest of both States and other humanitarian actors to include the principle of neutrality in the legal framework of the present draft articles.

101. As far as impartiality was concerned, he agreed with the Special Rapporteur that, in some conditions, directing the disaster response towards certain vulnerable groups, such as children, did not violate the principles of non-discrimination or impartiality.

102. The principle of humanity was important for guiding humanitarian relief in the wake of a disaster. It placed affected persons within the relief process and recognized that respecting the rights and needs of those persons was the ultimate goal. It also served as an important indicator against which actors in a disaster situation could measure the effectiveness of their performance.

103. However, while he agreed that the three principles should be included in the draft articles as guiding principles for humanitarian response to disasters, he believed it might also be useful to amend draft article 6 to reflect that their purpose was to provide guidance. The statement in draft article 6 that response to disasters must take place in accordance with the principles of humanity did not of itself impose any specific legal obligation on the actors involved. The reference to the principle of neutrality, on the other hand, was directed at providers of assistance other than the affected State and could entail the specific legal obligation of non-interference. The principle of impartiality, meanwhile, could be applied to all actors involved, including the affected State, and implied the key obligation of non-discrimination. Thus, although the three principles could be grouped together as guiding principles, the specific obligations to which they gave rise should be enumerated individually in the draft articles. In that connection, he proposed that the Commission give consideration to three options: first, draft article 6 should

be reformulated to indicate that the protection of persons in the event of disasters was guided by or based on the principles of humanity, neutrality and impartiality; alternatively, the reference to the three principles should be placed in the preamble to the draft articles; and, lastly, separate draft articles should be formulated to reflect the content of the principles of neutrality (the obligation of non-interference on the part of external providers of assistance) and impartiality (the obligation of all actors involved not to discriminate).

104. In his report, the Special Rapporteur made an elaborate case for the inclusion of human dignity as an obligation under the draft articles, but the fact remained that human dignity was a source of human rights and not a right *per se* entailing specific obligations. That issue had been debated in the Commission during its consideration of the topic of the expulsion of aliens. In that context, it had been agreed that, in order to avoid discussing whether human dignity should be constituted as a general right, the focus of the obligation should be respect for human dignity in the specific context of the treatment of persons who had been or were being expelled. He questioned whether that solution could be transposed to the topic under consideration, given the different contexts of the two topics. Whereas the first topic referred to the process of expulsion during which individuals were entitled to respect for their human dignity, the second topic, relating to disasters, referred to a situation, not a process. Nevertheless, if the Commission agreed that the treatment given to individuals affected by a disaster must show respect for their human dignity, then the content of the corresponding obligation had to be clearly enunciated.

105. In his report, the Special Rapporteur had thoroughly addressed a key issue that would help orient the draft articles: the primary responsibility of the affected State for organizing relief in the event of a disaster. Based on the instruments, jurisprudence and case law cited in his report, the Special Rapporteur demonstrated that international law considered that such responsibility lay with the affected State. That was an important pronouncement that served to safeguard the sovereignty of affected States; however, it also had significant legal consequences. Under the draft articles, the affected State had a duty to protect the individuals in its territory, and while it was entitled to refuse the provision of any external assistance offered it, it bore responsibility for its decision and could be found in breach of the draft articles if such refusal undermined the rights of affected individuals under the draft articles or general international law. The affected State could also incur international responsibility if it performed its obligations in a deficient manner, whether from a humanitarian or an operational perspective. The responsibility of an affected State in the event of a disaster had to be read together with the duty to cooperate, as the two obligations carried equal weight. Also, primary responsibility did not mean exclusive responsibility, and the affected State had to be aware that its rights stemmed only from its fulfilment in good faith of its obligations under the draft articles towards individuals in its territory.

106. He could therefore accept the content of draft article 8 reflecting the primary responsibility of the affected State for the protection of persons, its right to organize

humanitarian assistance and its right to consent to the provision of external assistance. He recommended referring draft articles 6, 7 and 8 to the Drafting Committee.

107. The CHAIRPERSON, speaking as a member of the Commission, commended the Special Rapporteur for his third report, which provided an in-depth analysis of the legal basis of the general principles of humanity, neutrality, impartiality, respect for human dignity and sovereignty in international law. On the whole, she agreed that those principles should be included in the draft articles, but she wished to make a few comments on the content of and the relationship between those principles.

108. As the Special Rapporteur pointed out, the three humanitarian principles of humanity, neutrality and impartiality had evolved from the International Red Cross and Red Crescent Movement and had subsequently become part of international humanitarian law. They were currently accepted as the leading principles governing various types of humanitarian assistance activities. In time of war, States on opposing sides of a conflict could allow humanitarian assistance to be made available to innocent civilians and the wounded on both sides by invoking those principles. Although that was easier said than done, the principles themselves had stood the test of time in international relations and had greatly promoted human progress. When emergency situations arose in times of peace, whether as a result of natural disasters or other catastrophes, the needs of victims became the highest priority, and assistance could be provided by actors of any kind. While such admirable efforts should be encouraged to the extent possible, it should be recalled that differences and even conflicts between States could arise and easily impede such efforts. The three humanitarian principles were intended to circumvent such differences in order to ensure the smooth operation of humanitarian assistance. From a certain perspective, therefore, those principles had the effect, not of weakening the principles of sovereignty and non-intervention, but rather of strengthening them, since all response operations must respect the principles of sovereignty and non-intervention. As the Special Rapporteur rightly pointed out in paragraph 27 of his report, a State's humanitarian response should not be used to intervene in the domestic affairs of another State. Thus the principle of neutrality was clearly subordinate to the principle of respect for the sovereignty of States: it obliged assisting actors to do everything feasible to ensure that their activities were not being used for purposes other than responding to the disaster in accordance with the humanitarian principles.

109. In his report, the Special Rapporteur highlighted the primary responsibility of the affected State, but only after discussing the three humanitarian principles. In her view, the principles of sovereignty and non-intervention that were reflected in draft article 8 should be established before the three humanitarian principles enumerated in draft article 6. Reversing the order of the placement of those draft articles would properly reflect both the rights of the affected State with regard to humanitarian assistance and the responsibility of that State for the overall rescue operation.

110. In substance, the principle of sovereignty referred not only to the primary responsibility and consent of the

affected State but also to the fact that those assisting, whether States or non-State actors, should follow the affected State's direction, respect its decisions and not interfere in its domestic affairs, threaten its political system or do anything unrelated to the rescue effort. If those principles were truly observed, an individual appeal for international relief should not pose any problem. China's recent experience in earthquake relief operations had shown that individual, collective and national appeals for international relief shared the common goal of rescuing and helping victims. Given that requests for assistance varied from individual to individual and from situation to situation, coordination at the local, national and international levels was crucial. It was not that the concept of an individual appeal for international relief was "in tension with the principles of sovereignty and non-intervention", as the Special Rapporteur stated in paragraph 6 of his report, but rather that the response from foreign countries to an individual appeal might not always be acceptable to the affected State for reasons unknown to the individual or because the affected State could not handle such a response, given the conditions in or the capacity of the country.

111. She was not certain why, in paragraph 15 of the report, the Special Rapporteur had referred to requirements for balancing the interests of the affected State and the assisting actors, since, in her view, those interests were identical—namely, to rescue the victims of a disaster. As the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations and the ASEAN [Association of Southeast Asian Nations] Agreement on Disaster Management and Emergency Response made clear, the affected State exercised overall direction, control, coordination and supervision of assistance within its territory. When the normal social order was disrupted by the sudden occurrence of a disaster, responses to individual appeals should proceed alongside the general flow of assistance operations. The question was not so much one of balancing as it was one of coordinating and supervising.

112. It was likewise not quite clear what was meant by the requirement to "respect and protect human dignity" in draft article 7. She wondered also how draft article 7 related to draft articles 6 and 8, as it seemed to imply more than it expressed. In her view, draft article 7 should be interpreted to mean that every life should be rescued and every victim should be assisted. That was a code of conduct, rather than a code of results. The goal of the Commission was to ensure that no person was left on his or her own, but as a legal duty that goal had a direct bearing on the capacity of the affected State and the duty of other States to provide assistance. The meaning of draft article 7 should therefore be elucidated, and an explanation should be provided in the commentary.

113. In the contemporary world, disasters, whether of natural or man-made origin, had become one of the most important security issues for all countries. If the problems associated with disasters stemmed primarily from the responsibility of States to protect their citizens in such events, the task of international law would be made easier. Likewise, if such problems occurred mainly at the national level, it would be easier to find solutions. More often than

not, however, even when affected States, particularly developing countries, fully discharged their responsibilities, they still lacked either the capacity or the experience to deal with a major disaster, thereby making international cooperation crucially important. Moreover, a major disaster, such as a tsunami, could affect several States at once, thereby making international cooperation fundamental to the provision of assistance in the resulting large-scale rescue operations. That did not mean that other fundamental principles could be put aside; instead, they combined to form the legal basis for assistance operations.

114. She had checked the statement made by the delegation of China to which reference was made in the report (in the first footnote to paragraph 12²¹²) and had discovered that the expression "moral value of cooperation" meant that the obligation to accept disaster relief by the affected State and the duty to fulfil requests for relief by assisting actors should not be construed as absolute legal obligations. In other words, the affected State could decline international assistance as it saw fit, and the assisting actor could also reject a request for relief, owing to its limited capacity. It should be possible for that understanding to be generally accepted without any difficulty.

115. In conclusion, she was in favour of referring draft articles 6, 7 and 8 to the Drafting Committee for further improvement.

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

[Agenda item 1]

116. The CHAIRPERSON drew attention to a study by the Secretariat entitled "Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'" (A/CN.4/630).²¹³

117. Mr. PELLET said that, in his capacity as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), he considered the study to be a particularly useful document for the Commission's forthcoming work on that topic. After consulting with Mr. Galicki, Special Rapporteur for the topic, he was in favour of deciding to issue it as an official document of the Commission, which would make it possible to have it translated from English into the other official languages of the United Nations, thus making it more accessible to the members of the Commission.

118. The CHAIRPERSON said that if she heard no objection, she would take it that the Commission wished to request that the study by the Secretariat entitled "Survey of multilateral conventions which may be of relevance

* Resumed from the 3053rd meeting.

²¹² "Solidarity and cooperation could then be included as moral values, provided that their inclusion could in no way be construed as an obligation on the part of disaster-affected States to accept relief or on the part of States providing relief to satisfy requests for assistance, since that depended on their capacity" (*Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 20th meeting (A/C.6/64/SR.20)*, para. 24).

²¹³ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

for the work of the International Law Commission on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’” be issued as an official document of the Commission.

It was so decided.

The meeting rose at 1 p.m.

3056th MEETING

Thursday, 3 June 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

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

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the agenda item on protection of persons in the event of disasters.

2. Mr. PERERA commended the Special Rapporteur on his comprehensive, well-structured third report (A/CN.4/629) which dealt with the key principles of the topic, namely humanity, neutrality and impartiality, and with the overarching concept of human dignity, which was intimately linked to those principles. The Special Rapporteur had also tackled the fundamental question of the primary responsibility of the affected State.

3. When the Sixth Committee had considered the second report,²¹⁴ States had expressed satisfaction with the Special Rapporteur’s dual-axis approach, which consisted in focusing first on States’ rights and obligations *vis-à-vis* each other and then on States’ rights and obligations *vis-à-vis* individuals (para. 5 of the third report). Most States had also approved of the Special Rapporteur’s emphasis on the rights and needs of affected persons (para. 6).

4. The Special Rapporteur noted that the principles of humanity, neutrality and impartiality were widely used in numerous international instruments, first and foremost in the guiding principles contained in the annex to General Assembly resolution 46/182 of 19 December 1991, on the strengthening of the coordination of humanitarian

emergency assistance of the United Nations. According to paragraph 22 of the report, the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance²¹⁵ emphasized that those humanitarian principles must not be used for extraneous purposes. Similarly, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had found that humanitarian assistance must be limited to “the purposes hallowed in the practice of the Red Cross” in order to “escape condemnation as an intervention in the internal affairs” of the affected State (para. 243 of the opinion). As paragraph 25 of the report rightly stated, disaster response was conditioned at all stages on those humanitarian principles so as to preserve its legitimacy and effectiveness.

5. With regard to draft article 6, he said that since the Commission had decided to exclude situations of armed conflict from the scope of the draft articles, it should reflect further on the notion of “neutrality”.

6. Having traced the origins of the concept of human dignity and its incorporation in human rights instruments, the Special Rapporteur concluded in paragraph 61 that “dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international law, and points to a true international community, based on the respect of human beings in their dignity”. Draft article 7 sought to place the concept of human dignity in the context of efforts to devise a normative framework for the protection of persons in the event of disasters.

7. Part IV of the report dealt with the important matter of the responsibility of the affected State. The principles of sovereignty and non-intervention, both of which were well established in international law, were fundamental to the treatment of the affected State’s role and responsibility. The key guiding principles for disaster response were set forth in the annex to General Assembly resolution 46/182, which stated that “[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country” (annex, para. 3).

8. The Special Rapporteur dealt with the matter by indicating that two general consequences flowed from the affected State’s primacy in disaster response. The first was that that State bore the ultimate responsibility for protecting disaster victims in its territory and had a central role in facilitating, coordinating and overseeing relief operations in its territory. The second was that humanitarian aid could be supplied only with its consent. The Special Rapporteur was right in saying that this fundamental requirement, a necessary corollary of the principles of sovereignty and non-intervention, was “of a primarily ‘external’ character”, since it governed the affected State’s relationships with other international actors in the wake of a disaster (para. 90). Draft article 8 did reflect these “internal” and “external” aspects of the responsibility of the affected State.

²¹⁴ See footnote 178 above.

²¹⁵ See footnote 198 above.

9. Another fundamental principle to which several members of the Commission had referred was that of international cooperation and solidarity, as set forth in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations adopted by the General Assembly in its resolution 2625 (XXV).

10. In its further work on the topic, the Commission should remember that the affected State and other actors played vital roles in the overall umbrella of international cooperation and solidarity. Hence, the issues that the Special Rapporteur was intending to cover in forthcoming reports, for example guidelines for foreign actors and the relationship between the affected State and foreign humanitarian personnel, were of crucial importance.

11. In conclusion, he suggested that draft articles 6, 7 and 8 be referred to the Drafting Committee.

12. Sir Michael WOOD congratulated the Special Rapporteur on his interesting and stimulating third report in which he proposed three new draft articles.

13. Draft article 6 (Humanitarian principles in disaster response) had the merit of simplicity—it read: “Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality.”

14. But what was meant by “response”? What was the scope of that word? What “response” was the Commission talking about? Did the phrase “shall take place in accordance with” clearly express what it wished to say? An even more substantive question was whether it was meaningful to include such general provisions in the operative part of what was intended to become a legal text. The Special Rapporteur apparently intended his future reports to contain more specific provisions that would elaborate on those general clauses. Rather than elaborating on those principles, however, it would be better to replace them with more precise provisions.

15. The Special Rapporteur stated repeatedly that the “principle of humanity” was a principle of international law. However, the various examples given were taken from non-binding instruments such as resolutions of the General Assembly or the Economic and Social Council, or were context specific. The texts were mostly more precise than the single word “humanity” might suggest, and it was not always clear how far they were intended to constitute a statement of a principle of law or a policy. For example, in the *Corfu Channel* case and in *Military and Paramilitary Activities in and against Nicaragua*, the reference by the ICJ to “elementary considerations of humanity” (*Corfu Channel*, p. 22) was a far cry from a statement of a general principle of “humanity” in international law.

16. Draft article 7 was worded: “For the purposes of the present draft articles, States, competent international organizations and other relevant actors shall respect and protect human dignity.” He agreed with the Chairperson that the meaning of that provision was not particularly plain and that the Drafting Committee might wish to replace the words “For the purposes of the present draft articles” with

“In implementing these draft articles”. Moreover, draft article 7 would read better and be clearer if the phrase “respect and ensure the protection of human dignity” were used instead of “respect and protect human dignity”.

17. Draft article 8 was more specific than the other two, but was perhaps too rigid. Although it raised some very important issues of principle, the absolutist terms of the two paragraphs making up the draft article might give a false impression. While he understood that the Special Rapporteur intended to refine those provisions in future reports, he wished to make four specific points about the draft article at the present stage.

18. First, he welcomed the fact that the Special Rapporteur intended to expand on draft article 8 in future reports. Among other things, consideration should be given to recognizing the legal consequences of the responsibility of the affected State, at least by saying that the consent of the affected State should not unreasonably be withheld. Such a statement, which could be found in other international instruments, would be without prejudice to that State’s sovereign right to decide whether external assistance was appropriate, but such a decision must be taken in good faith and in light of the affected State’s primary responsibility. It was also necessary to recognize that, in some exceptional circumstances, the affected State might be unable to give formal consent within the timescale needed to react to an overwhelming disaster.

19. Secondly, the two paragraphs of draft article 8 dealt with different matters: first, the primary responsibility of the affected State to protect its own population; and secondly, the need to obtain the affected State’s consent to what was termed “external assistance”. The Drafting Committee might wish to consider whether those two matters should be dealt with in separate provisions: the relationship between the two required careful consideration. In particular, the fact that consent of some sort might be necessary did not imply that the affected State’s primary responsibility towards its own population was in any way diminished.

20. Thirdly, the second paragraph of draft article 8 related to “external assistance”, a term that was not defined. Was the Commission purporting to impose an international law requirement that NGOs or other private bodies must obtain the affected State’s consent? Was it not sufficient to say that they must comply with the affected State’s internal law, which in turn must be designed to enable the affected State to fulfil its primary responsibility? Presumably, the phrase “external assistance” was not intended to cover assistance given by foreign private entities or international organizations already present in the affected State.

21. His fourth and final point concerned the draft articles already considered by the Drafting Committee, as well as the three new draft articles now proposed. As they stood, those texts did not make it clear whether the Commission was seeking to lay down rules for States and other bodies with international legal personality, principally international intergovernmental organizations, or whether it was trying to cover private entities as well. Why, for example, did draft article 7 impose an obligation on “States, competent international organizations and other relevant actors”

(whoever “other relevant actors” might be), whereas draft articles 6 and 8 were drafted in a very general way and did not specify who, if anyone, had rights and obligations in that context?

22. In conclusion, he supported the referral of draft articles 6 and 7 to the Drafting Committee but thought it preferable to see what the Special Rapporteur’s more detailed proposals were before doing likewise with draft article 8.

23. Mr. DUGARD congratulated the Special Rapporteur on his informative and interesting report. It was also provocative in the sense that it was not neutral: it was heavily weighted in favour of the early precepts of international law, grounded in the principles of sovereignty and consent as the basis for international relations. While he disagreed with the Special Rapporteur’s legal philosophy, he welcomed the report as a good basis for a debate that would highlight differing approaches within the international law community.

24. He wondered about the purpose of the report. Was it simply to confirm that the protection of persons in the event of disasters fell within the affected State’s domestic jurisdiction? If so, then it was enough to adopt the existing draft articles. Draft article 8 simply reaffirmed Article 2, paragraph 7, of the Charter of the United Nations. Paragraph 74 of the report said that a State affected by a disaster was free “to adopt whatever measures it sees fit” to ensure the protection of affected persons. Draft articles 6 and 7 asserted that States, in exercising their sovereign rights, must respect the rights of the persons affected.

25. He was uncertain why the Commission should embark on such an exercise at all, since the Charter of the United Nations already embodied those principles. Indeed, it went further than the draft articles: under Articles 55 and 56, States were obliged to exercise their rights, in a given domestic sphere, in a non-discriminatory manner and with respect for the human rights of the affected persons. Draft article 1, adopted at the sixty-first session by the Drafting Committee, referred to the rights of the persons concerned (not to their human rights), and draft articles 7 and 8 spoke of the principles of humanity, neutrality and impartiality and of human dignity, but made no mention of the principle of non-discrimination. The Special Rapporteur held that that principle was subsumed under impartiality but, like Mr. Vargas Carreño, he personally believed that non-discrimination should be mentioned expressly, as it had been in the resolution of the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, to which reference was made in paragraph 22 of the report.

26. It was undoubtedly not the Special Rapporteur’s intention simply to reaffirm Article 2, paragraph 7, of the Charter of the United Nations, because in paragraph 75 of the report he said that the sovereign authority of the affected State “remains central to the concept of statehood, but it is by no means absolute”. As was clear from paragraphs 15 and 61, *inter alia*, the purpose of the draft articles was to balance the State’s rights with the human rights of its citizens, and even with the interests of the international community, in the event of a disaster.

27. In his introductory statement, the Special Rapporteur had indicated that in later reports he would submit draft articles limiting State sovereignty. However, irreparable harm would be done if draft article 8 were accepted as it stood: the requisite limitations should be addressed without delay. The Commission must adopt a set of draft articles that balanced State sovereignty with the international community’s interests, on the basis of respect for human rights. Unfortunately, contemporary history showed that not all States responded to natural disasters while taking account of the need to protect human rights. One had only to compare the recent response of the Government of Haiti with that of the Government of Myanmar a few years earlier. After the earthquake, Haiti had immediately appealed for international assistance, aid from the United Nations and other international organizations. Governments had responded in a constructive manner and with no ill effects on the sovereignty of Haiti, as demonstrated by the fact that the Government had prevented an NGO from taking orphans out of its territory without permission. The State’s sovereign rights had been safeguarded, even with the intensive involvement of the international community. The reaction of Myanmar had been different, even though the situation there could be described as exceptional in many respects. There were many evil regimes in the world that might find it inconvenient to allow in international emergency assistance, as that would oblige them to open their borders to observers from the international community.

28. The Special Rapporteur had repeatedly emphasized that the affected State had a primary responsibility for handling disasters, and he himself did not dispute that. The State’s secondary responsibility should be mentioned as well, however, if only through a reference to the resolution adopted by the Institute of International Law in 2003, cited in paragraph 89 of the report, in which the Institute indicated that the affected State had the duty “to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses”.²¹⁶

29. The Commission should go much further, however: it should return to the bold approach it had adopted in the draft articles on responsibility of States for internationally wrongful acts²¹⁷ and engage in moderate progressive development. Article 8, paragraph 2, should therefore be deleted or at least state that consent should not be unreasonably withheld, as Sir Michael had suggested. Personally, he would prefer to add a paragraph to the effect that the international community as a whole had a secondary responsibility for the protection of persons and the provision of humanitarian assistance in the event of disasters. States must cooperate with the affected State to provide humanitarian assistance in a lawful manner. The Commission could go even further and say that draft article 8, paragraph 1, was without prejudice to the right of the international community as a whole to provide lawful humanitarian assistance to persons affected by a disaster if the affected State lacked the capacity or will to exercise its primary responsibility to furnish such assistance.

²¹⁶ See footnote 187 above.

²¹⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

30. Lastly, he wondered what was meant by “affected State”. Did that term include a territory over which a State exercised jurisdiction, such as Guantánamo Bay; an occupied territory, such as Western Sahara, northern Cyprus or Palestine; or did it apply also to a State whose troops were present in another country for some other reason, such as in Afghanistan or Iraq? A better definition of “affected State” was necessary.

31. In conclusion, he said he was in favour of referring draft articles 6 and 7 to the Drafting Committee. However, he would like them to be combined into a single article or placed in the preamble rather than in the operative provisions. He was not in favour of the referral of draft article 8.

32. Mr. SABOIA said that the Special Rapporteur’s third report was clear and precise, based on thorough research into both the law and practice relating to the topic.

33. Although the three draft articles were short and clear, the analysis preceding them was so substantive that he wished to comment on it in the order in which the issues were tackled. As the Special Rapporteur noted in paragraph 15 of his report, humanitarian assistance must comply with certain requirements in order to balance the interests of the affected State and those of the assisting actors. In view of some of the comments made during the debate, the interests of disaster victims could be added to that list. The principles of humanity, neutrality and impartiality were the source of most of those requirements, which had been developed mainly in the context of international humanitarian law and in the pertinent resolutions and documents of the United Nations, the ICRC and the IFRC.

34. The Special Rapporteur dealt first with the principle of neutrality, stating very clearly its meaning in the context of armed conflict. Transposing that principle to the topic of protection of persons in the event of disasters was a complex task, as shown in paragraphs 27, 28 and 29 of the third report. First, as the Special Rapporteur said in paragraph 27, neutrality neither conferred nor took away legitimacy from any authority, and humanitarian response must not be used to intervene in the domestic affairs of a State. In the passage citing Patnogie, in paragraph 27 of his report, the Special Rapporteur also explained that “the principle of neutrality may not be interpreted as an action that fails to take account of respect for other fundamental human rights principles”²¹⁸ and was clearly subordinate to the principle of respect for the sovereignty of States. The experiences of the ICRC in armed conflicts or post-conflict situations showed that there might be times when the principles involved gave rise to tension and dilemma; however, neutrality could never be interpreted as indifference in the face of serious human rights violations.

35. In paragraph 29 of his report, the Special Rapporteur also recalled that “those responding to disasters should abstain from any act which might be interpreted

as interference with the interests of the State. Conversely, the affected State must respect the humanitarian nature of the response activities and ‘refrain from subjecting it to conditions that divest it of its material and ideological neutrality’”. That apt statement of the balance that had to be found between the different goals and values at stake added meaning to draft article 6.

36. The principles of impartiality and humanity had been skillfully analysed by the Special Rapporteur, who called humanity the point of articulation between international humanitarian law and human rights law. The Special Rapporteur clearly explained that the principle of impartiality encompassed three distinct principles: non-discrimination, proportionality and impartiality proper.

37. It was important to underline the relevance of the quotations from decisions of the ICJ and the International Tribunal for the Former Yugoslavia with regard to the coexistence of human rights law and international humanitarian law and the need to respect the inherent dignity of the human person. In the light of the recent discussion about the latter issue, he was of the view that while human dignity was a source of human rights, it likewise constituted a value and must, as such, be mentioned in the relevant provisions.

38. Based on such considerations, in paragraph 50 the Special Rapporteur proposed a draft article 6, entitled “Humanitarian principles in disaster response”, which was clear and straightforward and which he could support.

39. In paragraph 61 of his third report, the Special Rapporteur concluded that “dignity embodies the evolution beyond a mere contractual understanding of the protection of persons under international law, and points to a true international community”. He shared that view and supported draft article 7.

40. In the last chapter of his report, the Special Rapporteur dealt with the responsibility of the affected State and reaffirmed that sovereignty and non-intervention were general principles of international law that must be respected in the context of humanitarian assistance and protection of persons. In paragraph 75, however, he pointed out that sovereignty was not absolute and that when the life, health and the physical integrity of human beings was at stake, areas of law such as international minimum standards, humanitarian law and human rights law demonstrated that principles such as sovereignty were a starting point for analysis, not a conclusion.

41. On the basis of the arguments developed in that chapter, the Special Rapporteur stated that the affected State bore the primary responsibility for protecting disaster victims and for facilitating, coordinating and overseeing relief operations on its territory. In addition, international relief operations required the affected State’s consent. He himself endorsed draft article 8, entitled “Primary responsibility of the affected State”, which was based on the Special Rapporteur’s analysis of those issues.

42. He again thanked the Special Rapporteur for the excellent quality of his work and supported the referral of draft articles 6, 7 and 8 to the Drafting Committee.

²¹⁸ J. Patnogie, “Protection de la personne humaine au cours des catastrophes naturelles”, *Annales de droit international médical*, vol. 27 (1977), pp. 16–33, at p. 19.

43. Mr. GAJA congratulated the Special Rapporteur on his clearly-written, well-documented third report, which allowed the Commission to make significant progress in studying the protection of persons in the event of disasters. It would be difficult not to share the Special Rapporteur's desire to enhance the protection of disaster victims. The overall plan of the study was not entirely clear, however, which perhaps explained the criticism voiced on matters that would probably be addressed in subsequent reports.

44. Draft article 8 stated that the affected State had the primary responsibility for the protection of persons and provision of humanitarian assistance in its territory. The main implication of that proposition was that external assistance might be provided only with the affected State's consent. He agreed that such consent had to be given an essential role—it would be unrealistic for the Commission to seek greater cooperation among States without first setting forth that principle. The Commission's task, however, should be to suggest incentives for that consent to be given when international cooperation was likely to improve the protection of disaster victims: it should make external assistance more acceptable. That aspect would probably be addressed by the Special Rapporteur in subsequent reports.

45. The Commission should suggest that an international organization—the United Nations, a regional body or a new specialized agency—be given the role of centralizing the main forms of assistance. That would have two main advantages. First, it would give international assistance a more neutral aspect and hence make it more acceptable. Secondly, it would improve coordination among relief entities—a problem that had again come up in the aftermath of the earthquake in Haiti.

46. When the affected State's primary responsibility was recognized in draft article 8, that State's obligation to provide all the protection it could should likewise be emphasized. As the General Assembly had stated in its resolution 63/141 of 11 December 2008 entitled "International cooperation on humanitarian assistance in the field of natural disasters, from relief to development", quoted in paragraph 77 of the third report, "the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory". That obligation of the affected State should be expressed more clearly in draft article 8 which, as it stood, placed more emphasis on the rights of the affected State. While all States had a duty to cooperate, the affected State had a more specific duty which might imply, as indicated in the Bruges resolution of the Institute of International Law, that "affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance".²¹⁹ Mr. Dugard, Mr. Hmoud, and Sir Michael had made a similar point.

47. Draft articles 6 and 7 set out some general principles concerning the way assistance should be supplied. They applied to all the State and non-State actors concerned. As Ms. Xue had suggested, their place in the general context

of the draft articles was not very clear. Draft article 6 was remarkably short, as Mr. Saboia had noted, and it would be wise to include in it some of the points made in the report, for example with regard to non-discrimination, as Mr. Dugard and Mr. Vargas Carreño had suggested. The Special Rapporteur's desire to stress the importance of human dignity in draft article 7, which was also very succinct, was legitimate, but it could be read *a contrario* as restricting to a minimum the duty to protect victims' human rights. That duty was incumbent upon all actors, albeit to a differing extent. The draft article should also refer to both human dignity and human rights, as Mr. Vargas Carreño had pointed out.

48. While he had no objection to the referral of the three draft articles to the Drafting Committee, he thought it would be useful for the Drafting Committee also to have a general overview of the project.

49. Mr. PETRIČ commended the Special Rapporteur on his third report, which drew the attention of members of the Commission to previous work, informed them of States' reactions and contained three important new draft articles chiefly based on numerous international documents reflecting State practice.

50. In 2009, after lengthy discussions in plenary, the Commission had taken note of the draft articles provisionally adopted by the Drafting Committee, in which the protection of persons was at the heart of the exercise: that was particularly true of draft articles 1 and 2. As draft article 2 indicated, their purpose was to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights".²²⁰ Thus, while the Commission must take account of the principles of State sovereignty and non-interference, at the same time it must not forget that its principal goal was to protect human lives. It was gratifying to see that during the debates in the Sixth Committee, States had not essentially called into question the basic thrust of the draft articles.

51. He very much agreed with the thinking and comments of Mr. Dugard, Mr. Vargas Carreño and Sir Michael. The principles of impartiality, proportionality and neutrality, which might have raised serious difficulties, seemed to be well established in several international texts, including General Assembly resolutions, as the Special Rapporteur had demonstrated in his report. It would therefore be better not to depart from them unless there were very good reasons for doing so. Emphasis should nevertheless be placed on the principle of non-discrimination, since when disasters actually occurred there could be—and already had been—instances of discrimination against various groups. All those principles, including that of human dignity, could be placed in the preamble, but he had no set opinion on the subject.

52. Since the Commission had already discussed the principle of human dignity in the context of the topic of expulsion of aliens, it should follow the same line of reasoning and formulate the same conclusions, namely that

²¹⁹ Institute of International Law, *Yearbook*, vol. 70, Part II (see footnote 187 above), p. 275.

²²⁰ A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

it did not constitute a specific human right, but rather formed the basis of all other rights and of the treatment of disaster victims.

53. He was pleased to note that, in his introductory statement, the Special Rapporteur had explained that in the draft articles following draft article 8, he intended to strike a balance between the rights and the duties of affected States. That seemed to be of crucial importance if the Commission wished to hold to the course set in draft articles 1 and 2, namely the emphasis on the protection of persons.

54. There was no doubt that the affected State's interests, especially its sovereignty and integrity and the principle of non-interference, must be fully respected when natural disasters occurred. However, in 2010 the term "sovereignty" did not have the same meaning as half a century earlier. It now covered not only the right, but also the duty of a State to ensure its population's security and well-being. That change in mindset, and therefore in international law, especially since the Second World War, had lent a new dimension to the principle of sovereignty. The protection of human rights under international law had ushered in a new era: it was now understood that States could not do as they pleased with their citizens—the individual and the protection of his or her rights had become *lex maxima*.

55. If the Commission retained draft article 8 without establishing a balance in the subsequent articles, that draft article would be unacceptable. Its fate therefore hung on finding the requisite balance between safeguarding States' interests, including the principle of their undisputed primary responsibility, and securing the rights and needs of disaster victims, to whom rapid and effective assistance must be given.

56. In most cases, obtaining the affected State's consent should not pose a problem. The affected State and foreign actors would act in accordance with their duty to cooperate, as set forth in draft article 5, and would jointly endeavour to protect victims, meet their needs and respect their rights. Difficulties would arise if the affected State was unable or unwilling to shoulder its primary responsibility to protect persons and provide effective humanitarian assistance. In such cases, vulnerable individuals would be left without protection, for no one would venture into the territory of an affected State without its consent, above all if international law required such consent. That was why draft article 8 had to be counterbalanced by later draft articles stipulating the affected State's duties and the criteria according to which it could refuse international assistance. It appeared that the Special Rapporteur intended to establish that balance in the next draft articles which he would present to the Commission. He therefore suggested that draft article 8 should be adopted provisionally and then reconsidered in light of the content of future draft articles.

57. In conclusion, he recommended the referral of the three draft articles contained in the third report to the Drafting Committee.

58. Mr. SINGH thanked the Special Rapporteur for his third report and his detailed introductory statement. In the report, the Special Rapporteur recalled the views of the Commission and the Sixth Committee with regard

to his second report²²¹ and the fact that his approach had been supported by States. He then identified "the principles that inspire the protection of persons in the event of disaster, in its aspect related to persons in need of protection" (para. 14 of the third report). He noted that disaster response, in particular humanitarian assistance, must comply with certain requirements in order to balance the interests of the affected State and of the assisting actors, and that the requirements for specific activities undertaken as part of the response to disasters might be found in the humanitarian principles of humanity, neutrality and impartiality. In draft article 6, he therefore proposed that "Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality." He noted that they originated in international humanitarian law and in the fundamental principles of the Red Cross²²² and that they were now widely used and accepted in a number of international instruments in the context of disaster response, including in General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations.

59. In paragraph 22 of his report, the Special Rapporteur recalled that paragraph 2 of guideline 4 of the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, which contained references to the three principles of humanity, neutrality and impartiality, required that assisting actors should ensure that their disaster relief and initial recovery assistance was provided in accordance with those principles. Specifically, such actors should ensure that:

- a) Aid priorities are calculated on the basis of need alone;
- b) Aid is provided to disaster-affected persons without any adverse distinction ... ;
- c) It is provided without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance; and
- d) It is not used as a means of gathering sensitive information of a political, economic or military nature that was irrelevant to disaster relief or initial recovery assistance.²²³

60. As noted in paragraph 11 of the report, it was widely agreed by States that armed conflicts should not be covered by the Commission's draft articles. He therefore agreed with Commission members who had stated that the reference to the principle of neutrality in draft article 6 did not appear to be relevant and that it should be replaced by a reference to non-discrimination. Furthermore, it would be useful to emphasize in that article that the provision of humanitarian assistance should not be used to intervene in the domestic affairs of a State.

61. With regard to draft article 7, he shared the views expressed by Commission members to the effect that, since human dignity was a source of rights and underlay the entire set of draft articles on the topic, it would be more appropriate to deal with it in the preamble—a task that could be entrusted to the Drafting Committee.

²²¹ See footnote 178 above.

²²² See footnote 185 above.

²²³ See footnote 198 above.

62. Paragraph 1 of draft article 8 on the primary responsibility of the affected State indicated that “[t]he affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.” Paragraph 2 provided that “[e]xternal assistance may be provided only with the consent of the affected State”. As mentioned in paragraph 77 of the report, the General Assembly had many times reaffirmed the primacy of the affected State in disaster response. In resolution 46/182, it had held that

[e]ach State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory (annex, para. 4).

The General Assembly had also recognized the relevance of the concepts of sovereign equality and territorial sovereignty in the context of disaster response, and in the guiding principles annexed to resolution 46/182, cited in paragraph 69 of the Special Rapporteur’s third report, it held that:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country (annex, para. 3).

Consequently, while emphasizing the principles of solidarity and cooperation with a view to encouraging the provision of assistance to affected persons and meeting basic human needs in emergency situations resulting from a natural disaster, the draft articles should also recognize the sovereignty of the affected State; its responsibility towards its nationals; its right to decide whether it needed international assistance, since it was best placed to assess the needs of the situation and its own capacity to respond in an effective and timely manner; and, if it accepted international assistance, its right to direct, coordinate and supervise such assistance within its territory. Given the Special Rapporteur’s view that it was necessary to strike a balance between those two basic requirements, the Commission was looking forward with great interest to his proposals on the subject. As Mr. Gaja had suggested, the draft articles should require States to consent to humanitarian intervention when external assistance was likely to improve the protection of disaster victims and not to delay such consent unreasonably.

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

64. Mr. WISNUMURTI said that the Special Rapporteur had very helpfully summarized the background of the Commission’s work on the topic and had analysed the views expressed by Member States during the debate in the Sixth Committee. The in-depth research he had carried out on various international legal instruments and the international case law supporting the three draft articles was also very useful. The Special Rapporteur had addressed the principles of humanity, neutrality and impartiality that formed the basis of the three important articles that deserved serious consideration. The draft

articles reflected the debate in the Commission and in the Drafting Committee. As noted in paragraph 2 of the report, the Drafting Committee had provisionally adopted draft article 5 on the duty to cooperate on the understanding that the Special Rapporteur would subsequently propose an article on the primary responsibility of the affected State. The Special Rapporteur had also been consistent with his own conclusion, supported by the members of the Commission, that the concept of “responsibility to protect” did not fall into the ambit of the work on the topic. It was nevertheless regrettable that the principles of sovereignty and non-intervention or non-interference in the domestic affairs of another State had not been reflected in the proposed draft articles, even though they were discussed extensively in paragraphs 64 to 75 of the report. While draft article 8, paragraph 2, stipulating that external assistance might be provided only with the consent of the affected State, could be interpreted as embodying the principles of sovereignty and non-intervention, that was not enough: those principles, in his view, should constitute the basis for developing the regime for the protection of persons in the event of disasters. Nonetheless, the Special Rapporteur had presented a valuable analysis of the principles of humanity, neutrality and impartiality, which he considered to be the core principles of humanitarian assistance, including in the event of natural disasters. The three principles had been set forth in various documents adopted, *inter alia*, by the General Assembly, the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the ICRC and the IFRC.

65. More specifically, with regard to the principle of neutrality, he agreed with the statement made in paragraph 27 of the report that neutrality neither conferred nor took away legitimacy from any authority and that humanitarian response should not be used to interfere in the domestic affairs of a State. The opinion of the author cited in the same paragraph²²⁴ also confirmed that the principle of neutrality was clearly subordinate to the principle of respect for the sovereignty of States. The Special Rapporteur had indicated in paragraph 31 of his report that the principle of impartiality encompassed three distinct principles, namely non-discrimination, proportionality and impartiality proper. He himself had no difficulty with the principle of non-discrimination as set forth in the Charter of the United Nations and as recognized in various international treaties and instruments, which had acquired the status of a fundamental rule of international human rights law, and he had no problem with the principle of impartiality either. However, he did have reservations concerning the principle of proportionality, particularly if it was interpreted narrowly. There were cases when an affected State did not have the resources needed to meet the requirement that the response must be proportionate to the degree of suffering and urgency. Hence, it was of primary importance for the principle of proportionality to be assessed on a case-by-case basis, taking into account the reality on the ground. The scope of the principle should therefore be defined and explained adequately in the commentary. He also agreed that, as stated in paragraph 37 of the report, the principle of humanity was the cornerstone of the protection of persons in international law, since it served as the point of articulation between international

²²⁴ Patnogie, *loc. cit.* (footnote 218 above).

humanitarian law and international human rights law. The principle had been applied by international and regional courts. Given those observations, he had no problem with draft article 6 on humanitarian principles in disaster response.

66. As noted in paragraph 51 of the Special Rapporteur's report, the principle of humanity in international humanitarian law was intimately linked to the notion of dignity. When the Commission had considered the fifth report on the expulsion of aliens at the beginning of the current session, it had discussed, *inter alia*, the question of human dignity and had recognized the importance of that principle as the source of human rights. In the chapter of his report on human dignity (paras. 51–62), the Special Rapporteur had developed that notion by referring to various international instruments, including the Charter of the United Nations, the Universal Declaration of Human Rights²²⁵ and other international and regional human rights instruments, judicial decisions, *opinio juris* and instruments intended to guide humanitarian relief operations. He therefore had no difficulty in endorsing draft article 7 on human dignity, as proposed by the Special Rapporteur in paragraph 62 of his report.

67. Given that, in 2009, the Drafting Committee had provisionally adopted draft article 5 on the duty to cooperate subject to the understanding that the Special Rapporteur would propose provisions on the primary responsibility of the affected State, he noted with satisfaction that the last chapter was devoted to that subject: it reviewed the principles of sovereignty and non-intervention and the primary responsibility of the affected State. As indicated in paragraph 65, State sovereignty was rooted in the fundamental notion of sovereign equality and was regarded as a fundamental principle in the international order. Its existence and validity had been recognized by States in numerous international instruments. In that connection, the Special Rapporteur referred to the principle of sovereignty embodied in the Charter of the United Nations and recognized by international courts. The ICJ had stated that State sovereignty was also part of customary international law. It was generally held that all offers of humanitarian assistance in response to a disaster must respect the sovereignty, independence and territorial integrity of the affected State. The principle of non-intervention in the domestic affairs of the affected State was also recognized as a principle of customary international law that should guide all international relief efforts. At the same time, it was important to recognize that the principles of sovereignty and non-intervention were the main source of the principle according to which the affected State had the primary responsibility for relief operations and the protection of persons in the event of disasters on its territory. That principle was recognized in General Assembly resolutions and in international and regional instruments, as well as in various international codes of conduct and guidelines for disaster relief. Draft article 8 on the primary responsibility of the affected State seemed to reflect the Commission's understanding of the relevant principles and the practice in the area of disaster relief. However, as he had indicated previously, those provisions were incomplete: in his view, they lacked a draft article on

the two essential principles of sovereignty and non-intervention on which disaster relief and the principle of the primary responsibility of the affected State were founded. Draft article 8, paragraph 2, which seemed to reflect those principles, was far from adequate, and he believed that the principles in question needed to be addressed in separate draft articles. It was important to stress that those principles must not diminish the obligation of the affected State to protect persons in the event of disasters. There was no doubt that sovereignty and non-intervention were cardinal principles of no lesser importance than the principles of humanity, neutrality and impartiality. In that connection, he disagreed with Mr. Dugard, who thought that the principle of sovereignty was an outdated concept or legal principle. In his own view, that principle, which was enshrined in the Charter of the United Nations, remained one of the cardinal principles of international law, respected by the international community, although admittedly it was not always considered an absolute principle.

68. In conclusion, and subject to the observations he had just made, he was in favour of referring the draft articles to the Drafting Committee.

69. Mr. COMISSÁRIO AFONSO said that the Special Rapporteur had discussed in great detail the three principles of humanity, neutrality and impartiality which, in his words, “inspire[d] the protection of persons” (para. 14). He himself agreed, in particular, with the idea that the principle of impartiality encompassed three distinct dimensions: non-discrimination, proportionality and impartiality proper. However, the question of whether it was appropriate to apply the principle of proportionality in the context of emergency relief seemed a legitimate one. There were concerns in that regard on two grounds. First, it was more common to speak of the principle of proportionality in the context of the use of force or in relation to countermeasures, given that respect for that principle was required in order for an act not to be qualified as unlawful. In the context of emergency relief, it appeared that what was meant by “proportionality” was a response that was commensurate with the needs on the ground. It would be useful for the Special Rapporteur to address that issue, clearly differentiating the two aspects of the principle and placing each in proper perspective, even though the issue did not directly affect draft article 6. Secondly, the term “proportionality” was somewhat confusing, because it was hard to imagine how a response to a disaster could ever be proportionate to the needs and suffering of the persons affected, materially, psychologically, morally or otherwise. Disasters inflicted terrible disruption in the lives of those affected. Whether viewed from a needs- or rights-based perspective, disaster responses were more mitigation than cure and could not give victims back their normal lives. It sometimes took years to heal the wounds caused by a disaster, and it was accordingly difficult to speak of proportionality in that respect. Perhaps the scope of the principle for the purposes of the entire set of draft articles could be explained in a draft article on the use of terms or in the commentary, as Mr. Wisnumurti had suggested. He himself accordingly suggested that draft article 6 be formulated along the lines of “Disaster relief shall be carried out in accordance with the principles of humanity, neutrality and impartiality”, wording that the Drafting Committee could finalize. The principle of human dignity, dealt with

²²⁵ See footnote 22 above.

very well by the Special Rapporteur, could be combined with the principles set out in draft article 6. As to draft article 7, it might read: “In the protection of persons in the event of disasters, States, international organizations and other actors shall respect and observe”—or “ensure”, as Sir Michael had suggested—“human dignity”.

70. He concurred with the Special Rapporteur’s analysis in the last chapter, where he addressed the responsibility of the affected State. He nevertheless fully agreed with the Chairperson who, speaking as a member of the Commission, had drawn attention to the need to restate the principles of sovereignty and non-intervention before referring to the three humanitarian principles. The restatement could be made side by side with the draft article on the duty to cooperate, which would be followed by the current draft article 8. It was crucial for cooperation to take place in the context of full respect for the principles of sovereignty and non-intervention. Experience showed that there was no real contradiction between bona fide external assistance and the observance of those principles. Tensions arose only in the event of a breach or attempted breach of those principles and failure to respect other principles such as impartiality and neutrality. What was not always understood was that assistance provided in circumstances that negated those principles was ineffective and could not produce the desired results. He hoped that the Special Rapporteur, in his wisdom, would take the necessary steps to harmonize the draft articles accordingly. On the whole, he agreed with the wording of draft article 8 but thought that paragraph 2 should read: “External assistance shall be provided with the consent of the affected State.”

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

72. Mr. FOMBA said that, with regard to the scope and substance of the topic, paragraph 3 of the report indicated that members of the Commission had supported the Special Rapporteur’s conclusion that the concept of the “responsibility to protect” would not play a role in the Commission’s work on the topic. The concept clearly raised fundamental issues, however. Taking the principles of sovereignty and non-interference to their logical conclusions, if a State could not or did not wish to provide appropriate protection and assistance to victims in the event of a disaster, what could or should other States do? Did international law encompass such concepts as rejection of assistance or inability to assist persons in distress or danger, or the individual or collective duty to assist such persons? What might or must be the legal impact of such concepts? In other words, it was necessary to address squarely the daunting and thorny issue of a “right” or “duty” of humanitarian interference. While he did not necessarily subscribe to the same interpretation of the “responsibility to protect” as did the Commission, he respected the consensus position that had been adopted. It would be interesting to see how the subsequent work on the topic evolved with regard to the definition of the role of the affected State, as mentioned in paragraph 101, and the right to reject assistance, an issue raised in paragraph 93: that would give an idea of how far the Commission could or should go. Even though refusal or inability to go much further would somewhat diminish the relevance of the topic, it was better to adopt a realistic attitude and to

draw a distinction between what would be desirable in the absolute and what States would find objectively feasible and reasonably acceptable. He endorsed the dual-axis and rights-based approaches outlined by the Special Rapporteur in paragraphs 5 and 6 of the report. As far as terminology was concerned, he queried the distinction between the expressions “humanitarian response” and “humanitarian assistance”, given the statement in paragraph 16 that “assistance” was used to indicate only the “minimum package of relief commodities”. The reference in paragraph 18 to the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) was useful.

73. With regard to draft article 6, he could accept the three principles cited therein with no particular difficulties. At first glance, the wording seemed clear, given that the meaning and scope of each principle would have to be clarified in the commentary. Mr. Hmoud had proposed that the Commission envisage three possibilities: to amend draft article 6 in order to demonstrate clearly that the three principles should be the basis; to define the three principles in the preamble; or to draft three separate draft articles. The important thing was to specify the scope of the principles, and he was inclined, *a priori*, to favour the third possibility. He would also like to know whether the terms “response” and “assistance” were interchangeable in the title of draft article 6.

74. As to draft article 7 on human dignity, what was true for the expulsion of aliens was equally true, if not more so, for the protection of persons in the event of disasters: the normative threshold must not be lower than for the former. With regard to wording, the obligation to respect and to protect human dignity was clearly formulated, and the scope *ratione personae* was defined in a comprehensive and balanced fashion. During the discussion, Mr. Hmoud, for one, had said that the content of the obligation set forth in draft article 7 should be spelled out more clearly, and Mr. Vargas Carreño had proposed that it should be supplemented by an obligation to respect fundamental human rights or that a separate provision along those lines should be drafted. Those proposals merited closer examination. He himself would favour formulating a dual obligation to respect both human dignity and human rights, on the assumption that the first was the source of the second.

75. With regard to draft article 8, he said that there was an obvious link between the primary responsibility of the affected State and the principles of sovereignty and non-interference, given that the first was the logical outcome of the second two. There seemed to be a contradiction in the relationship between the end of paragraph 76, on the one hand, and paragraphs 82 and 88, on the other. During the discussion, Mr. Vargas Carreño had commented that paragraph 2 of the draft article gave the impression that it was necessary to obtain the formal consent of the affected State, whereas that was not always the case in practice—a point that would have to be taken into account if that assertion proved well founded. Mr. Hmoud had pointed out that primary responsibility did not mean exclusive responsibility and that it also entailed a duty to cooperate, an interpretation that he himself thought was heading in the right direction. In that connection, he endorsed the important comments made by Mr. Gaja and Mr. Petrič.

76. In conclusion, he proposed that articles 6, 7 and 8 be referred to the Drafting Committee.

77. Mr. HASSOUNA said he appreciated the fact that the Special Rapporteur had agreed to expand the three initially proposed draft articles to five so as to make a better distinction between the concepts they covered, even if that had created some confusion in the Sixth Committee, where some Member States had commented on the original draft articles while others had commented on the new ones. Since many disasters had ravaged the world recently, it was a particularly opportune moment to consider the question of the protection of persons in the event of disasters. It would be useful to include in the commentary information on the international community's response to those disasters on the basis of the principle of cooperation.

78. A provision must be devoted to the three major humanitarian principles of intervention in the event of a disaster—humanity, neutrality and impartiality—since they were mentioned frequently in many instruments, including regional ones, governing emergency situations. It would also be useful to include the principle of independence in draft article 6, as had been done in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), or at least to discuss that principle in the commentary. The principle of neutrality was particularly important in situations of disaster coupled with armed conflict, but when there was no armed conflict, the principle might overlap with those of national sovereignty, non-interference and impartiality. The highly important principle of non-discrimination also warranted inclusion, as had been suggested.

79. The principle of human dignity was the ultimate foundation of human rights law. It was mentioned in the Charter of the United Nations, in all the universal human rights instruments and in most regional instruments. Draft article 7 should be reformulated, however, in order to clarify its scope and its relationship to the human rights embodied in international treaties.

80. Lastly, it must be borne in mind that the above-mentioned principles served merely to “inspire the protection of persons in the event of disaster”, to borrow the words of the Special Rapporteur (para. 14). It was regrettable that the Special Rapporteur had chosen not to address their legal implications and ramifications in disaster situations, as that would have helped to underscore further pertinence to the current study.

81. Draft article 8 also set forth an essential rule—that of respect for sovereignty and for the principle of non-interference. In the text annexed to General Assembly resolution 46/182, it was clearly stated that humanitarian assistance must be provided with the consent of the affected State and in principle on the basis of an appeal by it. Two things had to be stipulated, however: first, that there must be no non-humanitarian assistance from donors, and secondly, that the consent of the affected State must be explicit, and not simply inferred from circumstances. As for the primary responsibility of the affected State to provide assistance and protection to disaster victims, that

notion was generally recognized and enunciated in most international and regional instruments. In accordance with draft article 8, the affected State played the primary role in directing, controlling, coordinating and supervising humanitarian assistance within its territory. However, it was also called on to play that role effectively with respect to victims, meaning the population. The affected State could, if it gave its consent, receive external assistance in the form of cooperation. That had already been mentioned in draft article 5, but in terms that were overly general and that failed to specify whether the duty to co-operate applied to affected or assisting States and what the extent of such cooperation should be. Mention should also be made of certain new and important aspects of cooperation in disaster response, such as cooperation with early warning mechanisms. Those elements needed to be expanded on in future reports on the topic. For now, he agreed to the referral of the draft articles to the Drafting Committee so that it could incorporate the comments and suggestions made.

82. The CHAIRPERSON said that at the next plenary meeting, the Special Rapporteur would sum up the debate on his third report on the protection of persons in the event of disasters. She invited the Special Rapporteur on the topic of the effects of armed conflicts on treaties to sum up the debate on his initial report.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

83. Mr. CAFLISCH (Special Rapporteur) said that he welcomed the critical comments and suggestions made during the debate on the topic, which seemed particularly resistant to codification or even to the progressive development of the law. In future work on the topic, he would divide the text into different parts, as had been requested, and expand his research in the area of practice.

84. As might have been predicted, draft article 1 had given rise to much controversy: first, as to whether it should cover treaties to which international organizations were parties along with one or more States. He was convinced that the issue of the fate of those treaties was very complex, that there were many eventualities to take into account and that any practice—if it even existed—would be difficult to identify. It was not enough to say that international organizations did not wage war and that the treaties they concluded thus continued to apply in the event of armed conflict. The most prudent course would be to undertake further study of the issue, as had been suggested by Belarus.²²⁶

85. At present, the scope of draft article 1 did not include inter-State treaties to which international organizations were parties. Nor did it include major legislative treaties, such as the United Nations Convention on the Law of the Sea, to which the European Union had become

²²⁶ *Official Records of the General Assembly, Sixty-third Session, Sixth Committee, 16th meeting (A/C.6/63/SR.16), para. 44.*

a party. Attention must therefore be given to those treaties as well, if necessary in a draft article dealing with the effects of armed conflicts on treaties to which international organizations were parties. However, that might be avoided by drawing a distinction between treaties *concerning* international organizations and those to which such organizations *were parties*. The former were covered by the current version of the draft article. Only the second category—specifically, general multilateral treaties of a legislative nature, such as the United Nations Convention on the Law of the Sea—posed a problem. It seemed self-evident that the participation of the European Union in that multilateral treaty should not be allowed to “pollute” relations among States parties in terms of their bilateral dealings. One solution would be to add to draft article 1, or to include among the “without prejudice” clauses, a provision that would read: “This set of draft articles is without prejudice to the rules of international law that apply to the treaty relations of international organizations in the event of an armed conflict.”

86. With regard to draft article 2, he said that controversy had arisen over the inclusion of non-international armed conflicts and the definition in subparagraph (b) of the very term “armed conflict”. The inclusion of internal conflicts was certainly problematic, in part because their effects on treaties could be different than those of international conflicts. The question should not be reopened, however, since it had been decided on first reading to include them and since most of the members were in favour of doing so. On the other hand, the definition of “armed conflict” adopted on first reading had not been agreed on unanimously, and many alternative solutions had been proposed—*inter alia*, a definition based on common article 2 of the Geneva Conventions for the protection of war victims and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). He himself had proposed using the definition utilized in the *Tadić* case, although without the last part of the sentence, which referred to conflicts that did not involve any States. The majority of Commission members supported that proposal and the retention of the adjective “protracted”, which was necessary in order to preclude an unduly broad interpretation. That left the question of whether to refer explicitly to occupation. His view was that occupation was an integral part of armed conflicts and that it was sufficient to mention it in the commentary. Lastly, the issue of State succession had also been raised in the context of draft article 2. While that issue might not be pertinent to the draft articles, however, it would be interesting to find out, in order to mention it in the commentary, perhaps, what had happened following the conflict between Morocco and the Frente Polisario (Frente Popular para la Liberación de Saguía el-Hamra y de Río de Oro) with the treaties concluded by Spain to which Western Sahara had succeeded.

87. Certain members had requested that draft article 3 be completely redrafted as a positive formulation to the effect that, in principle, treaties continued to operate in the event of armed conflict. That would imply the identification, in draft articles 4 and 5 and in the corresponding list in the annex, of those that ceased to operate. He stressed the need for agreement between the title and content of

the draft article. The Latin expression *ipso facto* could very well be replaced by its non-Latin equivalent, “by that very fact”, but it had been agreed that the word “presumption” should be avoided, since the draft article did not deal with a presumption. Another question, by no means insignificant, that had been raised in relation to draft article 3 was about the various conflict scenarios and parties to the conflict that were covered, namely: (a) armed conflicts between two or more States parties to a treaty; (b) armed conflicts in which States parties to a treaty were allies; (c) conflicts in which only one State party to a treaty was involved; and (d) internal armed conflicts. The last two scenarios were similar but not identical. The various scenarios should be dealt with in the commentary, unless they were included in the text of the article itself.

88. As far as draft article 4 was concerned, he was in favour of reinstating a reference to “the intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties”. However, some members had pointed out that articles 31 and 32 were aimed not at establishing the intention of the parties but rather at determining its subject matter. It had therefore been proposed to retain the wording adopted on first reading. Another problem was the reference to “the subject matter of the treaty” among the indicia listed in subparagraph (b). In fact, the subject matter of the treaty was dealt with in subparagraph (a), in that it was determined through interpretation, and in draft article 5, and that was certainly ample treatment. The reference to subject matter in subparagraph (b), at least, should therefore be deleted.

89. Many changes had been proposed for draft article 5. It had not been deemed necessary to merge it with draft article 4, nor had it been felt that the treaties covered by draft article 5 should include those relating to international humanitarian law, human rights and international criminal justice or the Charter of the United Nations. That was probably because their inclusion would mean making a distinction between the treaties mentioned in the article itself that would almost certainly continue in operation in the event of a conflict and those contained in the list, whose chances of survival were less certain. Another proposal had been to deal with the modification of a treaty. Assuming that modifications were permitted in the situations in question, they could certainly be made, in keeping with the Latin saying *de maiore ad minorem*, and in accordance with draft article 6. Lastly, it seemed desirable to clarify the indicia in draft articles 4 and 5, as well as the links between draft articles 3, 4, 5 and 6 and the list. That would be done in the commentary. With regard to the list, the majority of the members preferred annexing it to draft article 5, rather than consigning it to the commentary. Some additions to that list had been proposed, some of which had sparked controversy: for example, treaties that embodied rules of *jus cogens*. The peremptory rules of international law remained, however, as customary rules with special rank that did not depend on the fate of the treaties that contained them. There had been no objection to the inclusion of treaties establishing an international organization or of those relating to international criminal justice, provided that the bodies concerned applied international law. Lastly, it was not desirable, for obvious reasons, to establish a hierarchy of treaties or to split treaties into various categories. In

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

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

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

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

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

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

altered the conflict’s effects on the treaty, which could not have been foreseen by the State upon giving its express or tacit acquiescence in accordance with draft article 10.

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

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

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

It was so decided.

The meeting rose at 1.05 p.m.

3057th MEETING

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

Chairperson: Ms. Hanqin XUE

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

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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

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

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

4. In paragraphs 89 and 97, the Special Rapporteur cited as one of the sources of his inspiration for draft article 8 the resolution on humanitarian assistance adopted by the Institute of International Law in Bruges, Belgium, in 2003.²²⁷ Without prejudice to the development of the content and scope of that duty in future draft articles, consideration might be given to adding to draft article 8 an explicit reference to the duty of protection referred to in the Bruges resolution.

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

6. Ms. JACOBSSON said that in his third report, the Special Rapporteur identified the three principles of humanity, neutrality and impartiality that underlay the protection

of persons in the event of disasters, and claimed that the response to disasters, in particular humanitarian assistance, must comply with certain requirements in order to balance the interests of the affected State and the assisting actors. He had used the term “humanitarian response” because the scope extended beyond what was generally understood by “humanitarian assistance”, which constituted only the minimum package of relief commodities. She fully supported that approach.

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

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

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

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

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

²²⁷ See footnote 187 above, p. 275.

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

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

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

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

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

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

State in transition—again, like Kosovo. The Commission must therefore discuss precisely what was meant by the term “the affected State”.

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

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

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

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

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

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

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

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

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

25. General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations expressly required

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

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

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

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

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

²²⁹ See footnote 182 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³² See footnote 178 above.

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

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

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

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

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

44. Draft article 8, it should be recalled, had been prepared in response to a request made by the Commission at its previous session for a text on the primary responsibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (continued)**

54. Mr. McRAE (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 4.1

to 4.4.3, adopted by the Drafting Committee at 13 meetings held from 11 to 27 May 2010, as contained in document A/CN.4/L.760/Add.1, which read:

“4. Legal effects of reservations and interpretative declarations

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

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

“4.1.1 Establishment of a reservation expressly authorized by a treaty

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

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

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

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

“4.1.3 Establishment of a reservation to a constituent instrument of an international organization

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

“4.2 Effects of an established reservation

“4.2.1 Status of the author of an established reservation

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

* Resumed from the 3054th meeting.

** Resumed from the 3051st meeting.

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

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

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

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

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

“4.2.4 Effect of an established reservation on treaty relations

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

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

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

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

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

“4.3 Effect of an objection to a valid reservation

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

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

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

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

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

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

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

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

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

“4.3.5 Effects of an objection on treaty relations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“A reservation to a treaty provision which reflects a rule of customary international law does not of itself

affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

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

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

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

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

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

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

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

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

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

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

62. The Drafting Committee had decided to reverse the order of paragraphs 1 and 2 so as to indicate from the outset the specificity that characterized the establishment of a reservation expressly authorized by a treaty, namely the fact that such a reservation did not require any subsequent acceptance by the other contracting States and contracting

organizations unless the treaty so provided. The commentary would explain that the expression “contracting States and contracting organizations” covered three possible scenarios, namely when there were only contracting States; when there were only contracting organizations; and when there were both. Paragraph 2 enunciated, in terms identical to those of draft guideline 4.1, the only condition for the establishment of a reservation expressly authorized by a treaty, namely that the reservation should be formulated in accordance with the required form and procedures.

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

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

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

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

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

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

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

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

70. Section 4.2 of the Guide to Practice dealt with the effects of an established reservation. In addition to draft guideline 4.2.1, which was directly related to draft guidelines 4.1 to 4.1.3, the four other draft guidelines in that section dealt with the effects of the establishment of a reservation on the entry into force of a treaty, the status of the author as a party to the treaty and treaty relations, as well

as with the specific issue raised by obligations that were not subject to reciprocal application.

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

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

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

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

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

²³⁵ See footnote 84 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

be subsumed under non-reciprocal application due to the nature of the obligation or the object and purpose of the treaty.

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

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

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

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

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

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

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

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

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

98. Draft guideline 4.3.3 was entitled “Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required”. It stated that in

situations in which unanimous acceptance was required for the establishment of a valid reservation, any objection to the reservation by a contracting State or by a contracting organization precluded the entry into force of the treaty for the reserving State or organization.

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

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

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

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

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

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

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

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

107. Draft guideline 4.3.6, entitled “Effect of an objection on provisions other than those to which the reservation relates”, was based on the earlier draft guideline 4.3.8. It

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

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

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

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

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

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

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

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

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

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

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

117. The Drafting Committee had considered a suggestion originally made in plenary that the qualifier “as such” should be included in the text of the draft guideline. The reasoning had been that, under certain circumstances, a reservation, an acceptance of a reservation or an objection to

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

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

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

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

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

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

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

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

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

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

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

It was so decided.

Organization of the work of the session (continued)*

[Agenda item 1]

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

It was so decided.

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

The meeting rose at 1.20 p.m.

* Resumed from the 3055th meeting.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-SECOND SESSION

Held at Geneva from 5 July to 6 August 2010

3058th MEETING

Monday, 5 July 2010, at 3.10 p.m.

Acting Chairperson: Mr. Christopher John Robert DUGARD (Vice-Chairperson)

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Election of a new Chairperson

1. The ACTING CHAIRPERSON informed the members of the Commission that on 29 June 2010, the Chairperson of the Commission, Ms. Xue, had been elected to the International Court of Justice and that in a letter addressed to the Legal Counsel on that same date, she had submitted her resignation from the Commission. He extended congratulations to Ms. Xue and wished her every success in her new functions.

2. In accordance with rule 105 of the rules of procedure of the General Assembly, the Commission was required to elect a new Chairperson for the remaining term of office. In 2010, the Chairperson of the Commission should be from among the members of the Asian Group.

Mr. Wisnumurti was elected Chairperson for the remainder of the sixty-second session of the International Law Commission by acclamation.

Mr. Wisnumurti took the Chair.

3. The CHAIRPERSON said that it was an honour to have been elected. Aware of the task before him, he was encouraged by the confidence placed in him. He paid tribute to Ms. Xue for the effective manner in which she had

chaired the first part of the session. Recalling that she had been the first woman to hold that position, he thanked her for her invaluable contribution to the work of the Commission. He trusted that he could count on the help and understanding of the members of the Commission to ensure that the second part of the sixty-second session would be productive and rewarding.

4. He proposed that the Commission amend its agenda in order to include a new item entitled “Filling of a casual vacancy in the Commission (article 11 of the statute)” and said that he would consult with members of the Bureau on the timing of the election to fill the vacancy left by Ms. Xue.

5. If he heard no objection, he would take it that the Commission wished to adopt that proposal.

It was so decided.

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

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

6. The CHAIRPERSON invited the members of the Commission to proceed with the adoption of the draft guidelines contained in document A/CN.4/L.760/Add.1.

4. *Legal effects of reservations and interpretative declarations*

Draft guideline 4.1 (*Establishment of a reservation with regard to another State or organization*)

Draft guideline 4.1 was adopted.

Draft guideline 4.1.1 (*Establishment of a reservation expressly authorized by a treaty*)

Draft guideline 4.1.1 was adopted.

Draft guideline 4.1.2 (*Establishment of a reservation to a treaty which has to be applied in its entirety*)

Draft guideline 4.1.2 was adopted.

Draft guideline 4.1.3 (*Establishment of a reservation to a constituent instrument of an international organization*)

Draft guideline 4.1.3 was adopted.

4.2 *Effects of an established reservation*

Draft guideline 4.2.1 (*Status of the author of an established reservation*)

Draft guideline 4.2.1 was adopted.

Draft guideline 4.2.2 (*Effect of the establishment of a reservation on the entry into force of a treaty*)

Draft guideline 4.2.2 was adopted.

Draft guideline 4.2.3 (*Effect of the establishment of a reservation on the status of the author as a party to the treaty*)

Draft guideline 4.2.3 was adopted.

Draft guideline 4.2.4 (*Effect of an established reservation on treaty relations*)

Draft guideline 4.2.4 was adopted.

Draft guideline 4.2.5 (*Non-reciprocal application of obligations to which a reservation relates*)

Draft guideline 4.2.5 was adopted.

4.3 *Effect of an objection to a valid reservation*

Draft guideline 4.3.1 (*Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*)

Draft guideline 4.3.1 was adopted.

Draft guideline 4.3.2 (*Entry into force of the treaty between the author of a reservation and the author of an objection*)

Draft guideline 4.3.2 was adopted.

Draft guideline 4.3.3 (*Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*)

Draft guideline 4.3.3 was adopted.

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

Draft guideline 4.3.4 was adopted.

Draft guideline 4.3.5 (*Effects of an objection on treaty relations*)

Draft guideline 4.3.5 was adopted.

Draft guideline 4.3.6 (*Effect of an objection on provisions other than those to which the reservation relates*)

Draft guideline 4.3.6 was adopted.

Draft guideline 4.3.7 (*Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation*)

Draft guideline 4.3.7 was adopted.

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

Draft guideline 4.4.1 (*Absence of effect on rights and obligations under another treaty*)

Draft guideline 4.4.1 was adopted.

Draft guideline 4.4.2 (*Absence of effect on rights and obligations under customary international law*)

Draft guideline 4.4.2 was adopted.

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

Draft guideline 4.4.3 was adopted.

The draft guidelines contained in document A/CN.4/L.760/Add.1, as a whole, were adopted.

Effects of armed conflicts on treaties (*continued*)* (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

7. The CHAIRPERSON invited the Special Rapporteur to introduce the rest of his first report on the effects of armed conflicts on treaties (A/CN.4/627/Add.1), which covered draft articles 13 to 18 adopted by the Commission on first reading in 2008.²³⁶

8. Mr. CAFLISCH (Special Rapporteur) recalled that the Commission had considered the first part of the report before the break in the sixty-second session and had referred draft articles 1 to 12 to the Drafting Committee (3056th meeting above, para. 97). By and large, the initial remarks made during the introduction of the first part also applied to the second part, in particular the fact that it was no longer a question of completely recasting the draft articles, unless absolutely necessary, or of carrying out new large-scale studies, but of considering the comments of Member States on the current version of the draft articles (A/CN.4/622 and Add.1), to which the Special Rapporteur and other members of the Commission could of course add new ideas.

9. At first glance, the six draft articles to be considered might seem secondary compared to those already examined, but appearances were deceiving and, as would be seen, some of those provisions might be controversial. Moreover, an important question had not yet been addressed: whether it was necessary to distinguish between the effects of international armed conflicts and the effects of non-international armed conflicts.

10. In his introduction, he would consider successively the effects of the exercise of the right to self-defence (art. 13), prohibition of benefit to an aggressor State (art. 15), “without prejudice” clauses (arts. 14, 16, 17 and 18), and other points raised by Member States and general issues (scope of the draft articles, responsibility of States and other questions).

* Resumed from the 3056th meeting.

²³⁶ Yearbook ... 2008, vol. II (Part Two), pp. 61–63.

11. Draft article 13, entitled “Effect of the exercise of the right to individual or collective self-defence on a treaty”, was based on article 7 on self-defence of the 1985 resolution of the Institute of International Law.²³⁷ Both articles sought to introduce a moral dimension by preventing the existence of treaties binding a State from depriving it of the exercise of the right to self-defence and, at the same time, permitting the aggressor State to insist on the strict application of those treaties by the attacked State. They primarily concerned agreements between the aggressor and the attacked State, while not excluding treaties between the aggressor State and one or more third States. Moreover, both articles provided for the possibility of suspension but not termination, and they were only applicable in an inter-State context. However, article 7 of the resolution of the Institute of International Law stipulated that, at a later stage, the Security Council of the United Nations might, in the exercise of its powers under Article 51 of the Charter of the United Nations, come to the conclusion that the attacked State was in fact the aggressor, and that the fate of the suspended instrument and questions of responsibility that might arise were subject to any consequences of such a determination, whereas draft article 13 was silent on that point for the reasons set out in paragraph 121 and upon which he would like to expand. Initially, the Drafting Committee had adopted article 7 of the resolution of the Institute of International Law as it stood: with its last phrase on any consequences resulting from a later determination by the Security Council of the State exercising the right to self-defence as an aggressor. The Commission in plenary had been opposed to that version of draft article 13 because of the presence of that phrase and had referred it back to the Drafting Committee for further consideration. The text that the Drafting Committee had produced, with the deletion of the controversial phrase, had been adopted by the Commission in plenary on first reading. In his opinion, it should be retained, because the Commission could not constantly change its mind, and also for the reasons set out in paragraph 122 of the report. Moreover, the draft articles concerned the law of treaties, and thus an addition along the lines of the last phrase of article 7 of the resolution of the Institute of International Law might exceed the Commission’s mandate; in any event, the subject was covered by draft article 14 (Decisions of the Security Council). However, a State that believed or claimed that it was exercising its right to self-defence did not always fulfil the necessary conditions, and measures of suspension taken by it might then be illegal. Such measures might also be unjustified because in reality the suspended treaty had not been prejudicial to the right to self-defence; they might also cause harm to third States.

12. One Member State had pointed out that the possibility of suspending treaties offered to a State in a situation of self-defence should be included in the framework of the parameters set in draft article 5 (Operation of treaties on the basis of implication from their subject matter). It was inconceivable that, in situations of self-defence, the power of suspension could be broader than in situations of armed conflicts in general. That point, which did not seem indispensable, should, if included, concern the content of draft articles 4 (Indicia of susceptibility to

termination, withdrawal or suspension of treaties) and 5; that was not specified in paragraph 124 of the report. In its current form, draft article 13 suggested that a State in a situation of self-defence could suspend any treaty rule, and one Member State had proposed stating, at least in the commentary, that this power did not extend to treaty rules meant to be applied in the context of armed conflicts, such as the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions on 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). That seemed superfluous: the text of draft article 13 would be enhanced by a reference to articles 4 and 5, since those provisions referred to the content of the treaty. In that connection, it should be noted that the category of treaties in question appeared in the first part of the list annexed to draft article 5.

13. Draft article 15, entitled “Prohibition of benefit to an aggressor State”, had been adopted on first reading in 2008 and was based on article 9 of the 1985 resolution of the Institute of International Law, the scope of both texts being limited to inter-State conflicts. It was the expression of the French saying “*bien mal acquis ne profite jamais*” (“ill-got, ill-spent”): the aggressor State must not be able to use the outbreak of an armed conflict that it had itself provoked to free itself from its treaty obligations. Once again, that was a principle aimed at introducing a moral dimension to the rules of international law in question. Of course, the characterization of a State as an “aggressor” depended fundamentally on how the word was defined and, in terms of procedure, on the Security Council. If the Security Council determined that a State claiming to be able to terminate, suspend or withdraw from treaties was an aggressor, the measure contemplated by that State was prohibited, or in any case insofar as it benefited from it, a point which might be assessed either by the Security Council or by an international arbiter or judge. In the absence of such a determination, the State could take the desired measure in the framework of the parameters established in draft articles 4 and 5. Although several Member States had endorsed the principle enunciated in draft article 15, some had suggested deleting the reference to General Assembly resolution 3314 (XXIX) of 14 December 1974, on the definition of aggression, notably to avoid creating an obstacle to any developments in the area because of the supposed risk that the text might encourage unilateral determinations. The two arguments did not seem very relevant, as he had explained in detail in paragraphs 133 and 134 of the report. It had been pointed out that the text of the draft articles contained a drafting error: the State determined as an aggressor would bear that stigma even in the context of a subsequent, entirely different, conflict. In other words, it would retain that determination forever, although a State that had been the aggressor in one conflict could very well find itself in a situation of self-defence in another. Hence the need to ensure that the “armed conflict” in question in the text of draft article 15 was in fact the result of the “aggression” referred to in the first line. That could be done by adding the words “*dû à l’agression*” (that results from the act of aggression) after the phrase “*du fait d’un conflit armé*” (as a consequence of an armed conflict).

²³⁷ See footnote 138 above.

14. It had also been argued that factors other than the act of aggression might become important in prolonged armed conflicts, which would mean that the benefits that an aggressor State might derive from termination, withdrawal or suspension would not be the result of the aggression alone. Although he appreciated the subtlety of the argument, that would correspond to approval of the aggressor State's actions. Any watering down of the rule set out in draft article 15 should be rejected. One Member State had taken the view that the question of the effects of armed conflicts on treaties should be separated from the question of the causes of conflicts; that would amount to calling for the deletion of draft articles 12 and 13, a proposal that he obviously did not support. Lastly, with regard to whether the scope of draft article 15 should be confined to aggression or whether it should be expanded to include any use of force prohibited under Article 2, paragraph 4, of the Charter of the United Nations, he preferred to retain the current scope. Article 39 of the Charter of the United Nations referred to the concept of aggression, as had also been done in article 5, paragraph 1 (*d*), of the Rome Statute of the International Criminal Court, which concerned the international criminal responsibility of individuals, the application of those provisions depending on the Security Council's determination. In his view, the aim of draft article 15 should remain limited to the consequences of armed aggression committed by States when they attempted to avoid their treaty obligations. However, if the Commission decided to enlarge the scope of the draft articles to include the use of force, as set out in Article 2, paragraph 4, of the Charter of the United Nations, it would suffice to reformulate the beginning of the text in the manner indicated in paragraph 139 of the report. In paragraph 140 of his report, the Special Rapporteur had suggested that draft article 15 be retained as it had appeared in the original draft of 2008.

15. On the "without prejudice" clauses, he said that draft articles 14 and 16 to 18 dealt with areas of law that were on the margins of the topic under consideration and served to make clear that those areas were not affected by the provisions of the text. Pursuant to draft article 14, the draft articles were without prejudice to decisions of the Security Council in accordance with Chapter VII of the Charter of the United Nations and thus followed article 8 of the 1985 resolution of the Institute of International Law. Draft article 16 (Rights and duties arising from the laws of neutrality) provided that the draft articles were without prejudice to the rights and duties of States arising from the laws of neutrality, something which the resolution of the Institute had omitted. Under draft article 17 (Rights and duties arising from the laws of neutrality), the draft articles were without prejudice to causes of termination, withdrawal or suspension of treaties not provided for in the provisions but permitted by the 1969 Vienna Convention, notably termination as a consequence of the agreement of the parties, a material breach of the treaty, a supervening impossibility of performance, either temporary or definitive, or a fundamental change of circumstances at the time of the conclusion of the treaty. Draft article 18 concerned the revival of treaty relations subsequent to an armed conflict.

16. Draft article 14 stipulated that the draft articles were "without prejudice" to the legal effects of decisions of the Security Council in accordance with the provisions

of Chapter VII of the Charter of the United Nations. That provision, which was limited to the decisions based on Chapter VII, might however be enlarged to include all coercive decisions taken by the Security Council, because Article 103 of the Charter of the United Nations held for all Security Council decisions and not only for those adopted in the framework of Chapter VII. Pursuant to Article 103, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the ... Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". As pointed out by a number of Member States, it was possible that draft article 14 was made superfluous by Articles 103 and 25 (Obligation for Member States to accept and carry out the decisions of the Security Council) of the Charter of the United Nations. However, he preferred to be very clear on the subject and thus to retain the draft article.

17. Pursuant to draft article 16, the draft articles in no way affected the rights and duties of States arising from the laws of neutrality. While one Member State with the status of neutrality had endorsed the provision, another would like a clear distinction to be drawn between relations between belligerent States and those between belligerent States and other States. The case of relations between neutral States could also be added. He did not see how the Commission could allow such a request in the context of draft article 16, which merely pursued the limited objective of excluding the laws of neutrality from the draft articles. Another State would like neutrality to appear in the list annexed to draft article 5, instead of making it the subject of a "without prejudice" clause, but that would overlook that the status of neutrality was not always of a treaty nature. Given that neutrality was a status which was applicable in time of armed conflict (apart from permanent neutrality, which also gave rise to obligations in peacetime), it did not seem useful to refer to it in the list in draft article 5, because the case envisaged was covered by draft article 7 (Express provisions on the operation of treaties).

18. Draft article 17 reserved the right of States, in situations of armed conflict, to terminate, withdraw from or suspend the operation of treaties for reasons other than the outbreak of the conflict. Even if a State could not or would not invoke the existence of a conflict to terminate treaties temporarily or permanently, partially or totally, it could do so on other grounds provided under the 1969 Vienna Convention, for example material breach of the treaty by the other party, supervening impossibility of performance (art. 61) or a fundamental change of circumstances (art. 62). For some treaties, notably in the framework of non-international conflicts, the outbreak of conflicts could in itself be qualified as a fundamental change of circumstances entailing a temporary or permanent impossibility of performance.

19. Draft article 17 had been criticized. One Member State noted that it would suffice to replace it by a general clause referring globally to other causes of termination, withdrawal or suspension. Although that was true, he still preferred the current text, because it gave examples of "other grounds" that could be invoked and, what was more, were particularly relevant in the context of the outbreak of armed conflicts. Another State suggested the insertion of an

additional example, that of termination as a consequence of “the provisions of the treaty itself”, which was a reference to article 57 (a) of the 1969 Vienna Convention. He agreed to that addition, which would have the advantage of rounding out the current formulation under article 17 (a).

20. Draft article 18, which had been discussed at length in the debate on the first part of the report, concerned the right of States to revive treaty relations subsequent to termination or suspension. It had been proposed and, apparently agreed, to merge draft article 18 with draft article 12 (Revival or resumption of treaty relations subsequent to an armed conflict). If that was done, it would do away with the function of draft article 18 as a “without prejudice” clause.

21. With regard to such clauses, it had been proposed to insert in the draft articles an additional rule referring to the duty to respect international humanitarian law and human rights. He was not opposed to that idea on the substance, but it was always important to bear in mind the purpose of the draft articles. “Without prejudice” clauses should not become an end in themselves, but should be limited to what was strictly necessary, namely to preserve collective security, neutrality and other causes of termination and suspension of treaties. The addition of other “without prejudice” clauses could “water down” the actual subject, as pointed out in paragraph 146 of the report.

22. Turning to other points raised and general issues, he noted that a number of States and their representatives had sharply criticized the draft articles. Some States suggested starting again from scratch. Others thought that there was too much doctrine, to the detriment of practice, or that both the draft articles and the doctrine and practice cited were too focused on common-law thought. Those comments led him to conclude that he would need to conduct an additional study on practice (for which he hoped to receive the Secretariat’s assistance), but he cautioned against expecting too much. The topic of the effects of armed conflicts on treaties was not blessed with an abundance of accessible practice, whereas from a doctrinal viewpoint, it had been discussed at great length.

23. Concerning the scope of the draft articles, the idea had again been broached that the Commission, once it had terminated its work on the topic, might undertake a study of the effects of armed conflicts on treaties to which international organizations were parties. One State had also suggested that the scope be strictly limited to the law of treaties and that any extension to the law governing the use of force be avoided. In his view, that seemed quite difficult: the two subjects were inseparable, although the focus was obviously on the law of treaties. Thus, some aspects of the law on the use of force could not be ignored.

24. One Member State had proposed that the list annexed to article 5 also include treaties on international transport, such as air agreements. At first glance, that seemed reasonable, but a closer examination indicated that it all depended on the circumstances, for example whether the armed conflict, international or internal, affected the part of the territory in which the treaty was applicable. All things considered, it seemed preferable to apply the criteria in draft articles 4 and 5 to such treaties and not to place them on the list.

25. On the responsibility of States, one State had asked about the responsibility of a State party to a treaty that had provoked an armed conflict, where the treaty ceased to operate on account of the conflict, and particularly where the other party or parties to the treaty had no desire for its application to be terminated. The same State had also asked whether the extent and duration of the conflict and the existence of a formal declaration of war were factors that should be taken into account in assessing the effects of armed conflicts on treaties. In his opinion, it was preferable to remain within the areas covered by the current draft articles and not to venture into the field of international responsibility.

26. As to the extent of the conflict, that factor had already been referred to in draft article 4, subparagraph (b). The duration of a conflict could be a function of its extent. As for the existence of a declaration of war, that requirement had long been irrelevant.

27. One State was of the view that if the draft articles did not take the path of an international conference with a view to negotiating a convention, the need for the many “without prejudice” clauses in the draft articles could be reconsidered. No decision had been taken on that question, which thus was premature. Moreover, even if the draft articles were not meant to lead to a convention, it was still necessary to determine their effects and limits, which was precisely what those clauses did.

28. With regard to the other points raised, one State had commented that the consequences of termination, withdrawal from or suspension of a treaty had not been examined in the draft articles. He thought, however, that articles 70 and 72 of the 1969 Vienna Convention were applicable by analogy, on the understanding that, if there was a notification followed by an objection (draft article 8), the question of justification of the notification remained open. In his view, it would suffice to mention articles 70 and 72, perhaps in the commentary to draft article 8 on notification of termination, withdrawal or suspension.

29. The draft articles adopted in 2008 had not been created in a day or in one piece. They had been drawn up in several stages, and sometimes the rest of the text had not been brought into line with the changes made. That had been the case when, in 2008, it had been decided to include non-international armed conflicts in the draft articles. Thus, one State had rightly asked whether the same rules applied, without distinction, to both internal and international armed conflicts. In his opinion, it seemed clear that this question must be answered by indicating, somewhere in the draft articles, either that those effects were identical, or that they were different; otherwise, the draft articles would lose some of their utility. The State that had posed that question had also answered it by noting that in the framework of article 2, subparagraph (b), of the draft articles, in principle, and in the absence of other grounds for termination or suspension based on articles 60 to 62 of the 1969 Vienna Convention, “a State does not have the right to claim exemption from its [treaty] obligations by reason of an ongoing internal armed conflict”.²³⁸ That question and the accompanying

²³⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/622 and Add.1, commentary by China to draft article 2.

observation might suggest that, for non-international armed conflicts, a rule should be added pursuant to which a State engaged in non-international armed conflict could request only the suspension of treaties whose continuation was not imposed under draft articles 4 and 5 and the annexed list. The difference in treatment proposed by that State appeared to reflect the difference between international and internal armed conflicts: international armed conflicts could result in a disaster, a veritable “earthquake” between two or more States, and put at stake their existence and their international relations, and even those of third States, whereas an internal armed conflict usually resulted in a temporary or partial incapacity at inter-State level that did not give rise to disproportionate reactions affecting third States. Moreover, it would not be the first time that, in the context of the draft articles, the reaction of the State concerned would be limited to suspension. He recalled in that regard the explanations given on draft article 13; a State hindered in the exercise of its right to self-defence by the existence of treaty ties only had the right to suspend those ties, not to demand their termination. He would like to hear the views of other members of the Commission before making any proposal on the question.

30. At some point, and the time had not come yet, because all the important questions had not yet been definitively resolved, the Commission should consider what form the draft articles should take.

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

[Agenda item 1]

31. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of protection of persons in the event of disasters would be composed of the following members: Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie (*ex officio*), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 5.05 p.m.

3059th MEETING

Tuesday, 6 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report on the effects of armed conflicts on treaties, in particular articles 3 to 18 and the other points raised by Member States and general issues (A/CN.4/627 and Add.1, paras. 115–164).

2. Mr. MURASE said that he wished to make two points relating to draft articles 13 and 15. The first was the difficulty of determining which side in an armed conflict could claim to be acting in legitimate self-defence; the second was the difficulty of determining aggression. The Special Rapporteur had stressed the need to retain the two draft articles, but he was not fully convinced that the Commission needed to address the specific issues of self-defence and aggression in the context of the law of treaties.

3. With regard to the first point, in theory, one side had a legitimate claim and the other side an illegitimate claim concerning the exercise of self-defence in a given conflict. However, in practice, it was often very difficult to determine which side was acting in legitimate self-defence. An example was the Iran–Iraq war in the 1980s, in which both parties had claimed that their exercise of self-defence was legitimate; the Security Council had refrained from making any determination on the matter. He feared that such a situation might give rise to confusion, or even abuse, in the actual application of draft article 13. He therefore suggested that the article be deleted and replaced by a “without prejudice” clause along the lines of draft article 14, or article 59 of the draft articles on responsibility of States for internationally wrongful acts,²³⁹ which was broader in scope. Nevertheless, since the draft articles on State responsibility had a provision on self-defence (art. 21), the Commission might prefer to retain draft article 13. In that case, he would suggest that the commentary to the draft article elaborate on the need for prudence in its application.

4. As for the second point, the Security Council had never employed the term “aggression” but had used the words “threat to the peace” and “breach of the peace”, which fell short of aggression. Likewise, the ICJ had avoided any pronouncement of aggression in cases where it might have been possible, and the international community had not yet reached a sufficiently clear definition of aggression.

5. In that connection, reference might be made to the amendments to the Rome Statute of the International Criminal Court adopted by consensus at the recent Review Conference of the Rome Statute as article 8 *bis*,²⁴⁰ where the definition of an act of aggression reproduced the wording of General Assembly resolution 3314 (XXIX)

²³⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 143.

²⁴⁰ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, International Criminal Court publication RC/9/11, Resolution 6 “The crime of aggression” (RC/Res.6), Annex I, p. 17.

of 14 December 1974. Those amendments, however, had no bearing on the Commission's current work for two reasons. First, the International Criminal Court was concerned with the criminal responsibility of individuals, which was not relevant to States' loss of rights to terminate or suspend treaties. Second, the Review Conference itself had adopted an understanding that the amendments addressing the definition of the act of aggression and the crime of aggression were for the purpose of the Statute only; in accordance with article 10 of the Statute, they should not be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

6. It could not be denied that the adoption of the amendments concerning aggression might have some indirect effect on international law, but that came under the scope of future development. In his view, the definition of an act of aggression adopted by the Review Conference virtually equated aggression with the unlawful use of force. Even the qualification, in paragraph 1 of new article 8 *bis*, "which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" was ambiguous, and thus the definition might not be sustained under general international law.

7. In view of the difficulty of applying the notions of self-defence and aggression, he suggested that draft articles 13 and 15 be replaced by "without prejudice" clauses. Perhaps draft article 14 could be expanded to cover those two situations, since the draft was concerned with the law of treaties and not with the question of the use of force. He could agree to retaining draft article 13 with an appropriate commentary, since the concept of the right of self-defence was clearly established, and his sole concern was its application. By contrast, the concept of aggression was not as well established in international law, and he would be reluctant to endorse its inclusion in draft article 15 as currently worded. He had no difficulty with the other draft articles, and was in favour of their referral to the Drafting Committee.

8. Sir Michael WOOD said that he agreed with Mr. Murase that not all the draft articles in the addendum were necessary. Some seemed to have been included because they were based on the 1985 International Law Institute resolution, "The effects of armed conflicts on treaties"²⁴¹ and, as the comments of Member States and Mr. Murase indicated, some posed problems. He recognized that at the second reading stage it was probably too late to reopen debate on the need for the draft articles, yet, Mr. Murase's suggestion for "without prejudice clauses" to replace draft articles 13 and 15 warranted consideration. On the assumption, however, that most of the draft articles would be retained, he wished to make the following points.

9. He had no substantive problem with draft article 13, which concerned the inherent right of self-defence, although the Drafting Committee might wish to consider beginning it with wording that would more accurately reflect Article 51 of the Charter of the United Nations, as follows: "A State exercising the right of individual or collective self-defence recognized in the Charter of the

United Nations". Article 51 was in fact a "without prejudice" clause and by no means set out all the conditions that had to be met for the proper exercise of the right of self-defence; in particular, it made no mention of proportionality and necessity.

10. The Drafting Committee might also wish to amend the title of article 13, but not as suggested by the Special Rapporteur. The current title might imply some automatic effect of the exercise of the right of self-defence, which was not, he believed, the intention. Paragraph 116 of the report suggested that draft article 13 did not cover internal conflicts. That would normally be so, although it was not excluded that the exercise of the inherent right of self-defence could lead to what might be qualified as a "non-international" armed conflict. In any event, such a possibility should be covered in the commentary to the draft article.

11. As originally conceived, draft article 15 had been limited to the case of an aggressor State, whereas the alternative version would cover all uses of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. If the draft article was retained—he hoped not—his preference would be for the broader approach offered by the alternative version. As Mr. Murase had noted, the Security Council had been reluctant to label States as aggressors, even in the most egregious breaches of the prohibition of the use of force, and had confined itself to a determination of a threat to the peace or breach of the peace. Such reluctance was unlikely to diminish once the International Criminal Court was in a position to exercise jurisdiction over the crime of aggression. Another reason for preferring the broader approach was that it would bring draft article 15 more in line with draft article 13. Self-defence did not apply only in the case of aggression (notwithstanding the French text of Article 51). Moreover, confining article 15 to the case of an aggressor State would set a very high threshold for its applicability. It might well exclude situations where both sides of the conflict had the right to suspend or withdraw from treaties during an armed conflict. If the concept of aggression was retained, then he would be in favour of omitting or at least amending the reference to General Assembly resolution 3314 (XXIX) on the definition of aggression. The resolution should not be placed on an equal footing with the Charter of the United Nations, as implied by the current draft. He shared Mr. Murase's view that the definitions of crime of aggression and act of aggression adopted by the Review Conference of the Rome Statute had no bearing on the Commission's work. They were as yet untested and had been developed in their own very special context. They did, however, display a rather more nuanced use of General Assembly resolution 3314 (XXIX) than did draft article 15.

12. The "without prejudice" clauses in draft articles 14, 16 and 17 did not raise particular problems. He supported the retention of draft article 14, concerning the decisions of the Security Council under Chapter VII of the Charter of the United Nations, and had taken note of Mr. Murase's suggestion to transform the draft article into a "without prejudice" clause covering the use of force. Of the two alternative versions of article 17, his preference was for the second one, which was simple yet comprehensive. It would be helpful if the commentary to the draft article explained how the set of draft articles differed

²⁴¹ See footnote 138 above.

conceptually from the ordinary rules of treaty law, such as those on fundamental change of circumstance or impossibility of performance, which applied regardless of whether there was an armed conflict.

13. He agreed with the Special Rapporteur that there was no need to add yet another “without prejudice” clause covering the duty to respect international humanitarian and human rights law. He also endorsed the Special Rapporteur’s comments on the scope of the draft articles and on other points.

14. With regard to the possibly different effects on treaties of international and non-international armed conflicts, he had formed no clear opinion and looked forward to hearing the views of other members. The effects could depend as much on the scale and duration of the conflict as on whether it was international or non-international. Many current conflict situations were hard to classify, and he was not certain that a clear distinction could be made for the purposes of the draft articles. The suggestion that a State engaged in a non-international armed conflict be permitted only to suspend treaties did not seem particularly logical or substantiated by practice. The argument that in such cases a State could fall back, where applicable, on the ordinary rules of treaty law, was hardly an answer. The same held true, perhaps even more so, for a State engaged in an international armed conflict.

15. He hoped that the Drafting Committee would consider favourably the Special Rapporteur’s suggestion to reorganize the draft articles, including by combining articles 12 and 18. He also hoped that the Drafting Committee would consider Mr. Candiotti’s suggestion to divide the set of draft articles into parts, which would be in accordance with practice and would make the draft articles easier to follow. In conclusion, he was in favour of referring to the Drafting Committee draft articles 13 to 18 and the drafting suggestions made by the Special Rapporteur in his first report.

16. Mr. KAMTO noted that the Special Rapporteur had continued his work on the topic with the same respect for Sir Ian Brownlie’s efforts and the same careful attention to the comments, sometimes critical, from States on the draft articles adopted on first reading. His own comments would address draft articles 13 and 15 only; his silence on the other draft articles signified approval.

17. Draft article 13 was useful, and the approach adopted by the Commission on first reading was appropriate. However, with reference to paragraph 122 of the report, he would stress that not only could the proposed addition be interpreted as recognition of a right of pre-emptive self-defence, it could also give the false impression that the Security Council had a monopoly on determining aggression. That was not the case, as was borne out by jurisprudence, doctrine and the practice of the General Assembly, as well as the statements made by many States during the Review Conference of the Rome Statute held recently in Kampala. He questioned the appropriateness of the Special Rapporteur’s suggestion to delete the adjectives “individual or collective” modifying self-defence from the title of draft article 13. To be sure, they were covered by the phrase “in accordance with the Charter of the United

Nations”, but the reference to those adjectives meant two different things in the context of draft article 13. On the one hand, it signified that legitimate self-defence could be individual or collective, as enshrined in the Charter of the United Nations. On the other hand it meant that, in all cases, self-defence must be exercised in accordance with the Charter of the United Nations. The current wording of draft article 13 should therefore be retained.

18. Regarding draft article 15, he supported the argument put forward by the Special Rapporteur in paragraph 133 of the report. There was no legal reason to delete the reference to General Assembly resolution 3314 (XXIX), which jurisprudence had amply demonstrated to be part of customary international law. A case in point was the judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*. No doubt the previous speakers would disagree, but the content of the resolution had recently been enshrined in a treaty of universal scope: article 8 *bis* of the Rome Statute of the International Criminal Court had been adopted in Kampala not merely by consensus, but in fact unanimously. He knew because he had been there. The debate had not centred on the content of article 8 *bis*, which had been considered established law, but on the role of the Security Council in the exercise of jurisdiction.²⁴² Article 8 *bis* defined not only the crime of aggression, but also an act of aggression, and not only made explicit reference to General Assembly resolution 3314 (XXIX) but reproduced its contents in full. It could therefore be said that article 8 *bis* had been incorporated into the Statute, although jurisdiction could not be exercised until 2017.²⁴³ The time lag was a matter of political expediency, not a legal issue. It had been generally accepted that General Assembly resolution 3314 (XXIX) was part of customary international law. Only two States had raised objections on that score, and he was not certain what legal weight should be given to their statements; it must be remembered that the Review Conference had been open to States not parties to the Statute as well as to States parties.

19. Therefore, it hardly seemed appropriate to assert that the Review Conference had no bearing on the Commission’s work because it had defined only the crime of aggression or that matters relating to the use of force were not relevant to the law of treaties, when the topic under discussion was the effects of armed conflicts on treaties. The Commission should not take such a narrow view when framing the draft articles. There was a tendency to compartmentalize different aspects of international law and claim that they did not fall within the purview of the Commission. However, international law was one and the same and, inevitably, some of its aspects touched upon others. The Commission could not simply avoid addressing them by drafting “without prejudice” clauses. For all those reasons, the reference to General Assembly resolution 3314 (XXIX) should be retained.

20. He was in favour of expanding the scope of draft article 15 to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations and endorsed Sir Michael’s comments on the subject. In

²⁴² *Official Records of the Review Conference of the Rome Statute of the International Criminal Court* (see footnote 240 above), Annexes VII, VIII and IX, pp. 121–127.

²⁴³ *Ibid.*, p. 6, para. 32.

certain cases which, objectively, had all the characteristics of aggression, the Security Council and even the ICJ did not employ the term. yet it could not be claimed that Security Council had never done so. According to his own recent research, there had been a few cases where the Security Council had explicitly referred to aggression, such as in the case of the invasion of Benin in 1977.²⁴⁴ Moreover, in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had not used the term “aggression”, but had accepted that the definition of aggression contained in General Assembly resolution 3314 (XXIX) formed part of customary law. There was also fairly widespread use of the term by the General Assembly. Accordingly, the Commission should guard against being categorical.

21. However, apart from those few cases, the Security Council generally refrained from using the term even in situations where it would seem to be justified, but probably more for reasons of internal politics within the Security Council than on legal grounds. A case in point had been the invasion of Kuwait by Iraq in 1990, where, incredibly, the Security Council had not used the term “aggression”.²⁴⁵ For that reason, the Commission should adopt a broader approach in draft article 15, based on Article 4, paragraph 2, of the Charter of the United Nations, namely the alternative version in square brackets proposed by the Special Rapporteur.

22. Mr. CAFLISCH (Special Rapporteur) said that in his report he had not advocated expanding the scope of the draft articles to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations, but had remained neutral on that point. He was, however, seeking the Commission members’ opinion on whether internal and international armed conflicts would have different or similar effects on treaties. That question had been raised during the debate in the Sixth Committee and was a new aspect not covered by the draft articles. He therefore required the members’ advice on the matter, because without it there would be little point in referring the draft articles to the Drafting Committee, since the latter had to obtain the opinion of the plenary Commission before reaching a decision on that kind of question.

23. Mr. MELESCANU said that the arguments put forward by previous speakers showed that the real obstacle faced by the Commission was that, at the outset, it had not identified the fundamental principles on which its work on the topic under consideration should rest. If it accepted the premise that the aim of the draft articles was to offer an attacked State all possible means of defending itself in conformity with the Charter of the United Nations—and those means would include the suspension of the provisions of certain bilateral agreements—the contents of the draft articles should be geared towards giving substance to that principle. The attacked State would have the right to use force, which was of course an exceptional measure, but it would also have the right to employ other legal tools, including the suspension of agreements. Acceptance of that premise would help the Commission to reach agreement on the draft articles.

24. A second fundamental premise was that the Charter of the United Nations and the definition of aggression adopted by the General Assembly in resolution 3314 (XXIX) formed the cornerstone of the draft articles. If the Commission opted for another rationale, it would arrive at different conclusions regarding the contents of the draft articles. It was vital to adopt a logical approach, and the basic logic currently underpinning the draft articles was indeed flawlessly Cartesian. If both the above-mentioned premises were accepted, the text of all the draft articles could clearly take the direction proposed by the Special Rapporteur, namely to offer an attacked State additional means of defending itself.

25. In fact it was essential to follow that logic: otherwise, the Commission might arrive at a very short set of draft articles which merely indicated that without prejudice to all the provisions of the Charter of the United Nations, the 1969 and 1986 Vienna Conventions and international customary law, a State could also defend itself against an aggressor by suspending international treaties. The text drafted by the Commission ought, however, to be able to stand alone, since references to other sources of law and conventions would greatly complicate the task of those who would have to apply the text and who, unlike the members of the Commission, would not have had the privilege of participating in the debates on the topic and of knowing what lay behind each full stop and comma.

26. As far as draft article 13 was concerned, Sir Michael had been right to contend that the draft article’s title might be interpreted as suggesting some automatic effect of the exercise of the right of self-defence. It should be remembered that if aggression occurred, a range of immediate effects were possible. The actual effects would depend on the attacked State, because it was up to the latter to decide which of the possibilities open to it was the most efficient means of exercising its right to self-defence in the circumstances. The Drafting Committee could easily solve that problem by introducing the adjective “possible” before the word “effect”, or by adding any other word which would clearly convey the message that there was nothing automatic about the effect of the exercise of the right to individual or collective self-defence on a treaty.

27. Turning to draft article 15 (Prohibition of benefit to an aggressor State), he said that if the aim of the draft articles was to give an attacked State means of self-defence which encompassed legal action, it was logical to have an article specifying that a State might not derive any benefit from aggression in the field of treaty law. For that reason, he strongly supported the version referring to aggression within the meaning of the Charter of the United Nations and General Assembly resolution 3314 (XXIX) at the beginning of draft article 15. The resolution could not be mentioned without incorporating a reference to the Charter of the United Nations in the same sentence. He honestly thought that it would be hard to argue against the inclusion of a reference to the resolution, since the Charter of the United Nations and the resolution, which was based on the Charter of the United Nations, were central to the set of draft articles. Failure to mention the resolution in draft articles dealing with the effects of armed conflicts on treaties might lead to some undesirable interpretations. Its inclusion was therefore essential.

²⁴⁴ Security Council resolution 419 (1977) of 24 November 1977, para. 1.

²⁴⁵ Security Council resolution 660 (1990) of 2 August 1990.

28. With regard to the “without prejudice” clauses contained in draft articles 14, 16 and 17, he noted that draft article 14 dealt with an issue that was regulated by the Charter of the United Nations. He therefore agreed with the Special Rapporteur that the draft article was essentially a reminder of the pre-eminence of the Charter of the United Nations with regard to the subject matter under consideration, and for that reason, he supported the wording of the draft article. As someone from an aligned State, he found it difficult to comment on the rights and duties of States arising from the laws on neutrality, on which the Special Rapporteur was a renowned specialist. In his view, it was useful to have a special article, in other words draft article 16, on the specific rights of neutral States, especially as their neutrality was not always enshrined in treaties and was operational at all times. In draft article 17, although a general formulation might have some advantages and might be more readily accepted, his own view was that the Commission should endeavour to make the text as specific as possible and to identify situations in which termination, withdrawal or suspension would be permissible. If the Commission was unable to agree, it could always fall back on the somewhat vague general formulation, but at the current stage of its work it would be worthwhile to ascertain whether there were any other cases where termination, withdrawal or suspension would be possible and to include them in draft article 17.

29. With regard to State comments on the quality of the draft articles, from his own experience as a Commission member, he feared that the Commission’s progress would be impeded if it tried to embark on a comprehensive study of national practices. Only three States had urged such a study. The draft articles rested on a sufficient amount of doctrine and were firmly based on the Charter of the United Nations, the work of the United Nations Special Committee on the Question of Defining Aggression and the *travaux préparatoires* of the Rome Statute of the International Criminal Court. He therefore encouraged the Special Rapporteur to continue along his chosen route.

30. Questions on the scope of the draft articles included the issue of whether their application should be confined to acts of aggression, or whether it should be extended to use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. Generally speaking, the Commission should be cautiously ambitious, but given that Article 51 formed the cornerstone of the draft articles, in that context it should confine itself to acts of aggression as defined in General Assembly resolution 3314 (XXIX). With all due respect to Mr. Kamto, he was skating on thin ice, as the issue was not purely legal in nature, but had substantial political implications as well.

31. In response to the question of whether the draft articles should cover both internal and international conflicts, he was of the opinion that since the draft articles were rooted in Article 51 of the Charter of the United Nations, it would be logical for them to refer solely to international conflicts, otherwise the Commission would be extrapolating provisions on aggression to internal conflicts, which might prove somewhat difficult. It was premature to decide what form the draft articles should take. In conclusion, he was in favour of referring draft articles 13 to 17 to the Drafting Committee.

32. Mr. KAMTO, replying to Mr. Melescanu, asked whether in draft article 15 the Commission deemed aggression to be a situation characterized as such by the attacked State, or whether it considered that aggression could be said to have occurred only after determination of the aggressor by the competent organs, in other words the Security Council. If one accepted the hypothesis that an attacked State could characterize a situation as aggression, because the Charter of the United Nations stated that measures taken in the exercise of the right of self-defence must be immediately reported to the Security Council, which would subsequently determine which State was the aggressor, he would agree with Mr. Melescanu that the Commission must remain within the framework of Article 51 of the Charter of the United Nations. His concern was, however, that if the Commission thought that it was necessary to wait until the competent organ had determined that a situation amounted to aggression, there was a risk that a situation like that of the Iraqi invasion of Kuwait in 1990 might not be qualified as aggression because the Security Council had not employed that term and that consequently a State in the position in which Kuwait was would be unable to avail itself of the possibility of not applying a given treaty in accordance with the instrument proposed by the Commission.

33. Positive international law recognized General Assembly resolution 3314 (XXIX) as part of international law. If the Commission did not include a reference to the resolution in draft article 15, it would give the impression that it was backtracking on the advances made in international law towards the definition of aggression, and that would be the wrong signal to send to the international community. That was why it would be wise to buttress that resolution which, as Mr. Melescanu had pointed out, was based on the Charter of the United Nations and enjoyed wide support.

34. Sir Michael WOOD, responding to Mr. Kamto’s comments regarding the definition of aggression, said that General Assembly resolution 3314 (XXIX) was of course very important and had been referred to in judgments of the ICJ. His own concern was with the wording of draft article 15, which placed the resolution on the same level as the Charter of the United Nations. That was not the case in resolution 6, on the crime of aggression, adopted by the Review Conference on the Rome Statute held in Kampala. His main point was that if the Commission were to expand draft article 15 so that it covered all uses of force in violation of Article 2, paragraph 4, of the Charter of the United Nations, it would not need to redefine aggression, since the language proposed by the Special Rapporteur for the broader approach did not require the use of the term.

35. Mr. SABOIA said that self-defence under Article 51 of the Charter of the United Nations was an inherent right. Of course, in the light of its assessment of the facts, the Security Council could subsequently determine that aggression had not taken place. He agreed with Mr. Kamto that General Assembly resolution 3314 (XXIX) was part of international law and should be mentioned in draft article 15. On the other hand, he was sceptical about expanding that article’s scope to include the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations.

36. Mr. CANDIOTI, replying to Mr. Melescanu's comments regarding the purpose of the draft articles, said that Mr. Melescanu was mistaken in his belief that their main aim was to offer attacked States all possible means of defence, including the suspension of a treaty, in other words the non-fulfilment of treaty obligations. Their main aim, as set forth in draft article 3, was to preserve the stability of international law and the continuity of treaty relations in the event of an armed conflict, in other words, to preserve the principle of *pacta sunt servanda*.

37. While it was important to consider the issue of the illegal use of force and not to reward the aggressor, it was equally essential to maintain the right balance in a situation created by an armed conflict. In that respect it was unfortunate that no preamble had yet been drafted, as it could have defined the purposes of the draft articles. Even before its session in Helsinki in 1985, the Institute of International Law had set itself the task of considering the preamble to the resolution adopted at that session and of deciding on the main principles on which the resolution should rest and on the strategic aims of the exercise. He regretted that the Commission was similarly unclear about the form that the draft articles should ultimately take, which was not a matter of secondary importance since it had a bearing on the contents of the draft articles.

38. Mr. MELESCANU said that his position and that of Mr. Candiotti were not mutually exclusive. One of the primary objectives of the draft articles was to promote the application of the principle of *pacta sunt servanda*. In some cases, however, that fundamental principle must be tempered by the additional condition of *rebus sic stantibus*—that international treaties and agreements were to be observed unless some important change occurred. Aggression was the most obvious case in which an exception to the rule that treaties must be respected was permitted, on the grounds of a fundamental change of circumstances.

39. Mr. McRAE said that the report demonstrated the careful attention devoted by the Special Rapporteur to the comments of States on the draft articles as adopted on first reading. He himself generally agreed with the Special Rapporteur's analysis of those comments. He disagreed, however, with the suggestion by Mr. Murase and Sir Michael that draft articles 13 and 15 be replaced by a "without prejudice" clause. True, it might be difficult to determine whether a given act was one of self-defence or of aggression, but that was insufficient reason for omitting useful provisions from the text.

40. In the revised version of draft article 13, the addition of the words "[s]ubject to the provisions of article 5" was problematic. As the Special Rapporteur himself pointed out in paragraph 124 of his report, the effect of a reference to draft article 5 was uncertain. He himself would go further: the reference to draft article 5 suggested a hierarchy between draft articles 5 and 13. That changed the very nature of what draft article 5 said, which was simply that for certain treaties, the mere fact of armed conflict would not affect their operation. The actual wording, "will not as such", suggested not that the treaties were inviolable, but only that armed conflict alone did not affect their operation. There could be other reasons for the treaties not to continue in operation in the event of

armed conflict, however, and draft article 5 did not rule out that possibility.

41. Draft article 13 had a different objective, namely, to allow States to suspend treaties if they were involved in an armed conflict but were exercising the right of self-defence. It allowed them to suspend only a limited category of treaties—those that were incompatible with the exercise of the right to self-defence—that they could not otherwise suspend, perhaps including, depending on the circumstances, a treaty that fell within the scope of draft article 5. Thus, to make draft article 13 subject to draft article 5, the provision that purported to prevent suspension, would deprive draft article 13 of any real effect. For treaties that could otherwise be suspended in the event of an armed conflict, there was no need for the exception laid down in draft article 13. Indeed, one might argue that draft article 13 should be worded "notwithstanding draft article 5", to make it clear that the State's right to self-defence was not curtailed by draft article 5 in the event that a treaty that fell under draft article 5 impeded the exercise of that right.

42. There was another reason for deleting the words "subject to the provisions of article 5", and it related to the indicative list of categories of treaties referred to in draft article 5. If draft article 5 took priority over draft article 13, then the content of the indicative list took on particular significance. Yet as the Special Rapporteur pointed out in paragraph 124 of his report, the list was intended only to be indicative. He himself would have argued strongly from the start against having any list at all. To give some examples in the commentary was appropriate, but a list created expectations about the status of the categories on the list and of those that were not. If the words "subject to the provisions of article 5" were included in draft article 13, then the nature of the list changed still further. It became a list of treaties that were in some sense overriding, something that went beyond the intent of draft article 5. He accordingly urged that the words "subject to the provisions of article 5" be deleted.

43. With respect to draft article 15, he did not favour extending its scope beyond aggression to any use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. A reference to Article 2, paragraph 4, would raise the potential for considerable disagreement over what constituted a violation of that provision, thus creating uncertainty, and would broaden the scope of the draft article beyond the original intent. The advantage of the term "aggression" was that it was a more readily defined violation of Article 2, paragraph 4, as recent events had helped to show. He agreed with Mr. Kamto that the Commission could not ignore the amendment made recently to the Rome Statute of the International Criminal Court at the Review Conference of the Rome Statute in Kampala. Although, as Mr. Murase had pointed out, a definition of aggression for the purposes of criminal responsibility was not necessarily the same thing as a definition for the purposes of the current draft, the basic problem was the same, and it could be argued that the Kampala definition of aggression was relevant to the Commission's work on the effects of armed conflicts on treaties. That made the reference in draft article 15 to the Charter of the United Nations and to General Assembly

resolution 3314 (XXIX) problematic, however, as it did not cover the latest developments. On the other hand, it would be premature to cite the amendment to the Rome Statute of the International Criminal Court in the draft article. As a solution, he would suggest that draft article 15 simply make a general statement about aggression contrary to the Charter of the United Nations, and the commentary explain the evolution of the definition of aggression, including reference to General Assembly resolution 3314 (XXIX) and the results of the Review Conference of the Rome Statute in Kampala.

44. With regard to draft article 17, he preferred the more specific version, no doubt because of his background in common law as opposed to civil law, but he could go along if other members preferred the more general version.

45. Turning to issues addressed by the Special Rapporteur under "Other points raised by Member States and general issues", he said that he agreed that no special provision should be made for air transport agreements, even though in many instances they might continue in operation in the event of an armed conflict. However, that question again highlighted the problem of the indicative list in the annex to draft article 5. The list would continue to create controversy over which agreements should be included and which should not, inclusion implying a status that was different from non-inclusion.

46. On the question of whether there should be a special rule for internal armed conflicts, the Special Rapporteur seemed to suggest that a State involved in such a conflict could only suspend but not terminate its treaty obligations, or perhaps could only request their suspension, so that the other party to the treaty could veto the suspension of the agreement. Neither solution would be appropriate. While he agreed with Mr. Candioti that one of the objectives of the draft was to uphold the sanctity of agreements, another objective must be to deal with circumstances when their sanctity was not upheld. With the exception of cases when the treaty itself provided for the consequences of an armed conflict, the draft articles were intended to make it possible to suspend treaties when, in the light of the nature of the treaty and of the conflict, it was simply not possible for them to continue in operation. The Special Rapporteur had mentioned impossibility, and in a sense what the draft articles did was to recognize a particular form of impossibility, one that could arise in a State-to-State conflict just as much as in an internal conflict. He agreed with the Special Rapporteur that a State involved in an internal conflict could not use that as a pretext for abandoning its treaty obligations, but neither could a State involved in an international armed conflict do so. In each case, the principle of good faith applied. Thus, he saw no need to have a special rule for internal conflicts that would limit the State to suspension or to requesting suspension. The rights of that State in respect of treaties affected by an internal conflict that effectively rendered the operation of the treaty impossible should be the same as the rights of a State in respect of treaties affected by an international conflict.

47. In conclusion, he supported the referral of the draft articles to the Drafting Committee.

48. Mr. DUGARD said that he agreed with many of the points made by Mr. Murase on draft article 13. The Special Rapporteur appeared to have been unduly influenced by the 1985 resolution of the Institute of International Law. There had been a number of important developments since 1985 in respect of international humanitarian law and the use of force. States had presented new arguments in favour of extending the scope of Article 51 of the Charter of the United Nations, rendering its content more uncertain than in the past. For that reason, it would be wiser simply to deal with the use of force in a "without prejudice" clause. That might also help to overcome some of the difficulties raised by Mr. McRae regarding the relationship between draft articles 5 and 13.

49. With regard to draft article 15, it was difficult to know whether it was wiser to refer to the prohibition of the use of force under Article 2, paragraph 4, of the Charter of the United Nations, to aggression or to both. There were words in the vocabulary of international law that were highly evocative and emotional in content: genocide, terrorism and aggression were among them. While the resolution adopted at the Review Conference of the Rome Statute in Kampala was an important development, General Assembly resolution 3314 (XXIX) had been and remained highly controversial. It might be many years before the International Criminal Court, through its jurisprudence, gave substance to the definition of aggression. Indeed, many believed it should confine itself to prosecuting persons for war crimes and crimes against humanity and not deal with the crime of aggression at all. Although he understood Mr. McRae's criticism of the idea of referring to the use of force, it was nevertheless more clear-cut, less emotional and preferable to a reference to aggression.

50. Draft articles 14 and 17 were useful and necessary, but he was not sure the same was true of draft article 16. It raised the question of what remained of the once-substantial law of neutrality, since the Charter of the United Nations in Article 2, paragraph 6, required Member States and even non-Member States in certain circumstances to comply with the directives of the Security Council.

51. Lastly, on the question of the extent to which the draft articles should apply to internal armed conflicts, he thought they should: the object of the exercise was to cover both internal and international armed conflicts. The title of the topic and the definition in draft article 2 certainly made that clear. He agreed with Mr. McRae that each situation had to be judged on its own merits to determine whether a departure from draft article 3 was warranted. He accordingly opposed the Special Rapporteur's suggestion in paragraph 162 of his report that a special rule for non-international armed conflict be inserted in the draft.

52. Mr. CAFLISCH (Special Rapporteur) said that there was no doubt that the draft articles as they stood were applicable to both international and internal armed conflict. However, several States had asked whether those two types of armed conflicts had the same effects on treaties. As Special Rapporteur, he had the duty to draw attention to such questioning, but he had taken no position on the matter. He simply wished to know the Commission's views on that point.

53. Mr. WISNUMURTI, speaking as a member of the Commission, said that in paragraph 119 of the report, the Special Rapporteur pointed out the link between draft article 13, on what the attacked State could do, and draft article 15, on what the aggressor State could not do. He himself agreed with the Special Rapporteur's suggestion that the link should be highlighted in the commentaries to the two draft articles. One Member State had suggested that, like article 7 of the resolution of the Institute of International Law, draft article 13 should contain a reference to a determination by the Security Council that an attacked State exercising the right of self-defence was an aggressor. He agreed with the Special Rapporteur's position that the Commission should not follow that suggestion. The inclusion of a reference to the Security Council would be inconsistent with and superfluous to the provision in draft article 13 that, as a condition for the right to suspend the operation of a treaty, a State must exercise its right of self-defence in accordance with the Charter of the United Nations. He agreed that a reference to article 5 should be added to draft article 13 and endorsed the revised draft article 13 that appeared in paragraph 127 of the report, although he agreed with Mr. McRae that the word "notwithstanding" would be preferable to "subject to".

54. With regard to draft article 15, he disagreed with the suggestion by some Member States that the reference to General Assembly resolution 3314 (XXIX) be deleted. The definition of aggression contained in the resolution had been adopted by consensus following lengthy negotiations during the difficult period of the Cold War. Moreover, retaining a reference to the definition of aggression provided clear and necessary criteria for the Security Council in determining whether a State was an aggressor. He had difficulty with the idea, referred to in paragraph 139 of the report, that the scope of the draft article should be expanded by referring to a State that was unlawful rather than to a State committing aggression. To make the unlawful use of force a defining element in draft article 15 would raise the prospect of differing interpretations and deprive the draft article of the specificity that the reference to a State committing aggression provided. For those reasons, he favoured the retention of draft article 15 as adopted on first reading²⁴⁶ and as reproduced in paragraph 140 of the report, with the deletion of the words in square brackets in the title and in the body of the text.

55. He agreed with the view expressed by the Special Rapporteur in paragraph 146 of the report that the "without prejudice" clauses in draft articles 14, 16 and 17 should not be expanded to include provisions on the duty to respect international humanitarian law and human rights. Such an addition would not only water down the substance of the draft articles, it would also digress from the main thrust of the project. He agreed to the retention of draft article 14 as adopted on first reading. He had no problem with the wording of draft article 16. With regard to draft article 17, he endorsed the suggestion to add a new subparagraph referring to "the provisions of the treaty" as additional grounds for the termination, withdrawal or suspension of a treaty. That would be consistent with article 57, subparagraph (a), of the 1969 Vienna Convention and would complement the existing elements of draft article 17. He disagreed with the suggestion to

replace draft article 17 with a more abstract text referring to international law, and he accordingly endorsed the first version of draft article 17 proposed in paragraph 150 of the report instead of the alternative general formulation.

56. Concerning the scope of the draft articles, it had been suggested that once the text had been completed, consideration should be given to the possibility of extending it to cover treaties to which international organizations were parties. He had already expressed his reservations about that suggestion when the question had been discussed earlier by the Commission.

57. In paragraph 161, the Special Rapporteur referred to the comment by a Member State that, except in cases of impossibility of performance as stipulated in article 17 of the present draft articles and article 61 of the 1969 Vienna Convention, a State could not abandon its treaty obligations by reason of an ongoing internal conflict. He himself agreed with that comment. However, a State engaged in an internal conflict might face an unusual situation in which it was temporarily unable to meet the obligations of a treaty and needed to suspend—if not to permanently terminate—the operation of the treaty. That situation needed to be accommodated. He therefore welcomed the wording proposed in paragraph 162 of the report, to be incorporated in draft article 8.

58. Lastly, the Special Rapporteur recalled the need for the Commission to consider the form to be given to the draft articles. In view of the importance of the draft articles in the quest for legal certainty in situations of armed conflict, it was essential that the draft articles be transformed into a convention. With those comments, he agreed that the draft articles should be referred to the Drafting Committee.

The meeting rose at 11.45 a.m.

3060th MEETING

Wednesday, 7 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Effects of armed conflicts on treaties (*continued*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to pursue their consideration of the Special

²⁴⁶ *Yearbook ... 2008*, vol. II (Part Two), chap. V, sect. C.2, p. 62.

Rapporteur's first report on the effects of armed conflicts on treaties, in particular draft articles 13 to 18 and the other points raised by Member States and general issues (A/CN.4/627 and Add.1, paras. 115–164).

2. Mr. VASCIANNIE said that draft article 13 acknowledged the relevance of the right of individual or collective self-defence in the context of the law on treaties. In essence, it suggested that when a State exercised its right of self-defence, it was entitled to suspend the operation of a treaty to which it was party, if the treaty's implementation was incompatible with the exercise of that right. That was a plausible and indeed useful rule. If a State exercising the right of self-defence were barred from suspending certain treaties, that State would, in some instances, find itself at a disadvantage compared to the offending State. For that reason, it was necessary to retain draft article 13 which, however, required further attention. First, the introductory clause "[s]ubject to the provisions of article 5" was problematic. The words "subject to" presupposed the subordination of draft article 13 to draft article 5, which meant that, in the event of a conflict between the two provisions, the latter would prevail. It seemed, however, that the Special Rapporteur's main objective was the opposite of that result, because it emerged from paragraph 124 of his report that both draft articles were on the same level and that the right established in draft article 13 existed notwithstanding the provisions of draft article 5. He therefore agreed with Mr. McRae's exposition at the previous meeting and with his proposal that the words "subject to" should be replaced with "notwithstanding", but that the indicative list annexed to draft article 5 should not be called into question. Secondly, as proposed by Sir Michael, it might be preferable to delete the phrase "in accordance with the Charter of the United Nations". In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ had provided a firm reminder that rules on the use of force, including those on self-defence, existed in both the Charter of the United Nations and customary law. A State exercising its right of self-defence in accordance with customary law might therefore suspend the operation of a treaty in the same way as a State acting under the Charter of the United Nations. Thirdly, it was not entirely clear whether draft article 15 sought to suspend treaties only with a putative aggressor State, or with third States as well. It would seem, from reading paragraph 116 of the report, that the aggressed State could suspend only the application of treaties between itself and the aggressor. However, that point was not unequivocally captured in draft article 13, which merely introduced the criterion of incompatibility without further clarification. Arguably, when a treaty existed between the aggressor and the victim State, it was easy to ascertain whether that treaty was incompatible with the exercise of self-defence by the victim. But what would happen if the fact of exercising self-defence made it impossible for the victim State to meet treaty obligations to a third, non-aggressor State? The incompatibility test might suggest that this treaty could also be suspended. He was uncertain whether that was the solution intended by the Special Rapporteur.

3. With respect to draft article 15, some members of the Commission had argued against use of the terms "aggression" and "aggressor State" and against reference to General Assembly resolution 3314 (XXIX). Although

the arguments presented were important, they were not altogether convincing. International law recognized the concept of "aggression" and resolution 3314 (XXIX) had been adopted by consensus. Of course, when the Security Council found that a State was an aggressor, it was expressing deep and enduring criticism. Nonetheless, the fact that the term "aggressor" had pejorative connotations was not sufficient reason to avoid the terms employed by the Special Rapporteur in draft article 15, or a reference to resolution 3314 (XXIX). Similarly, although some aspects of the term "aggression" were not readily applicable in practice and the Security Council had not actively applied that term in Chapter VII situations, aggression remained a recognized concept in the law of the use of force. Furthermore, while the Charter of the United Nations was authoritative in matters concerning the use of force, it was doubtful that there was any drafting principle that forbade a reference, within the same article, to the Charter of the United Nations and other rules of law. There was nothing wrong in mentioning the Charter of the United Nations and resolution 3314 (XXIX) in the same article if that was appropriate for the purposes of a given rule. Nor was it convincing to suggest that use of the term "aggression" be confined to the context of the Rome Statute of the International Criminal Court. It seemed that the Review Conference of the Rome Statute held in Kampala in 2010 had concluded that the notion of aggression was applicable in the area of liability for international criminal acts, but there was no reason to believe that it must be ring-fenced into that context alone, as Mr. Kamto had indicated in his careful analysis, with which he personally agreed. The number of States opposed to a reference to that concept in draft article 15 was insignificant and it seemed that a majority, if not a large majority, of States considered it acceptable to mention resolution 3314 (XXIX). He therefore wished to retain draft article 15, as it stood.

4. In paragraphs 161 to 163 of his report, the Special Rapporteur had invited the members of the Commission to comment on whether the same rules should apply to both internal and international armed conflicts. His first reaction was that they should. In both cases, the State was subjected to special pressures resulting from an armed conflict, which might or might not undermine its capacity to meet its commitments. The same set of rules on treaty continuity or discontinuity should therefore apply, irrespective of whether the conflict was international or internal.

5. Mr. SABOIA said that he wished to retain draft article 13 for the same reasons that Mr. Vasciannie had so eloquently expressed in his statement, which he fully endorsed. He again emphasized that self-defence was an inherent right that any State could exercise immediately in the event of armed aggression, without a previous determination by the Security Council. Of course, it was an exception to the general prohibition of the use of force in international relations. It was therefore incumbent upon the State to produce convincing evidence in support of its allegation, in order to prove that there were genuine grounds for its recourse to force to repel an armed attack and that it was complying with the rules on proportionality and other standards of international law for determining what might be deemed an act of self-defence. While the right of self-defence must be preserved, caution was needed because States or groups of States had

often abused it for their own political or strategic ends. The Special Rapporteur had been right not to mention the Security Council in draft article 13. While the draft articles presumed that States were acting in good faith, the Security Council might find otherwise and that would have consequences which would depend on the political conditions of the Council—but that went beyond the scope of the topic under examination. The Commission must not pave the way for the flagrant abuse of the right of self-defence that the possible recognition of a right to pre-emptive self-defence, mentioned in paragraph 122, would constitute. He was dubious about the usefulness of the phrase “[s]ubject to the provisions of article 5” and would prefer its deletion.

6. Turning to draft article 15, he agreed with the members of the Commission who were in favour of a reference to resolution 3314 (XXIX) preceded by the phrase “within the meaning of the Charter of the United Nations” which logically included Article 2, paragraph 4, of the Charter of the United Nations. As for the “without prejudice” clauses, in draft article 17 he would prefer the adoption of a precise list to a broad, abstract formulation. It was unnecessary to have a draft article on the effects of internal armed conflicts, the issue raised in paragraph 162. The State in question, which could be that in which the internal conflict was taking place, or another country where the effects of the internal conflict were impinging on its capacity to fulfil its treaty obligations, could rely on the general rules set forth in the 1969 Vienna Convention.

7. Mr. NOLTE said that, at the previous meeting, Mr. Candioti had made a very important point when he had reminded the Commission that it should always remember that the main aim of its current exercise was to affirm the stability of treaty relations, even during an armed conflict. The principal purpose of the draft articles was to make it clear that the old principle that war ended the effects of treaties was no longer valid and had been replaced by a more differentiated set of rules and presumptions which emphasized the preservation, as far as was possible and reasonable, of treaty relations, even in a situation of armed conflict. Nevertheless, that exercise was situated within the bounds of general international law. That meant that the Commission must take account of some very important general concepts and rules, especially the concept of “armed conflict”, the right of self-defence and the prohibition of aggression, all of which had been debated and developed in a specific context and with certain policy considerations in mind. When the Commission had debated those concepts and rules in connection with the draft articles, it had sometimes focused too much on determining their relative importance and significance in relation to its general policy and had paid insufficient heed to the effects of the meaning given to the terms “armed conflict”, “self-defence” and “aggression” in the context of the effects of armed conflicts on treaties. He was part of the consensus within the Commission that the term “armed conflict” should refer to both international and non-international armed conflicts and that, in order to define “armed conflict”, it was necessary to adopt the same approach as that applied by the International Tribunal for the Former Yugoslavia in the *Tadić* judgement. The reason why that approach had been chosen had little to do with the issue of the effects of armed conflicts on

treaties, but was to be found more in the general development of the international law of armed conflict. In other words, it had been chosen because of the growing difficulty of distinguishing between international and non-international armed conflicts and because of the changing nature of armed conflicts in the current world. It was the right decision, but it had crucial implications for the draft articles. The possibility of terminating or suspending treaty relations as a result of an armed conflict had hitherto been debated mainly in respect of international armed conflicts. The primary purpose of the draft articles was, however, to confine belligerent States’ capacity to end or suspend treaty relations. By extending the concept of an armed conflict to non-international armed conflicts, the Commission was, on the contrary, offering States a possibility of terminating or suspending treaty relations that had not existed previously. By following that general trend in international law, it was undermining the draft articles’ principal purpose, namely to ensure the stability of treaty relations. It was therefore quite legitimate for the Special Rapporteur to ask the Commission repeatedly if it really wished to frustrate its chief aim, or whether it would not prefer to follow the suggestion made by one State that it should postulate the sanctity of treaty relations in the context of non-international armed conflicts. If non-international conflicts were limited to situations where the government of a State dealt by itself with an insurrection in its own territory, there would be no justification for their inclusion in the draft articles, for there was no reason why a classic civil war situation should give a State the possibility of terminating or suspending treaty relations with other States. The general rules of treaty law, especially those relating to impossibility of performance or a change in circumstances, would probably be sufficient to safeguard the legitimate interests of the States concerned. The term “non-international armed conflict” also covered other situations such as those in which third States’ forces fought alongside government troops to combat armed groups and, to some extent, those where States intervened in the territory of another State which was unable to control that part of its territory from which armed groups were launching operations against the intervening State. Those situations could give States legitimate grounds for ending or suspending treaty relations, especially States whose territory was being used for foreign troops’ operations with or without the consent of the government concerned.

8. If the definition of “armed conflict” was seen from that angle, it was quite logical to try to nuance the rules contained in the draft articles so that they did not unintentionally undermine the stability of treaty relations. Nevertheless, it would be inappropriate simply to exclude non-international armed conflicts from the scope of the draft articles, for it was often hard to tell the difference between them and international armed conflicts between States. He was not persuaded by the solution proposed by the Special Rapporteur, namely to allow States to suspend, but not terminate, treaty relations in the event of non-international armed conflicts. That distinction was misleading, because it wrongly suggested that the suspension of a treaty was a mild measure and it was based on the misconception that non-international armed conflicts involved only one government and rebels. What should therefore be done? First, the Special Rapporteur could

stress in the commentary that the purpose of including non-international armed conflicts and widening the concept of “armed conflict” was not to expand States’ possibilities of terminating or suspending treaty relations during classical armed conflicts where a government was contending on its own with an insurrection in its territory. He should likewise indicate that the draft articles did not address the potential difficulties which a party to the treaty could face in honouring its obligations because of a non-international armed conflict—that was a question of general treaty law; the draft articles had to do with the fact that relations between parties to a treaty altered as a result of an armed conflict. Such a change in relations could arise when a third State was involved in a non-international armed conflict, but obviously not when a State was dealing with an insurrection on its own. Secondly, the Commission could insert into the draft articles an additional paragraph that would read: “The present draft articles apply to non-international armed conflicts which by their nature or extent are likely to affect the application of treaties between States parties.” That sentence, which was borrowed from the previous definition of armed conflicts proposed by Sir Ian Brownlie, referred only to non-international armed conflicts. Its purpose was to serve as a reminder that non-international armed conflicts must have an additional, inter-State dimension before the principle of *pacta sunt servanda* could be called into question. In that connection, it was also necessary to consider the application of the rules of *jus ad bellum*, or to be more exact, of *jus contra bellum*. Of course, the right of self-defence should not be called into question and, equally plainly, an aggressor should not benefit from aggression. However, when reaffirming the basic rules of *jus contra bellum*, care should be taken not to reintroduce inadvertently possibilities that had been excluded or restricted at the outset. The Commission had agreed that, in the interests of the principle of *pacta sunt servanda*, the outbreak of an armed conflict did not *ipso facto* entail the termination or suspension of treaties. The way in which the Commission reaffirmed the basic rules of *jus contra bellum* should not therefore amount to an invitation to States to terminate or suspend treaty obligations by simply invoking their right of self-defence, or to deny their opponents that opportunity by branding them as aggressors. States would then only have to adjust their terminology in order to achieve undesirable goals.

9. That concern should, in principle, lead him to support the positions of Mr. Murase and Sir Michael who were in favour of deleting draft articles 13 and 15 and of replacing them with a “without prejudice” clause. However, as alluding to a problem was not enough to solve it, it would be preferable to reaffirm the existing rules as clearly as possible and to try to avert the possibility of the abuse to which Mr. Saboia had referred by careful formulation and explanatory commentaries. The fact that a determination of whether a situation constituted self-defence or aggression was infrequently or rarely objective was a general problem of international law that the Commission could not solve within the framework of the current topic.

10. Turning to draft article 13, he approved of the introductory clause “[s]ubject to the provisions of article 5”, since that reference was essential in order to limit abuse of the right of self-defence. Some treaty rules, especially

those of international humanitarian law, but also rules concerning borders, could not be terminated or suspended by invoking the right of self-defence. Since article 5 contained only an indicative list, the extent to which the exercise of the right of self-defence could override certain treaty obligations was not strictly limited, but open-ended to allow legitimate uses of that right. For that reason, unlike Mr. McRae, he did not think that the reference to draft article 5 would deprive draft article 13 of any effect. On the contrary, if the indicative list were to be discarded, which was apparently what Mr. McRae was suggesting, and if everything became dependent on the specific circumstances of the case in question, powerful States would have ample possibilities of defending their preferences or of accusing others, as the case might be. He concurred with the Special Rapporteur that the right of self-defence must be exercised “in accordance with the Charter of the United Nations” and not, as Sir Michael had suggested, “as recognized in the Charter of the United Nations”. The fact that the Charter of the United Nations did not explicitly mention the principles of necessity and proportionality could not be remedied by replacing the phrase “in accordance with the Charter of the United Nations” with the word “recognized”. The right of self-defence had two closely-linked sources, the Charter of the United Nations and customary international law.

11. Draft article 13 called for one last comment: it would be wise to make it clear that a State exercising its right of self-defence was not entitled to terminate or suspend a treaty as a whole when all that was needed was the termination or suspension of certain divisible obligations under the treaty. Admittedly that principle had already been set forth in a previous draft article, but it deserved an express mention in the context of self-defence. He therefore proposed that the end of draft article 13 be reformulated to read, “... a State ... is entitled to suspend in whole or in part the operation of a treaty to which it is a party as far as this treaty is incompatible with the exercise of this right”. As they stood, the words “or in part” did not allay his concerns, since they related only to the entitlement to suspend the treaty’s operation and not to any restriction of that entitlement.

12. Draft article 15 posed more difficulties than draft article 13. Once again, it was necessary to ensure that the legitimate principle that aggression must not pay could not be misused to undermine the basic aim of the current exercise, which was to uphold the *pacta sunt servanda* rule. As Mr. Dugard had pointed out at the previous meeting, the danger was that the word “aggression” was an evocative and emotive term. Nonetheless, the Commission should not attempt to ward off one danger by creating another. Acceptance of the alternative solution proposed by the Special Rapporteur and endorsed by Mr. Dugard and Sir Michael, namely a general reference to the prohibition of the use of force, would multiply the uncertainties and possibilities of abuse, as Messrs. Kamto, McRae, Melescanu, Saboia and Wisnumurti had pointed out. Violations of the prohibition of the use of force had been asserted and could arguably be asserted in so many situations that draft article 15 would almost always be cited if such a solution were to be adopted. He therefore preferred the solution proposed by the Special Rapporteur, namely that of limiting draft article 15 to situations

of aggression. The fact that hitherto the Security Council had rarely characterized a situation as one of aggression was not a vice but a virtue. That practice suggested that such a qualification had to be applied restrictively. In that context, he was likewise in favour of a reference to General Assembly resolution 3314 (XXIX). The resolution might not be entirely satisfactory and did not cover all conceivable forms of aggression, especially some of its modern manifestations, but it encompassed a generally accepted basic list that was not restrictive. Although the 2010 Review Conference of the Rome Statute had dealt only with the criminal aspect of aggression, it had undeniably reaffirmed the pertinence of resolution 3314 (XXIX) by adopting a definition of the crime of aggression based on it.

13. On the other hand, he agreed with Sir Michael that resolution 3314 (XXIX) should not be placed on an equal footing with the Charter of the United Nations. The wording of draft article 15 should indicate that there was room for the development of norms below the level of the Charter of the United Nations. He therefore proposed that the beginning of that provision should be reformulated to read, “A State committing aggression within the meaning of the Charter of the United Nations, in particular according to resolution 3314 ... shall not terminate...”. That wording allowed for the possibility that the Security Council might well qualify certain acts not explicitly mentioned in resolution 3314 (XXIX) as acts of aggression and it indicated that other forms of aggression might exist. Draft article 15 raised an issue of interpretation, insofar as it was not always easy to say when the termination or suspension of a treaty obligation was “of benefit” to the aggressor State. In some instances, the armed conflict caused by aggression might make the operation of certain treaties or the fulfilment of certain treaty obligations pointless. In such cases, it was conceivable that the aggressor could terminate or suspend a treaty which was equally senseless or burdensome for both parties, if such action did not give it a specific benefit that was unavailable to the other party.

14. In draft article 17, the situation with regard to a general saving clause covering other cases of termination, withdrawal or suspension, was more complex than the wording of that provision suggested. The draft articles did provide an indication of whether a situation had changed so radically that article 62 of the 1969 Vienna Convention could be invoked. In some ways, they clarified, illustrated or fleshed out article 62 of the Convention. Article 62 and possibly other grounds for termination, withdrawal or suspension were certainly preserved, but in the sense that they had to be interpreted in the light of the draft articles in cases which fell within their scope. That consideration might be too complicated to be expressed in the text of the draft articles, but it could be reflected in the commentaries.

15. Mr. KAMTO said that he had listened very carefully to Mr. Nolte’s lengthy exposition regarding draft article 13 and especially the definition of armed conflict. He had some doubts about the advisability of, or even the legal basis for, any extension of that definition to non-international armed conflicts for the purposes of the draft articles. The examples quoted by Mr. Nolte were covered

by international law, since modern case law recognized the responsibility of a State that supported armed gangs or groups of rebels operating in the territory of another State, although its armed forces did not directly intervene in the armed conflict. International law accepted that a purely internal conflict could become international. For example, in *Armed Activities on the Territory of the Congo*, the ICJ had examined whether the Government of Uganda had supported the armed groups led by Mr. Bemba in the Democratic Republic of the Congo.

16. Although the Security Council sometimes tended not to qualify as aggression certain conflicts that objectively displayed the characteristics of a situation of aggression—the invasion of Kuwait by Iraq in 1990 was one of the examples that had been mentioned—he had initially been in favour of a broad approach to the matter, but Mr. Melescanu’s arguments at the previous meeting and the statement just made by Mr. Nolte had caused him to change his mind. The provision should be limited to cases of aggression, because even if a State relied on self-defence and pleaded that it had been the victim of what it deemed to be aggression, if the competent organ under Article 39 of the Charter of the United Nations or an international legal body, such as the ICJ, subsequently found that there had been no aggression, the situation would then fall within the scope of the rules on the responsibility of States for internationally wrongful acts. Draft article 15 should not therefore be substantively amended on that point. On the contrary, with regard to the issue raised by Sir Michael at the previous meeting and to Mr. Nolte’s comments, if placing the Charter of the United Nations and resolution 3314 (XXIX) on the same footing was problematic, the solution might not be that proposed by Mr. Nolte. It was impossible to say “within the meaning” of the Charter of the United Nations because, although the latter referred to aggression, it did not define it, unlike resolution 3314 (XXIX). It would be more correct to say, for example, “*Un État qui commet une aggression telle que prévue par la Charte et définie dans la résolution 3314 (XXIX)*” (“A State committing aggression as referred to in the Charter of the United Nations and defined in resolution 3314 (XXIX)”).

17. Mr. CANDIOTI said that the Commission must explore the very serious issues raised by the draft articles. In that connection, at the beginning of draft article 13, reference should be made not only to the provisions of article 5, but also to those of draft articles 3 and 4; the purpose of the former was to safeguard the stability of treaty relations in the event of an armed conflict and that of the latter was to set out a series of parameters—the term “indicia” was perhaps unfortunate in that respect. Draft article 4 should be revised and it would be wise to indicate which characteristics of an armed conflict were pertinent and might justify the non-performance of treaty obligations. Moreover, as far as draft article 15 was concerned, it was necessary to remember that the United Nations Conference on the Law of Treaties, which had culminated in the adoption of the 1969 Vienna Convention, had deliberately refrained from dealing with the use of force, not because it considered that the matter was unrelated to the law of treaties, but because it had no mandate to consider the law of the use of force. It was therefore very important to retain a provision such as draft article 15.

18. Mr. MELESCANU said that he had been interested by Mr. Nolte's comments and drew his attention to the provisions of article 73 of the 1969 Vienna Convention. It was indeed necessary to be cautious about any widening of the definition of an armed conflict to encompass non-international conflicts. He fully agreed with Mr. Kamto's comments concerning the reference to the Charter of the United Nations and General Assembly resolution 3314 (XXIX) in draft article 15.

19. Mr. NOLTE said that he had not been the first person to suggest that the definition of armed conflict be extended. It had been proposed by the Special Rapporteur and debated at length during the first part of the current session. Initially, he had doubted the wisdom of broadening the definition, but he had come round to the idea because of the difficulty, in the modern world, of distinguishing between international and non-international conflicts.

20. Mr. CAFLISCH (Special Rapporteur) said that the Working Group had decided to study the effects of international and non-international armed conflicts and the Commission had approved that decision. He was therefore surprised that the point was being discussed again. On the other hand, one question, which he had already raised twice, still remained, namely that of the effects of both kinds of conflict on treaties. There were two possible answers to that question and he asked the members of the Commission to give their opinion.

21. Mr. VÁZQUEZ-BERMÚDEZ said that, with regard to draft article 13, which sought to preserve in full the individual or collective right of self-defence exercised in accordance with the Charter of the United Nations, he agreed with the Special Rapporteur that it was unnecessary to indicate that the Security Council might subsequently conclude that, in reality, it was the aggressed State which was the aggressor, since that clarification would conflict with the phrase "in accordance with the Charter of the United Nations" at the beginning of the draft article. Draft article 13, as adopted on first reading, clearly said that a State exercising its right of individual or collective self-defence could suspend in whole or in part the operation of a treaty, but only if the treaty was incompatible with the exercise of that right. Moreover, that right did not apply without restriction to any kind of treaty. That draft article must be read in conjunction with draft article 5, which contained the indicative list of categories of treaties in respect of which the outbreak of an armed conflict did not as such produce their suspension or termination. That should form the subject of a commentary to draft article 13.

22. The purpose of draft article 15 was to prevent an aggressor State from benefiting from the armed conflict which it had provoked, in spite of the prohibition of the use of force, by freeing itself of its treaty obligations. In that draft article, he was in favour of retaining the reference to General Assembly resolution 3314 (XXIX) on the definition of aggression. He proposed the deletion of the phrase "if the effect would be to the benefit of that State" from the end of the draft article. If no consensus were reached on that deletion, the commentary should at least explain that the benefit that an aggressor State

would derive by terminating, withdrawing from or suspending the operation of a treaty was not seen in solely military or strategic terms, but included any advantage of any kind, in any context.

23. The proposal made by some States to widen the scope of draft article 15 to encompass any unlawful use of force had met with the approval of some members of the Commission and might seem attractive at first sight, but it would be wiser to retain solely the reference to an act of aggression.

24. As adopted on first reading, the "without prejudice" clauses contained in draft articles 14 (relating to the decisions of the Security Council under Chapter VII of the Charter of the United Nations), 16 (relating to States' rights and duties arising from the laws of neutrality) and 17 (concerning other cases of termination, withdrawal or suspension) did not raise any problems.

25. He was in favour of merging draft article 12 proposed by the Special Rapporteur with draft article 18, which concerned States' right to regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of an armed conflict.

26. With regard to draft article 12 on the revival or resumption of the operation of a treaty that had been suspended solely because of an armed conflict, he said that if it was rare for States, when they adopted a treaty, to contemplate the possibility of terminating, withdrawing from or suspending its operation in the event of an armed conflict, it was even rarer for them to envisage its revival after a conflict. For that reason, the application of the indicia listed in draft article 4 would be extremely difficult, especially if they did not include the object of the treaty. It should be presumed that treaties whose operation had been suspended owing to an armed conflict would be revived automatically when the conflict was over. If the causes of the suspension of the treaty's operation had disappeared, it was to be hoped that the treaty would continue to apply in keeping with the principle of *pacta sunt servanda*, according to which treaties must be performed in good faith. That was also the intention behind article 11 of the resolution adopted in 1985 by the Institute of International Law²⁴⁷, which provided that at the end of an armed conflict the operation of a treaty that had been suspended should be resumed as soon as possible.

27. Lastly, he drew attention to the fact that the Commission's basic aim was to safeguard the stability of treaty relations and legal certainty, even in extreme circumstances such as armed conflicts.

28. Mr. PERERA said that, although draft articles 13 to 18 could be categorized as "secondary", they raised a series of complex issues which the Special Rapporteur had brought to the Commission's attention. He had also underlined the close linkage between some of the draft articles, for example between draft articles 13 and 15, an aspect which should be highlighted in the commentaries thereto.

²⁴⁷ See footnote 138 above.

29. The purpose of draft article 13 was to prevent an attacked State from being deprived of its natural right of self-defence by the treaties by which it was bound. That draft article therefore permitted a State that wished to exercise its right of self-defence temporarily to suspend a treaty to which it was a party. That being so, he shared the concerns expressed at the previous meeting by Mr. McRae that the inclusion of the phrase “[s]ubject to the provisions of article 5” was likely to deprive draft article 13 of its essential meaning and content. It should therefore be deleted.

30. The provisions of draft article 13 were counterbalanced by those of draft article 15, whose purpose was to prevent an aggressor State from benefiting from an armed conflict that it had provoked and to free itself of its treaty obligations. Draft article 15 raised some difficult questions, such as the definition of the terms “act of aggression” or “aggressor State”. Notwithstanding those difficulties, the draft article should be retained, since it rested on the principle that an aggressor State could not use an armed conflict which it had itself provoked as an opportunity to free itself of its treaty obligations. With that in mind, he would be in favour of widening the scope of the draft article to include the use of force contrary to Article 2, paragraph 4, of the Charter of the United Nations. If the aim was to prevent a situation in which a State provoked an armed conflict in order to put an end to its treaty obligations, the provisions applicable to the commission of an act of aggression applied with equal force to a violation of Article 2, paragraph 4, of the Charter of the United Nations. If the Commission were to limit the scope of that article to cases of aggression, it would be advisable to refer to resolution 3314 (XXIX).

31. He entirely agreed with the Special Rapporteur that, as it stood, draft article 17, which set out specific grounds for termination, withdrawal or suspension that were particularly relevant in the context of the effects of armed conflicts, tended to make the draft article’s purpose clearer than a general, abstract formulation. He therefore supported the current text with the addition of a new subparagraph (a) (“the provisions of the treaty”) which would be consonant with article 57 (a) of the 1969 Vienna Convention.

32. Adverting to the question raised by one member State whether the same rules applied, without distinction, to both internal and international armed conflicts, in paragraph 162 of his report the Special Rapporteur had proposed that a rule be added that would limit the right of exemption from treaty obligations to the right to request the suspension of those obligations since, in that type of conflict, the actual existence of the State bound by the obligations was not in question.

33. The members of the Commission who had reservations about extending draft article 15 to internal armed conflicts had continually asked the crucial question of what impact such a conflict would have on the continuance of treaty relations between States. Since the Commission had decided to include that kind of conflict in the scope of the draft articles, the question must be addressed by looking at the nature, extent and intensity of a particular situation and, having taken those criteria into

account, the relevant rules should then be applied, without differentiation, to both categories of conflict. Lastly, he proposed that draft articles 13 to 18 be referred to the Drafting Committee.

34. Mr. FOMBA endorsed the Special Rapporteur’s comments regarding the comparison of draft article 13 with article 7 of the 1985 resolution of the Institute of International Law and the caution required in interpreting the scope *ratione personae* and *ratione materiae* of the treaty relations in question. He approved of the explanations in paragraphs 118 and 119 of the report of the link between draft articles 13, 14 and 15, and of the proposal that this link be highlighted in the commentaries. As to the attitude that the Commission must adopt, the Commission might exceed its mandate if it tried to settle every detail of the issue, but it might not fulfil its mandate if it merely fell back on “without prejudice” clauses; it therefore had to find a happy medium.

35. The caution displayed and the questions raised in paragraph 122 of the report were warranted. He endorsed the comments made in paragraphs 124 and 125 in respect of the reference to draft article 5, but he preferred an express mention of draft article 5 to moving the reference to the commentary. As for paragraph 126, he agreed that it would be advisable to delete the phrase “individual or collective” from the title of draft article 13.

36. He was fully in favour of referring to General Assembly resolution 3314 (XXIX) on the definition of aggression, because of the convincing reasons put forward by the Special Rapporteur and, above all, because of Mr. Kamto’s eloquent and scientifically rigorous arguments. He concurred with the comments made in paragraph 134 with regard to the possible additional complication that might arise from conflict between the relevant provisions of a treaty and draft article 15 and with the proposal to mention that question in the commentary.

37. As to whether it was necessary to limit the scope of draft article 15 to aggression or expand it to include the use of force, he was in favour of the second course of action, and therefore of the examination of the phrase in square brackets by the Drafting Committee. However, it would be wiser to confine its scope to aggression in order to avoid problems of interpretation. As far as the “without prejudice” clauses were concerned, he approved of the comments made in paragraphs 142 to 144 of the report, especially the reminder that the context of the draft articles was that of armed conflicts. He agreed with the Special Rapporteur’s view as expressed in paragraph 146 that it was unnecessary to extend the list of “without prejudice” clauses, since it was crucial to focus on especially relevant cases.

38. As far as draft article 17 was concerned, he preferred the enumerative to the more general version, since it was more enlightening. The term “*inter alia*” showed that the list was not exhaustive. As for the scope of the draft articles, he agreed to take note of the suggestion that, at a later stage, the Commission study the possibility of extending the draft articles to treaties to which international organizations were parties. He approved of the conclusion drawn by the Special Rapporteur in paragraph 156

regarding the connection between the two subjects of the law of treaties and the law of the use of force.

39. The handling of articles 70 and 72 of the 1969 Vienna Convention was a crucial matter. He approved of the Special Rapporteur's proposal at the end of paragraph 160 of the report that both provisions be mentioned in the commentaries, perhaps the commentary to draft article 8.

40. The fundamental question raised by China and its accompanying observation regarding the possible need to distinguish between rules depending on whether the armed conflict in question was internal or international were important and relevant. The approach the Special Rapporteur proposed in paragraph 162 seemed to be going in the right direction. The additional rule proposed for incorporation in draft article 8 appeared *prima facie* to have the merit of being logical and justified from a legal point of view. The question of the form that the draft articles should take should be settled in due course. He was in favour of referring the draft articles under consideration to the Drafting Committee.

41. Mr. AL-MARRI said that Member States had submitted many comments on the draft articles and in particular on the question of whether they should be extended to non-international armed conflicts and to treaties to which international organizations were a party. The Commission must study those comments with great care. The Special Rapporteur had very wisely examined the draft articles that needed closer scrutiny. It was therefore unnecessary to review all the draft articles that had been adopted earlier or to look at jurisprudence.

42. It was inadvisable to widen the definition of "armed conflict", as some members of the Commission were proposing. All the draft articles presented by the Special Rapporteur were interesting and should be referred to the Drafting Committee. He hoped that the Commission would be able to complete its consideration of the draft articles on second reading before the end of the quinquennium.

Organization of the work of the session (*continued*)^{*}

[Agenda item 1]

43. Mr. McRAE (Chairperson of the Drafting Committee) said that the Drafting Committee on the effects of armed conflicts on treaties would comprise Mr. Candioti, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie (*ex officio*), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, as well as Mr. Caflisch (Special Rapporteur).

The meeting rose at 11.30 a.m.

3061st MEETING

Thursday, 8 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Effects of armed conflicts on treaties (*concluded*) (A/CN.4/622 and Add.1, A/CN.4/627 and Add.1)

[Agenda item 5]

FIRST REPORT OF THE SPECIAL RAPporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the Special Rapporteur's first report on the effects of armed conflicts on treaties, in particular draft articles 13 to 18 and the other points raised by Member States and general issues (A/CN.4/627 and Add.1, paras. 115–164).

2. Ms. JACOBSSON said that the Special Rapporteur's first report took an open-minded and balanced approach that clearly took into consideration the views expressed by States, while also dealing squarely with problematic issues. She agreed with Mr. Candioti that the Commission should not lose sight of the purpose of the current exercise, which was to ensure the continuation of treaty relations in the event of armed conflicts. The greatest challenge, as she saw it, was that the Commission had decided to cover both international and non-international conflicts, while also attempting to limit the number of situations in which treaties could be suspended or terminated during such conflicts. The Commission's aim was not to expand the scope of the exceptions contained in the 1969 Vienna Convention, but rather to lay down the legal framework for the stability and continued operation of treaties in times of armed conflict.

3. With regard to draft article 13, she agreed with the Special Rapporteur that it should be retained. She found it acceptable that the article was silent on questions relating to notification and opposition, time limits and peaceful settlement of disputes and thus did not cover every aspect of the suspension of the operation of a treaty in exercise of the right of self-defence. It was important to retain the phrase "in accordance with the Charter of the United Nations" so as to avoid conveying the message that the Commission was open to other interpretations. The only change she might propose was to insert the word "inherent" before "right".

4. Mr. McRae's proposal to have the draft article begin with the phrase "notwithstanding" (rather than "[s]ubject to") "the provisions of article 5" seemed logical at first

^{*} Resumed from the 3058th session.

sight, particularly for Commission members, like herself, who were in favour of safeguarding the sovereign State's right to individual and collective self-defence; however, the term "notwithstanding" differed significantly in meaning from "subject to", as the former implied a hierarchy while the latter was more neutral. In view of the purpose of the current exercise, namely to ensure the continuation of treaty relations in the event of armed conflict, she was in favour of retaining the formulation proposed by the Special Rapporteur in his report.

5. As to draft article 15, she agreed with other Commission members who had argued in favour of retaining an explicit reference to General Assembly resolution 3314 (XXIX). The resolution had achieved a particular standing in international law: it was referred to and invoked in international courts and had recently played a crucial role in the definition of the phrase "act of aggression" as an element of the crime of aggression, over which the International Criminal Court would have jurisdiction.²⁴⁸ Although it did not cover all conceivable forms of aggression, it was the most widely accepted and applied definition currently available. She was not in favour of widening the scope of the draft article by making an explicit reference to the use of force.

6. However, draft article 15 was not problem-free. Although she understood that the rationale behind the draft article was that the Security Council should determine whether a State was an aggressor, it was unsatisfactory to be forced to accept that the five permanent members of the Security Council with veto power would never be subject to such a decision and would always benefit from the article. Since the Security Council had rarely referred to acts of aggression or explicitly labelled a State as an aggressor, the issue was somewhat theoretical, but it also posed an ethical problem with regard to policy.

7. With respect to the cluster of "without prejudice" clauses, she concurred with the Special Rapporteur that it was wise, in the context of armed conflict, to limit the scope of draft article 14 to Member States' obligations arising from Chapter VII of the Charter of the United Nations. With regard to draft article 16, she welcomed the fact that it referred to neutrality *per se*—whether that meant the rights and duties of permanently neutral States or those of States choosing neutrality—and not to the imprecise term "neutrals" formerly employed by the Commission. Even though it was true, as Mr. Dugard had pointed out, that there was little room for neutrality under the Charter of the United Nations—as evidenced by Security Council decisions on particular conflicts—neutrality had not yet been eliminated entirely from the sphere of international law. Under the *lex specialis* regime of neutrality, the rights and duties of neutral States took precedence over the draft articles currently under consideration by the Commission. With regard to draft article 17, she was in favour of the longer version of the two proposed by the Special Rapporteur.

8. As to whether, in the context of draft article 2, subparagraph (b), the same rules applied, without distinction, to both international and non-international armed conflicts,

she found it tempting to consider making a distinction between the two types of situations along the lines proposed by Mr. Nolte, but she was not sure whether that approach was workable. As a practising lawyer in her country's Ministry of Foreign Affairs, she had witnessed first-hand how difficult it was to identify and label a conflict as either international or non-international, as well as the legal subtleties involved. However, it did seem to be worth a try. The crucial question was whether there should be different consequences in situations of non-international conflict or whether in those situations the threshold for applying exceptions should be higher.

9. In conclusion, she recommended referring the draft articles to the Drafting Committee.

10. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the effects of armed conflicts on treaties.

11. Mr. CAFLISCH (Special Rapporteur) thanked the Commission members for their comments and advice, which had afforded him a number of insights and in certain cases had caused him to change his mind. During the debate, some general points had emerged. The first of those was that draft articles 13 to 18 were supplementary to draft articles 1 to 12, and more specifically to draft articles 3 to 7, which constituted the core of the draft. However, that should not induce the Commission to let down its guard and neglect to set the necessary limits, particularly in draft articles 13 and 15. Those limits should be set with precision and should be based, as far as possible, on the existing rules of the law of nations.

12. The second general point—and it should be stressed—was that the draft articles were intended to apply to both international and non-international armed conflicts, the only question arising in that regard being the potential effects that would be produced by each type. In order to underscore the point that the draft articles applied to both types of conflicts, which were not always easy to distinguish, it had been proposed during the debate to insert the following reference in the draft: "The present draft articles apply to non-international armed conflicts, which, by their nature or extent are likely to affect the application of treaties between States parties." He could accept that wording and would leave it up to the Drafting Committee to decide where to place it.

13. The third general point was that, among draft articles 13 to 18 presented in paragraph 115 to 151 of the report that had just been considered by the Commission, there were some—namely draft articles 13 and 15—that limited the rights and freedoms of States in respect of treaty matters, and others—namely draft articles 14, 16 and 17—that were safeguard or "without prejudice" clauses. Since the debate had focused on draft articles 13 and 15, he would address those first.

14. Before doing so, however, it might be useful to consider what would happen if, as some Commission members had suggested, those two provisions were deleted. It would no longer be possible to exercise fully the inherent right of self-defence, since the right would be subject to treaty law, and the aggressor State, even if stigmatized

²⁴⁸ See footnote 240 above.

by the international community, could take advantage of its unlawful behaviour to free itself of treaty obligations that it found inconvenient. He would have some trouble accepting that consequence, even if it was true that the inclusion of draft articles 13 and 15 did pose certain problems relating to definitions. While he did not wish to minimize them, problems of interpretation and application could not be accepted as justification for the elimination of the provisions concerned.

15. As far as draft article 13, in particular, was concerned, while it might be difficult to identify an aggressor State or a State exercising its inherent right to self-defence in accordance with the requirements established by international law (urgency, proportionality etc.), that difficulty did not justify the deletion of the article. Draft article 13 served as a reminder that there were, in fact, situations in which the right to self-defence took precedence over treaty obligations. That would occur whenever the State acting in self-defence so decided, but its decision would subsequently be subject to review. That was how self-defence worked. The only argument in support of the deletion of draft article 13 might be the existence of Article 103 of the Charter of the United Nations, according to which rights and obligations under the Charter of the United Nations—in this instance, the exercise of the inherent, full and complete right to self-defence—prevailed over treaty law. Thus a State acting in self-defence could disregard any treaty obligations that limited that right—since the right to self-defence would necessarily prevail over them—under both customary law and the provisions of the Charter of the United Nations, but only if and to the extent that the treaty obligations in question hampered or restricted the exercise of the right to self-defence. That was something that had to be made clear, and draft article 13 had accomplished that; a “without prejudice” clause would be inadequate.

16. Concerning the argument that the Special Rapporteur and his predecessor had allowed themselves to be unduly influenced by article 7 of the 1985 resolution of the Institute of International Law,²⁴⁹ it would suffice to say that if they had been, it was with good reason. In his view, article 13 should be retained, and he believed that this view reflected the wishes of the majority of the members of the Commission.

17. Another point concerned a suggestion he had made in paragraph 124 of his report that the right to suspend treaty obligations under draft article 13 be made subject to the provisions of draft articles 4 and 5. As he had explained during the debate, that suggestion had been somewhat ill-advised, and he withdrew it. The focus in draft article 13 was on the process of self-defence: it was no longer a question of safeguarding the stability and continuation of treaty obligations, but rather of ensuring that the right to self-defence could be exercised fully, provided that it was in conformity with the legal requirements pertaining to self-defence.

18. It had been suggested that draft article 13 would be more closely aligned with existing law if the phrase “in accordance with the Charter of the United Nations” was

replaced by “as recognized in the Charter of the United Nations”. In his own view, the current wording was preferable, since it covered self-defence as provided for under both the Charter of the United Nations and customary law. Still with regard to draft article 13, the Special Rapporteur had encountered little opposition and even approval when he had proposed to delete the words “individual or collective” from the title and to retain them only in the text of the draft article, since it was unnecessary to include them in both places.

19. Draft article 15 was, in a sense, the reverse of draft article 13: its aim was to prevent a State committing “an armed attack” [in French “*agression armée*”] (Article 51 of the Charter of the United Nations) or an “act of aggression” (Article 39 of the Charter of the United Nations) from taking advantage of a conflict that it had provoked in order to free itself from treaty obligations that it found inconvenient, as had frequently occurred in the past. Those considerations suggested that the Commission should adhere to the specific notion of aggression, including the definition contained in General Assembly resolution 3314 (XXIX). In place of that, he could have accepted a reference to Article 2, paragraph 4, of the Charter of the United Nations, as indicated in paragraph 139 of his report. However, it should be recognized that such a solution would lead to a considerable broadening of the scope of draft article 15, with the result that the State in question might more easily—too easily—free itself of its treaty obligations.

20. The issue that had dominated the debate on draft article 15 was the reference it contained to General Assembly resolution 3314 (XXIX), which defined the term “act of aggression”. That definition was, moreover, reproduced in article 8 *bis* of the Rome Statute of the International Criminal Court, as contained in the resolution adopted by consensus in Kampala in 2010. In his view, even if the definition was imperfect, it seemed to be generally accepted, as evidenced by its inclusion in the Rome Statute of the International Criminal Court, and the reference should be retained. The fact that the International Criminal Court would have jurisdiction over crimes of aggression committed by individuals rather than acts of aggression committed by States did not change the situation. He himself believed that reference should be made to both the Charter of the United Nations and resolution 3314 (XXIX), but perhaps they should be placed at different levels, as had been suggested by certain Commission members, by referring to “aggression within the meaning of the Charter of the United Nations, as defined by General Assembly resolution 3314 (XXIX)”.

21. It had also been proposed to delete from draft article 15 the phrase that, while prohibiting an aggressor State from using an armed conflict as an opportunity to free itself from treaty obligations, limited the prohibition to situations in which the removal of those obligations would be to the benefit of that State. To his mind, and to that of other Commission members, that limitation was indispensable. Deleting it would tend to result in the elimination of all treaty obligations of the aggressor State and would be contrary to the spirit of the set of draft articles, which was to promote the stability of treaty relations.

²⁴⁹ See footnote 138 above.

22. Sandwiched between draft articles 13 and 15 was draft article 14. Consideration might be given to moving it from that location and placing it after draft article 15 as a “without prejudice” clause. Some Commission members had proposed that draft article 14 be used as a “without prejudice” clause, not only for the decisions of the Security Council, but also for the matters currently dealt with in draft articles 13 and 15. Given the desire expressed by what he took to be a majority of Commission members to retain those provisions, that suggestion no longer seemed pertinent.

23. Draft article 16, which protected the rights and obligations arising from the laws of neutrality, had been accepted, or at least not opposed, by a majority of Commission members. One member had expressed doubts about the importance of neutrality in contemporary international law, and in particular under the collective security framework of the United Nations, and had questioned the usefulness of the draft article. He himself was not prepared to take that position. The existence of the Charter of the United Nations removed neither the possibility of armed conflict nor that of neutrality, whether temporary or permanent. Accordingly, the “without prejudice” clause in draft article 16 should be retained, all the more so as some Member States were quite attached to their neutral status.

24. Article 17 set out a number of other possible causes of termination or suspension of treaties: the agreement of the parties; a material breach; supervening impossibility of performance, temporarily or permanently; and a fundamental change of circumstances. The question raised by some Member States was whether that list of examples should be replaced by an abstract formulation merely referring to other causes of termination, withdrawal or suspension in a general way. However, since no member of the Commission, to his recollection, had endorsed that approach, he proposed to retain the text as it stood.

25. Lastly, a proposal to add to the examples the phrase “the provisions of the treaty itself”, an addition that would be consonant with article 57, subparagraph (a), of the 1969 Vienna Convention, had been favourably received.

26. The idea of merging articles 12 and 18 had been found generally acceptable.

27. Turning to the general issues discussed at the end of his report, he noted that the suggestion that treaties to which international organizations were parties be considered, once the present draft articles had been completed, had been strongly opposed by one member of the Commission. If the Commission took that position, it would nevertheless have to find a way to make the draft articles apply to multilateral treaties, such as the United Nations Convention on the Law of the Sea, to which international organizations as well as States were parties. A provision along those lines, the wording of which might be improved, had been submitted at the end of the first part of the session. It stated: “The present draft articles are without prejudice to any rules of international law that regulate the treaty relations of international organizations in the context of armed conflict.”

28. With regard to the effects of armed conflict on treaties, it seemed obvious that articles 70 and 72 of the 1969 Vienna Convention were applicable by analogy, but that point should be mentioned, perhaps in the commentary to draft article 8 on notification. Another point to be considered was whether the effects of armed conflict differed for different types of conflicts. It had been suggested by one Member State that a rule should be drafted to the effect that a treaty might be terminated only in the context of international conflicts, whereas in the context of internal conflicts only suspension was possible. The question was not whether internal conflicts were covered by the draft articles—they most certainly were—but whether their effects were different from those of international conflicts. While there was a certain logic to that position, it did not seem to be grounded in practice, but strayed instead into the realm of *lex ferenda*. The suggestion had met with a tepid response, which he interpreted to mean that the Commission did not wish to include a provision on the different effects on treaties of international versus internal conflicts; the effects would thus have to be evaluated on a case-by-case basis.

29. In conclusion, he requested that draft articles 12 to 17 should be referred to the Drafting Committee.

Draft articles 12 to 17 were referred to the Drafting Committee.

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

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (continued)*

30. Mr. VÁZQUEZ-BERMÚDEZ, speaking on behalf of the Chairperson of the Drafting Committee, introduced the titles and texts of draft guidelines 5.1 to 5.4.1, provisionally adopted by the Drafting Committee in the course of two meetings held on 1 and 2 June 2010, as contained in document A/CN.4/L.760/Add.2, which read:

5. Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States

5.1 Reservations and succession of States

5.1.1 [5.1] Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

* Resumed from the 3058th meeting.

4. For the purposes of this Part of the Guide to Practice, “newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

5.1.2 [5.2] *Uniting or separation of States*

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.

2. A successor State which is a party to a treaty as the result of a uniting or separation of States may not formulate a new reservation.

3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification or formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty. 4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

5.1.3 [5.3] *Irrelevance of certain reservations in cases involving a uniting of States*

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

5.1.4 *Establishment of new reservations formulated by a successor State*

Part 4 of the Guide to Practice applies to new reservations formulated by a successor State in accordance with guideline 5.1.1 or 5.1.2.

5.1.5 [5.4] *Maintenance of the territorial scope of reservations formulated by the predecessor State*

Subject to the provisions of guideline 5.1.6, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraphs 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

5.1.6 [5.5] *Territorial scope of reservations in cases involving a uniting of States*

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of the foregoing paragraphs shall apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

5.1.7 [5.6] *Territorial scope of reservations of the successor State in cases of succession involving part of a territory*

When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is a party or a contracting State becomes applicable to that territory, any reservations to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) the successor State expresses a contrary intention; or

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

5.1.8 [5.7] *Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State*

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting organization or another State or international organization party to the treaty only when notice of it has been received by that State or international organization.

5.1.9 [5.9] *Late reservations formulated by a successor State*

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

5.2 *Objections to reservations and succession of States*

5.2.1 [5.10] *Maintenance by the successor State of objections formulated by the predecessor State*

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization or by a State party or international organization party to a treaty unless it expresses a contrary intention at the time of the succession.

5.2.2 [5.11] *Irrelevance of certain objections in cases involving a uniting of States*

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization or by a State or an international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

5.2.3 [5.12] *Maintenance of objections to reservations of the predecessor State*

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or State party or by a contracting organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State.

5.2.4 [5.13] *Reservations of the predecessor State to which no objections have been made*

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a contracting State or State party or a contracting organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

- (a) the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or
- (b) the territorial extension of the treaty radically changes the conditions for the operation of the reservation.

5.2.5 [5.14] *Capacity of a successor State to formulate objections to reservations*

1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice, object to reservations formulated by a contracting State or State party or by a contracting organization or international organization party to the treaty, even if the predecessor State made no such objection.

2. A successor State other than a newly independent State shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The capacity referred to in the foregoing paragraphs shall nonetheless not be recognized in the case of treaties falling under guidelines 2.8.2 and 4.1.2.

5.2.6 [5.15] *Objections by a successor State other than a newly independent State in respect of which a treaty continues in force*

A successor State other than a newly independent State in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

5.3 *Acceptances of reservations and succession of States*

5.3.1 [5.16 bis] *Maintenance by a newly independent State of express acceptances formulated by the predecessor State*

When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered

as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

5.3.2 [5.17] *Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State*

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

5.3.3 [5.18] *Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State*

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

5.4 *Interpretative declarations and succession of States*

5.4.1 [5.19] *Interpretative declarations formulated by the predecessor State*

1. A successor State should, to the extent possible, clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of any such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

2. The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

31. The draft guidelines pertained to Part 5 of the Guide to Practice, dealing with reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. The texts originally proposed by the Special Rapporteur in his sixteenth report (A/CN.4/626 and Add.I) had been referred to the Drafting Committee by the Commission at its 3054th meeting. He paid a tribute to the Special Rapporteur, whose mastery of the subject and patient guidance had greatly facilitated the Drafting Committee's work, and thanked the members of the Committee for their active and effective participation and the Secretariat for its valuable assistance.

32. During the plenary debate, some members of the Commission had questioned the placement of the provision on newly independent States at the very beginning of Part 5 of the Guide to Practice, as the Special Rapporteur had proposed. In their opinion, that put too much emphasis on a type of succession that was more the exception than the rule and had been consigned to history after the end of the decolonization process. However, other members of the Commission had expressed their support for the approach taken by the Special Rapporteur. It had been

observed that a variety of legal issues were still likely to arise concerning reservations to treaties in relation to the succession of newly independent States. The point had also been made that it was justified to assign a prominent place to the draft guideline on newly independent States, since it reproduced article 20 of the 1978 Vienna Convention, the only provision that addressed the issue of reservations in relation to the succession of States.

33. The Drafting Committee had decided to retain the order of the draft guidelines proposed by the Special Rapporteur, with the understanding that the commentary would provide an explanation of the way in which the different types of succession regulated in the 1978 Vienna Convention—in particular, the distinction between automatic and non-automatic succession—were reflected in the draft guidelines. The commentary would also indicate that the draft guidelines would not revisit the rules governing the succession of States in respect of treaties.

34. The numbering of the draft guidelines provisionally adopted by the Drafting Committee differed from the numbering in the sixteenth report on the topic (A/CN.4/626 and Add.1). That was because the Drafting Committee, following a proposal by the Special Rapporteur, had divided the guidelines into four subsections dealing, respectively, with reservations, objections to reservations, acceptances of reservations and interpretative declarations. For each draft guideline, the original number was indicated in brackets.

35. The first text in section 5.1, which was entitled “Reservations and succession of States”, was draft guideline 5.1.1, entitled “Newly independent States”. In paragraphs 1 to 3, it reproduced the text of the 1978 Vienna Convention, replacing, as appropriate, the cross references to the articles of the 1969 Vienna Convention by cross references to the relevant provisions of the Guide to Practice. Except for the inclusion of an additional paragraph, the Drafting Committee had retained, with minor editorial changes, the formulation of the corresponding draft guideline 5.1 proposed by the Special Rapporteur.

36. Paragraph 1 of the draft guideline stated that a newly independent State that established its status as a party or as a contracting State to a treaty by a notification of succession was considered as maintaining any reservation to that treaty that had been applicable, on the date of the succession of States, to the territory to which the succession related, unless when making the notification of succession it expressed a contrary intention or formulated a reservation relating to the same subject matter as the reservation. Paragraph 2 recognized the right of a newly independent State to formulate a reservation when making its notification of succession unless that reservation was impermissible according to subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice. Paragraph 3 referred to the rules concerning the procedure for the formulation of a reservation as set out in Part 2 of the Guide to Practice.

37. Paragraph 4 was new. In response to a suggestion made in the plenary debate, it reproduced the definition of a “newly independent State” contained in article 2, paragraph 1 (f), of the 1978 Vienna Convention. The commentary would explain that the definition had been reproduced

in order to prevent any misunderstanding as to the meaning of the expression and because the distinction between newly independent States and successor States other than newly independent States was important for resolving the legal issues relating to reservations, objections to reservations and acceptances of reservations in relation to the succession of States.

38. Draft guideline 5.1.2 was entitled “Uniting or separation of States”. The Drafting Committee had retained the substance of the corresponding draft guideline 5.2, which had not been questioned during the plenary debate. However, the text had been restructured so as to deal in separate paragraphs with two distinct scenarios: on the one hand, cases in which succession to a treaty by a State arising from a uniting or separation of States took place *ipso jure* and, on the other hand, cases in which succession to the treaty required a notification by that State. Paragraphs 1 and 2 dealt with the first scenario and, for the sake of clarity, referred to a successor State that was a party to a treaty “as the result of” a uniting or separation of States. An appropriate explanation regarding the meaning of that phrase would be provided in the commentary. According to the relevant provisions of the 1978 Vienna Convention, in the event of a uniting or separation of States, succession took place *ipso jure* in respect of treaties which, at the date of the succession of States, had been in force for the predecessor State. It had been suggested, however, that the commentary should mention that, especially in cases of separation of States, the practice of States and depositaries in recognizing the automatic character of succession in respect of such treaties did not appear to be uniform.

39. Paragraph 1 enunciated the presumption that reservations were maintained unless the successor State expressed its intention not to maintain one or more reservations of the predecessor State at the time of the succession. That presumption was, however, subject to the provisions of draft guideline 5.1.3, which pointed out the irrelevance of certain reservations in cases involving a uniting of States. Since paragraph 1 of draft guideline 5.1.2, as redrafted by the Drafting Committee, referred only to those cases in which succession took place *ipso jure*, the reference to the hypothesis of the formulation of a reservation relating to the same subject matter had been omitted, because in such cases, the successor State was not entitled to formulate a new reservation, as was stated in paragraph 2. That point would be emphasized in the commentary.

40. In contrast, paragraph 3 referred to those cases in which, following a uniting or separation of States, succession to the treaty did not take place *ipso jure* but required a notification to that effect by the successor State. According to the relevant provisions of the 1978 Vienna Convention, such was the case for treaties which, at the date of the succession of States, had not been in force for the predecessor State but in respect of which the predecessor State was a contracting State. The presumption that the reservations were maintained was also applicable in those cases, since it applied to all successor States, including newly independent States, as indicated in draft guideline 5.1.1, paragraph 1. Since, in the cases envisaged in draft guideline 5.1.2, paragraph 3, the succession to the treaty did not take place *ipso jure*, the successor State could formulate a new reservation. Furthermore, if the reservation

formulated by the successor State related to the same subject matter as a reservation formulated by the predecessor State, the latter was not considered as maintained.

41. Draft guideline 5.1.2, paragraph 4, recalled the conditions for the formulation of a reservation pursuant to paragraph 3. For the sake of consistency with draft guideline 5.1.1, paragraph 2, and in response to a suggestion made during the plenary debate, the Drafting Committee had decided to add a reference to the conditions for the permissibility of a reservation set out in subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

42. Draft guideline 5.1.3, which corresponded to the Special Rapporteur's draft guideline 5.3, was entitled "Irrelevance of certain reservations in cases involving a uniting of States". The text adopted by the Drafting Committee was identical to the text presented by the Special Rapporteur, except for the replacement of the expression "State so formed" by the words "successor State".

43. Draft guideline 5.1.4, entitled "Establishment of new reservations formulated by a successor State", was new. During the plenary debate, it had been observed that the draft guidelines did not indicate the conditions under which a reservation formulated by a successor State was to be regarded as established. In response to that concern, the Drafting Committee had decided to include a new draft guideline making express reference to the general provisions relating to the establishment of a reservation contained in Part 4 of the Guide to Practice. It was felt that such a reference was appropriate in order to make it clear that a successor State that formulated a reservation found itself in the same position as any other reserving State or international organization regarding the establishment of that reservation, particularly with reference to the right of the other contracting States or contracting organizations to accept, or object to, the reservation formulated by the successor State. The Drafting Committee considered that the inclusion of the draft guideline rendered superfluous two provisions on related issues proposed by the Special Rapporteur, namely draft guideline 5.8 on the timing of the effects of a reservation formulated by a successor State and draft guideline 5.16 on objections to reservations of the successor State. Those draft guidelines had therefore been deleted.

44. Draft guideline 5.1.5, which corresponded to the original draft guideline 5.4, was entitled "Maintenance of the territorial scope of reservations formulated by the predecessor State". While the principle it enunciated had not been questioned in the plenary debate, it had nevertheless been suggested that the possibility for the successor State to express a contrary intention be recognized in the text. The Drafting Committee had decided to follow that suggestion and had added a phrase to that effect at the end of the draft guideline. The commentary would explain, however, that the rights and obligations of other contracting States or contracting organizations would not be affected, as such, by a declaration whereby the successor State extended the territorial scope of a reservation formulated by the predecessor State. As a result of that addition, the Drafting Committee had moved the proviso "subject to the provisions of guideline 5.1.6" to the beginning of the text, to make it easier to read.

45. Draft guideline 5.1.6, which corresponded to draft guideline 5.5 presented by the Special Rapporteur, had retained its original title, "Territorial scope of reservations in cases involving a uniting of States". During the plenary debate, some members of the Commission had drawn attention to the complexity of that draft guideline. After careful consideration, the Drafting Committee had concluded that the complexity was necessitated by the variety of scenarios that could arise, in the context of the uniting of States, regarding reservations and their territorial scope. The Drafting Committee had therefore only slightly modified the text proposed by the Special Rapporteur. The main changes concerned paragraphs 1 (a) and 2 (b) and were intended to draw attention to the fact that, under the relevant provisions of the 1978 Vienna Convention, the territorial scope of a treaty might be extended following the uniting of States only if the successor State made a notification to that effect. For that reason, the phrase "at the time of the extension of the territorial scope of the treaty" had been replaced, for greater clarity's sake, with the phrase "when making the notification extending the territorial scope of the treaty". Furthermore, in order to ensure consistency with the text of the other draft guidelines, throughout the text of the guideline the Drafting Committee had employed the phrase "following a uniting of two or more States" instead of "as a result of the uniting of two or more States".

46. A suggestion had been made in the Drafting Committee that the proviso contained in paragraph 1 (b) be included in paragraph 2 (a). The idea behind that suggestion was that the extension of the territorial scope of an identical reservation, as envisaged in paragraph 2 (a), could not occur if the "nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States". After discussing the merits of that suggestion at length, the Drafting Committee had realized that the scenario in question could indeed occur when two or more States united. For example, it might be that, because of its nature and purpose, an identical reservation formulated by two of those States in respect of which the treaty had been in force at the date of the succession of States could not be extended to the part of the territory of the successor State which, prior to the uniting, had belonged to a third State in respect of which the treaty had not been in force at the date of the succession of States. The Drafting Committee had considered that, in order to avoid complicating further the text of the draft guideline, it would be sufficient to explain in the commentary that the nature and purpose of the reservation might, in certain situations, prevent the extension of the territorial scope of an identical reservation as envisaged in draft guideline 5.1.6, paragraph 2 (a).

47. Draft guideline 5.1.7 was entitled "Territorial scope of reservations of the successor State in cases of succession involving part of a territory". Since no change to the corresponding draft guideline 5.6 presented by the Special Rapporteur had been suggested during the plenary debate, the Drafting Committee had retained the text and title of the draft guideline as proposed by the Special Rapporteur.

48. Draft guideline 5.1.8, which corresponded to former draft guideline 5.7, was entitled "Timing of the effects

of non-maintenance by a successor State of a reservation formulated by a predecessor State”, as originally proposed. The Drafting Committee had again retained the text presented by the Special Rapporteur, including the cross references in brackets, which had received the support of some members of the Commission during the plenary debate, although they had been adjusted to agree with the renumbering of the draft guidelines. In order to align the text of the draft guideline with article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, the word “only” had been inserted before the word “when” in the penultimate line. In order to further ensure consistency with the text of the 1986 Vienna Convention and the other guidelines, the expression “contracting international organization” had been replaced by “contracting organization”. The commentary would mention the role of the depositary in transmitting the relevant notification to the contracting States or contracting organizations.

49. Draft guideline 5.1.9, which corresponded to draft guideline 5.9 proposed by the Special Rapporteur, was entitled “Late reservations formulated by a successor State”. The Drafting Committee had decided to shorten the original title, but, as no modification had been suggested during the plenary debate, it had retained the text of the draft guideline as proposed by the Special Rapporteur.

50. Turning to the draft guidelines in section 5.2 entitled “Objections to reservations and succession of States”, Mr. Vázquez-Bermúdez said that draft guideline 5.2.1 was entitled “Maintenance by the successor State of objections formulated by the predecessor State”, as originally proposed. The Drafting Committee had retained most of the text of the corresponding draft guideline 5.10 presented by the Special Rapporteur, but it had adjusted the cross reference in the first line and deleted the word “international” between the words “contracting” and “organization” in order to be consistent with the terminology of the 1986 Vienna Convention and the text of the other draft guidelines. For the sake of clarity, the commentary would indicate that the presumption enunciated in draft guideline 5.2.1 would not apply if a successor State that did not succeed *ipso jure* to a treaty chose to become a contracting State, or a party, to that treaty through means other than by notifying its succession, for example by acceding to the treaty.

51. Draft guideline 5.2.2, entitled “Irrelevance of certain objections in cases involving a uniting of States”, corresponded to former draft guideline 5.11. Apart from adjusting the cross references in paragraph 2, removing the square brackets and replacing the expression “contracting international organization” with “contracting organization”, the Drafting Committee had not introduced any modifications to the text or title of the guideline, neither of which had elicited any comments during the plenary debate.

52. The title of draft guideline 5.2.3 was “Maintenance of objections to reservations of the predecessor State”. The Drafting Committee had adopted the text of draft guideline 5.12 proposed by the Special Rapporteur, but it had adjusted the cross references and deleted the word “international” between the words “contracting” and “organization”. It had decided to simplify the title of the draft guideline by deleting the phrase “formulated by another

State or international organizations”, which had been deemed superfluous.

53. Draft guideline 5.2.4 corresponded to former draft guideline 5.13. It was entitled “Reservations of the predecessor State to which no objections have been made”, as originally proposed. The main change introduced by the Drafting Committee was the inclusion, at the end of the text, of a subparagraph permitting an additional exception to the principle that a contracting State or contracting organization could not object to a reservation maintained by a successor State if it had not objected to it in respect of the predecessor State.

54. During the plenary debate, it had been argued that the solution retained in that draft guideline might be too rigid in the event of a uniting of States, since the significance for the other contracting States or contracting organizations of a reservation maintained by the successor State might change. It had therefore been suggested that, in such cases, a contracting State or a contracting organization should be allowed to object to the reservation, even if it had not done so in respect of the predecessor State. In the Drafting Committee, the Special Rapporteur had indicated that he was prepared to accept that suggestion, provided that the additional exception was limited to instances where, as a result of the extension of the treaty’s territorial scope following the uniting of States, the balance of the treaty would be compromised by a reservation maintained by the successor State. According to a different opinion expressed in the Drafting Committee, that potential difficulty seemed to be related to the extension of the territorial scope of the treaty, rather than of the reservation as such; hence there was no need to amend the text of the draft guideline. After careful consideration, the Drafting Committee had decided to include that additional exception but to formulate it in a restrictive manner. Accordingly, draft guideline 5.2.4, as provisionally adopted by the Drafting Committee, allowed for the formulation of an objection to a reservation maintained by the successor State to which the contracting State or contracting organization had not objected in respect of the predecessor State, not only if the time period for the formulation of an objection had not expired at the date of the succession of States, but also if the territorial extension of the treaty radically changed the conditions for the operation of the reservation. In order to make the draft guideline easier to understand, the Drafting Committee had thought it preferable to address the two different scenarios in separate subparagraphs (a) and (b).

55. The Drafting Committee had retained but adjusted the cross references and had replaced the expression “contracting international organization” with “contracting organization” and the phrase “shall not have the capacity to” with the more concise “may not” in the *chapeau*.

56. Draft guideline 5.2.5 corresponded to draft guideline 5.14 proposed by the Special Rapporteur. It was entitled, “Capacity of a successor State to formulate objections to reservations”, as originally proposed. The Drafting Committee had introduced only minor modifications to the text. In paragraph 1, the Drafting Committee had deemed the proviso “and subject to paragraph 3 of the present guideline” superfluous and had deleted it. For

the sake of consistency with the terminology of the 1986 Vienna Convention, the term “contracting international organization” had once again been replaced by “contracting organization”. At the end of paragraph 3, the Drafting Committee had inserted the number of the guideline that reproduced the language of article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions.

57. Draft guideline 5.2.6, the last in that section, was entitled “Objections by a successor State other than a newly independent State in respect of which a treaty continues in force”, as originally proposed. The Drafting Committee had merely replaced the phrase “shall not have the capacity to” with the more succinct wording “may not” and had otherwise kept the text of the original draft guideline 5.15, to which no amendments had been suggested during the plenary debate.

58. Turning to the draft guidelines in section 5.3, “Acceptances of reservations and succession of States”, he said that draft guideline 5.3.1 had retained the original title, “Maintenance by a newly independent State of express acceptances formulated by the predecessor State”. Apart from the deletion of the word “international” before “organization” in the penultimate line in order to secure consistency with the terminology of the 1986 Vienna Convention, the Drafting Committee had retained the text of the corresponding draft guideline 5.16 *bis*, as presented by the Special Rapporteur, to which no changes had been proposed during the plenary debate.

59. Draft guideline 5.3.2 was entitled “Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State”, as originally proposed. The Drafting Committee had introduced only minor changes to the corresponding draft guideline 5.17 presented by the Special Rapporteur. In the English text, the phrase “for which a treaty remains in force” in paragraph 1 had been altered to “in respect of which a treaty continues in force” in order to follow the wording of the 1978 Vienna Convention, and the expression “contracting party” in paragraph 2 had been replaced by “contracting State” in order to align it more closely with the French text. As in other draft guidelines, the expression “contracting international organization” had been amended to “contracting organization” in paragraphs 1 and 3.

60. Draft guideline 5.3.3 was entitled “Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State”, as originally proposed. Since the corresponding draft guideline 5.18 presented by the Special Rapporteur had been well received by the plenary Commission, the Drafting Committee had made only minor changes to its text. For the sake of consistency with other draft guidelines, the phrase “in accordance with” had been replaced by “in conformity with” in the first line and the term “contracting international organization” had been altered to “contracting organization”. In the English text, in order to align the wording with that of draft guideline 5.1.8, the phrase “shall take effect for” had been amended to “becomes operative in relation to” and the clause “when that State or that organization has received the notification thereof” had been replaced by “only when notice of it has been received by that State or that organization”. The

cross references had been retained and brought into line with the renumbering of the draft guidelines.

61. The last section of Part 5 of the Guide to Practice, entitled “Interpretative declarations and succession of States”, comprised only one provision, namely draft guideline 5.4.1, which corresponded to draft guideline 5.19 proposed by the Special Rapporteur and was entitled “Interpretative declarations formulated by the predecessor State”. During the plenary debate, it had been suggested that the text proposed by the Special Rapporteur be supplemented by the enunciation of a presumption that a successor State, in the absence of any clarification on its part, should be considered as maintaining the interpretative declarations of its predecessor State. The Drafting Committee had followed that suggestion, which had been accepted by the Special Rapporteur. A sentence to that effect had therefore been added to paragraph 1 of the draft guideline. As a result of that addition, the Drafting Committee had considered that the provision should have a broader title than that originally proposed. For that reason, the words “clarification of the status of” had been omitted from the title, which therefore referred in general terms to interpretative declarations formulated by the predecessor State.

62. He hoped that the Commission would find that it could provisionally adopt the draft guidelines presented by the Drafting Committee.

63. The CHAIRPERSON invited Commission to proceed to adopt the draft guidelines contained in document A/CN.4/L.760/Add.2.

Draft guidelines 5.1.1 to 5.4.1

Draft guidelines 5.1.1 to 5.4.1 were adopted.

64. The CHAIRPERSON said he took it that the Commission wished to adopt the report of the Drafting Committee on reservations to treaties contained in document A/CN.4/L.760/Add.2 as a whole.

The report of the Drafting Committee on reservations to treaties contained in document A/CN.4/L.760/Add.2, as a whole, was adopted.

The meeting rose at 11.30 a.m.

3062nd MEETING

Friday, 9 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Organization of the work of the session (continued)*

[Agenda item 1]

1. The CHAIRPERSON said that in order to take into account the availability of Special Rapporteurs, the Bureau had had to propose several changes to the programme of work. The revised programme of work for the following two weeks having been circulated, he said that if he heard no objection, he would take it that the members of the Commission wished to approve it.

It was so decided.

Cooperation with other bodies (continued)**

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

2. The CHAIRPERSON welcomed Mr. Owada, President of the International Court of Justice, and gave him the floor.

3. Mr. OWADA (President of the International Court of Justice) said that, as had become the custom, he would start with a report on the judicial activities of the Court over the past year, drawing attention, as appropriate, to aspects of relevance to the work of the Commission.

4. Over the past year, the Court had rendered two judgments on the merits and had also spent much of its time on dealing with the request from the General Assembly for an advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.²⁵⁰ Another case, concerning *Ahmadou Sadio Diallo*, was nearing conclusion. Those cases had involved States from all regions of the world, and the subject matter had been wide-ranging, from classical questions such as diplomatic protection and sovereign immunity to issues of contemporary relevance, for example the law relating to the use of international waterways and international environmental law.

5. On 13 July 2009, the Court had rendered its judgment in the *Dispute regarding Navigational and Related Rights*. The case had dealt with the navigational and related rights of Costa Rica on a section of the San Juan River, the southern bank of which formed the boundary between the two States as stipulated in an 1858 boundary treaty between them. While it had not been contested that, in accordance with that treaty, the relevant section of the waters belonged to Nicaragua, the parties had differed as to the nature of the legal regime regarding navigational and other related rights under the treaty, especially the issue of the scope of the navigational rights of Costa Rica and the regulatory measures that Nicaragua could exercise as sovereign State over the river. The Court had had to assess in particular the meaning and scope of the right of Costa Rica of “*libre navegación ... con objetos*

de comercio” enunciated in the 1858 Treaty,²⁵¹ a question that had deeply divided the parties.

6. The Court had found, on the one hand, that this right of free navigation applied to the transport of persons as well as to the transport of goods, as the activity of transporting persons, including tourists, could be commercial in nature for the purposes of applying the stipulation “*con objetos de comercio*” (“for purposes of commerce”) [para. 156 of the decision]. On the other hand, following an examination of the basic principles of the regime established under the 1858 Treaty, the Court had defined the specific scope of the regulatory measures which Nicaragua could take as the State with sovereign power over the river. The Court had held that Nicaragua had the right to: (1) require Costa Rican vessels to stop at the first and last Nicaraguan post on the San Juan River; (2) require persons travelling on the San Juan River to carry a passport or an identity document; (3) impose timetables for navigation on the San Juan River; and (4) require Costa Rican vessels fitted with masts or turrets to display the Nicaraguan flag. In the same vein, the Court had held that Nicaragua had the right to issue departure clearance certificates to Costa Rican vessels navigating on the San Juan River, but that it did not have the right to charge for the issuance of such certificates [para. 156 (2) of the judgment]. With regard to the issue of fishing by inhabitants of the Costa Rican bank of the San Juan River for subsistence purposes from that bank, the Court had held that the issue was not covered by the treaty itself, but that such fishing was to be respected by Nicaragua as a customary right [para. 144 of the judgment].

7. On 20 April 2010, the Court had rendered its judgment in the case concerning *Pulp Mills on the River Uruguay*. The case had involved the planned construction, authorized by Uruguay, of the CMB (ENCE) pulp mill and the construction and commissioning, also authorized by Uruguay, of the Orión (Botnia) pulp mill on the River Uruguay.

8. Argentina had argued that the authorization to build, the actual construction and, where applicable, the commissioning of the mills and the associated facilities, constituted violations of obligations arising under the Statute of the River Uruguay,²⁵² a bilateral treaty signed by the parties on 26 February 1975. That had been so because the acts of Uruguay had been in violation of the mechanism for prior notification and consultation created by Articles 7 to 13 of the Statute (the procedural violations). Those allegations had been made in respect of both the CMB mill, whose construction on the River Uruguay had ultimately been abandoned, and the Orión mill, which was currently in operation. Argentina had further contended, on the subject of the Orión mill and its port terminal, that Uruguay had also violated the provisions of the Statute on

* Resumed from the 3060th meeting.

** Resumed from the 3047th meeting.

²⁵⁰ General Assembly resolution 63/3 of 8 October 2008.

²⁵¹ Tratado de límites territoriales entre Costa Rica y Nicaragua (“Tratado de Cañas-Jerez”), San José de Costa Rica, 15 April 1858, *Colección de Tratados*, San José, Secretariat of External Relations, 1907, p. 159 (for the English translation, see Treaty of Territorial Limits between Costa Rica and Nicaragua, *British and Foreign State Papers*, 1857–1858, vol. 48, London, William Ridgway, 1866, p. 1049).

²⁵² Statute of the River Uruguay, signed at Salto, Uruguay on 26 February 1975, United Nations, *Treaty Series*, vol. 1295, No. I-21425, p. 331.

protection of the river environment. Argentina had also asserted that the industrial activities authorized by Uruguay had, or would have, an adverse impact on the quality of the waters of the river and the area affected by it and had caused significant transboundary damage to Argentina (the substantive violations). For its part, Uruguay had argued that it had violated neither the procedural nor the substantive obligations laid down by the Statute.

9. With regard to the procedural violations, the Court had noted that Uruguay had not informed the Administrative Commission of the River Uruguay, a body established under the Statute to monitor the river, including by assessing the impact of proposed projects on the river (known under the Spanish acronym “CARU”). The Court had concluded that by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orión (Botnia) mill and by failing to notify the plans to Argentina through CARU, Uruguay had violated the Statute [paras. 111 and 122 of the judgment].

10. With respect to the substantive violations, based on a detailed examination of the parties’ arguments, the Court had found “that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007” [para. 265 of the judgment].

11. Consequently, the Court had concluded that Uruguay had not breached substantive obligations under the Statute [*ibid.*]. However, it had also stressed that “both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orión (Botnia) mill on the aquatic environment” [para. 266]. According to the Court, “Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU” [*ibid.*]. The Court had stressed that “[t]he Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment” [*ibid.*].

12. The case, which at its core concerned allegations of transboundary harm, highlighted the close synergy between the work of the ICJ and the work of the International Law Commission. He noted in that regard that the parties had made frequent reference to the Commission’s 2001 draft articles on prevention of transboundary harm from hazardous activities,²⁵³ and he hoped that the Court’s judgment would contribute to the work undertaken by the Commission in that area.

13. One intriguing aspect of the case was the extensive amount of technical and scientific evidence submitted by the parties. That was an encouraging development, because it showed that States were placing their trust in the Court to decide highly technical disputes. He referred in that connection to the case concerning *Aerial Herbicide Spraying*, which was currently before the Court and was likely to entail a large amount of technical data and arguments on the nature and effects of the aerial herbicide spraying at issue.²⁵⁴ Such cases brought new challenges, to the extent that they involved the Court in a legal assessment of scientific and technical evidence.

14. One difficulty that the extensive scientific evidence had raised in the *Pulp Mills on the River Uruguay* case had been that of how the ICJ should determine the authority and reliability of the studies and reports submitted to it by the parties and which had sometimes been prepared by experts and consultants retained by the parties and at other times by outside experts, such as the International Finance Corporation. Assessing those expert reports could be particularly complicated, because they often contained conflicting claims and conclusions. In the present case, the Court had found that it was not necessary, for the purposes of the judgment, to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the parties. It had concluded that:

despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate [para. 168 of the judgment].

15. The case had been rendered more complicated, however, by the fact that the situation on the ground had continuously evolved: one of the mills had been functioning, and thus follow-up technical reports by experts on each side had continuously become available. Another issue raised in the context of the scientific evidence had been the precise status of scientific experts. The issue had arisen because certain scientific experts had presented evidence to the ICJ as counsel rather than as experts or witnesses. On that issue, the Court had stated the following in paragraph 167 of its judgment:

Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court²⁵⁵, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

16. With respect to those issues, it might be useful to cite Article 1, subparagraph (i), of the Resolution concerning the Internal Judicial Practice of the Court adopted on 12 April 1976, which read: “After the termination of the written proceedings and before the beginning of

²⁵³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 146.

²⁵⁴ Memorial of Ecuador, vols. 1–4 (28 April 2009), and Counter-Memorial of Colombia, vols. 1–3 (29 March 2010).

²⁵⁵ ICJ, *Acts and Documents concerning the Organization of the Court*, No. 6 (2007), pp. 91–155.

the oral proceedings, a deliberation is held at which the judges exchange views concerning the case, and bring to the notice of the Court any point in regard to which they consider it may be necessary to call for explanations during the course of the oral proceedings.”²⁵⁶ Such deliberation would likely prove even more important in highly technical cases, because it afforded an opportunity for the ICJ to discuss what further material it would like the parties to produce and whether it would be useful for the Court to hear experts at the oral hearings, and in what capacity.

17. In addition to those two judgments on the merits rendered in the past year, the Court had also held deliberations and hearings in other cases, for example the case concerning *Ahmadou Sadio Diallo*, which involved claims for diplomatic protection by Guinea on behalf of Ahmadou Sadio Diallo, a Guinean businessman who alleged that he had been unlawfully arrested, detained and expelled from the Democratic Republic of the Congo, where he had been living and conducting business for over 30 years. The Court had already addressed, in a judgment of 2007, the issue of preliminary objections raised by the respondent, and it had also settled other issues. On that basis, it had held public hearings on the merits of the case in April 2010. Its judgment would be rendered in due course. One of the topics currently being considered by the Commission, namely “Expulsion of aliens”, was at issue in that case: one of claims by Guinea concerned the expulsion of one of its nationals from the Democratic Republic of the Congo, which it argued was unlawful.

18. The Court was also considering the case concerning *Jurisdictional Immunities of the State*, filed by Germany in December 2008. The dispute involved whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims in Italian courts based on violations of international humanitarian law by the German Reich during the Second World War. Italy had included a counterclaim in its counter-memorial filed on 23 December 2009, and the Court was currently deliberating whether that counterclaim met the requirements of article 80, paragraph 1, of the Rules of Court. The order on the admissibility of that counterclaim by Italy would be delivered in the not-too-distant future.

19. In addition to those contentious cases, the ICJ had been dealing with the request from the General Assembly for an advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. On 8 October 2008, in resolution 63/3, the General Assembly had decided, pursuant to Article 96 of the Charter of the United Nations, to request the Court to render an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Thirty-six Member States of the United Nations had filed written statements on the question, and the authors of the unilateral declaration of independence had filed a written contribution. Fourteen States had submitted written comments on the written statements by States and the written contribution

by the authors of the declaration of independence. From 1 to 11 December 2009, the Court had held public hearings on the question, in which 28 States and the authors of the unilateral declaration of independence had participated. The Court was now engaged in the deliberation process.

20. In addition, three new contentious cases had been filed in the past year, and the Court had also received another request for an advisory opinion. On 28 October 2009, an application had been filed by the agent of Honduras whereby the Republic of Honduras had instituted proceedings against the Federative Republic of Brazil. The case (*Certain Questions concerning Diplomatic Relations*) was unique in that the Court had received conflicting messages from different governmental authorities all purporting to be acting on behalf of Honduras. The initial letter of application from Honduras had stated that the

dispute between [the two States] relates to legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State, a principle incorporated in the Charter of the United Nations.

However, immediately after the filing of the Application, another letter in the name of the Minister for Foreign Affairs of Honduras had reached the Court, informing it that the agents and co-agents of the Republic of Honduras who had co-signed the initial application no longer represented the Government of Honduras. Then, in a letter dated 2 November 2009, the said agent had informed the Court that the Government of Honduras had appointed his co-agent to act as its agent. Faced with those contradictory communications, the Court had decided that no further action would be taken in the case until the situation in Honduras was clarified. The matter had finally been settled when the Court had received a letter dated 30 April 2010, in which the Minister for Foreign Affairs of Honduras had informed the Court that the Government of Honduras was “not going on with the proceedings initiated by the Application filed on 28 October 2009 against the Federative Republic of Brazil” and that “in so far as necessary, the Honduran Government accordingly [was] withdraw[ing] this Application from the Registry”. Consequently, in its order of 12 May 2010, the Court, noting that the Government of Brazil had not taken any step in the proceedings in the case, had officially recorded the discontinuance by Honduras of the proceedings instituted by the application filed on 28 October 2009 and had ordered that the case be removed from its list.

21. In December 2009, Belgium had initiated proceedings against Switzerland (*Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*) relating to a dispute between the main shareholders of Sabena, the former Belgian airline, concerning the interpretation and application of the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters. Belgium argued that Switzerland was breaching the Convention by virtue of the decision of its courts to refuse to recognize, or to stay its proceedings pending, a future decision in Belgium on the liability of the Swiss shareholders to the Belgian shareholders. The parties were now in the process of preparing their written pleadings.

²⁵⁶ *Ibid.*, p. 175.

22. In April 2010, the Court had received a request for an advisory opinion from the International Fund for Agricultural Development (IFAD) concerning *Judgement No. 2867 of the Administrative Tribunal of the International Labour Organization* requiring IFAD to pay a staff member two years' salary plus moral damages and costs for the non-renewal of her contract. The request for an advisory opinion fell within the framework of a rarely used procedure, namely the review of judgements of administrative tribunals, which had given rise to four advisory opinions since 1946. The Court had fixed 29 October 2010 as the time limit for the submission of written statements by IFAD and its member States, the States parties to the Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, entitled to appear before the Court, and those specialized agencies of the United Nations that had made a declaration recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organization. The Court had also fixed 29 October 2010 as the time limit within which any statement by the complainant who was the subject of the judgement could be presented and 31 January 2011 as the time limit within which the parties could submit written comments.

23. Finally, at the end of May 2010, Australia had initiated proceedings against Japan, alleging that "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ("ICRW"), as well as its other international obligations for the preservation of marine mammals and marine environment". The parties were now preparing their written pleadings.

24. Sixteen cases, which raised a great variety of issues of public international law, were currently on the docket of the ICJ.

25. Turning to more general challenges facing the Court, he said that the number of cases on the docket of the Court had increased significantly over the past five decades, from 3 cases in the 1960s, to fewer than 5 in the 1980s, to 13 in the 1990s and to an average of more than 20 pending cases each year over the past decade. All 16 cases currently on the Court's docket involved different legal issues.

26. Although the length of the written pleadings had not increased exponentially over time, there had been a marked increase in the overall volume of documents presented by the parties, especially when account was taken of the annexes, which had grown enormously in size.

27. For example, the documents in the case concerning *Pulp Mills on the River Uruguay* contained 14,521 pages with annexes; the documents in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* contained 5,702 pages with annexes; and the documents in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* contained approximately 14,000 pages with annexes.

28. Needless to say, such extensive case files put an enormous strain on the Court, not only in relation to the workload of the judges themselves, but also the burden on the Registry, especially its linguistic department, which had to translate all the documents into the other official language of the Court. Although there had been other cases in the past that had been similar in dimension, such as *South West Africa*, *Barcelona Traction* and *Military and Paramilitary Activities in and against Nicaragua*, they had been exceptions, whereas in recent years such lengthy cases were becoming the rule rather than the exception. The Court was coping with that situation as best it could, for example through Practice Direction III as modified in 2009, which provided that:

The parties are strongly urged to keep the written pleadings as concise as possible, in a manner compatible with the full presentation of their positions.

In view of an excessive tendency towards the proliferation and protraction of annexes to written pleadings, the parties are also urged to append to their pleadings only strictly selected documents.²⁵⁷

29. In recent years, there had been a marked expansion of the substantive issues coming before the Court, which reflected the globalization of international relations and the proliferation of multilateral legislation in domains which in the past had been regulated at national level. Substantive issues which had recently come before the Court ranged from international human rights law and international humanitarian law, to international criminal jurisdiction and international environmental law. The cases on the Court's docket reflected a welcome trend in the attitude of States in favour of the judicial settlement of legal disputes arising as a result of the rapid process of integration of the international community in areas in which States had previously not tended to submit disagreements to international adjudication. That development could be seen in the increasing prominence of issues relating to the rights of individuals, for example the *LaGrand* and *Avena* cases. Environmental law was also an area in which the Court had been increasingly active. The Court had considered the *Pulp Mills on the River Uruguay* case primarily as a case of the rights and obligations of the States involved in relation to the regime created by an international treaty between the parties.

30. The issue of implementation of and compliance with the decisions of the Court had given rise to comments in international case law. It might surprise many of the observers of the international adjudication process to hear that, in general, the judgments of the Court were complied with. In the nearly one hundred years of existence of either the Permanent Court of International Justice or the International Court of Justice, there had been only a few occasions in which States had willfully chosen to disregard the Court's judgments: *Corfu Channel*, *Fisheries Jurisdiction*, *Military and Paramilitary Activities in and against Nicaragua* and *United States Diplomatic and Consular Staff in Tehran*. Even in those cases, the effects of non-compliance had been mitigated to a certain extent.

31. In contrast to the situation relating to overall compliance, the Court had recently been faced with some

²⁵⁷ Report of the ICJ, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 4 (A/64/4)*, p. 50.

increasingly complex questions concerning specific details of compliance. He referred to the implications of the *Avena* case, in which both parties to the dispute, namely Mexico and the United States of America, had pledged to observe the judgment of the ICJ. However, when the Court rendered a judgment that had to be implemented in the domestic legal order of a State, it might happen, depending on the legal system in force in that State, that the latter encountered difficulties in implementing the judgment. The Government of the United States had in fact tried to implement the judgment of the ICJ at both the federal and state level, but that had not been possible because of both the federal system in the United States and its constitutional system, in which the doctrine of “self-executing” treaties had prevented the executive branch from implementing the decisions of the Court at state level. In *Medellín v. Texas*, the Supreme Court of the United States, to which the case had been referred, had held that, for the purposes of the Constitution, the United States was not bound by the *Avena* judgment, because the latter did not automatically become an integral part of the law of the United States. That type of question could arise in other States; the problem was how to harmonize the international legal order and the domestic legal order.

32. The CHAIRPERSON invited the members of the Commission to put questions to Mr. Owada.

33. Mr. DUGARD asked Mr. Owada to comment on the subject of the optional clause on compulsory jurisdiction set out in Article 36, paragraph 2, of the Statute of the International Court of Justice.

34. Mr. OWADA (President of the International Court of Justice) said that at present, 66 States had accepted the optional clause; that constituted a considerable improvement compared to the 48 States which had accepted the optional clause of the Permanent Court of International Justice. However, those figures were misleading, because of 192 States, only 66 had accepted the optional clause, or 34 per cent, as compared to 48 out of 55 States in the days of the League of Nations, or 72 per cent. Moreover, there had been many more substantive reservations attached to the declaration accepting the optional clause, which tended to circumscribe the scope of compulsory jurisdiction, hence the “decline of the optional clause”. That was a situation which the United Nations and the international community as a whole must address.

35. On the other hand, there was a growing tendency to accept the compulsory jurisdiction of the Court, not through the optional clause, but through the use of compromissory clauses, in multilateral conventions in particular. A large number of cases had been referred to the Court on that basis. That was not a substitute for the acceptance of the optional clause, but it had the effect of expanding the scope of the compulsory jurisdiction of the Court and in some cases was more effective.

36. Ms. JACOBSSON, referring to the issue of compliance, enquired whether the nature of disputes, in particular those concerning human or individual rights, might not make it more difficult for States to implement the judgments of the Court.

37. Mr. OWADA (President of the International Court of Justice) said that, in his view, there were two causes for that state of affairs. One was the growing interaction between the domestic legal order and the international legal order. As more and more areas were regulated by international conventions, it was legitimate for disputes in those areas to be brought before the ICJ. The problem was that in many countries, the domestic legal order was not yet able to respond to that situation; that was particularly significant in areas in which States traditionally dealt with issues such as human rights and the environment.

38. The second problem was the more traditional issue of dualism versus monism. The case concerning *Medellín v. Texas* on which the United States Supreme Court had ruled was a good illustration: owing to the federal system in the United States, many states, particularly in the south, had a sense of “independence” *vis-à-vis* the federal Government.

39. Mr. KAMTO asked the following question: if the Court did not have the annexes accompanying the documents and pleadings of the parties, would it not deprive itself of the possibility of verifying some of the information in the annexes? Noting, secondly, that even in a federal system, in most cases only the State itself was concerned and that its federal components were of little importance, he wondered how a State’s domestic legal order could prevent it from implementing a binding decision of the Court.

40. Mr. OWADA (President of the International Court of Justice), replying to Mr. Kamto’s first question, said that the parties to cases brought before the Court were strongly urged throughout the proceedings to make their presentations as short as possible and not to repeat what they had already said. However, that was merely a recommendation, and the Court was not in a position to dictate the conduct of the parties. For its part, the Court must take on a growing workload, and it was the only international jurisdiction in which the judges did not have any assistants. Fortunately, the Fifth Committee of the General Assembly had recently decided that each judge would be provided with the assistance of a P2 law clerk.²⁵⁸ Currently, judges rarely had time to exchange views on a case after the termination of the written proceedings and before the beginning of the oral proceedings, as called for in the resolution adopted in 1976 concerning the internal judicial practice of the Court.²⁵⁹ The additional assistance would allow judges to devote more time to that important phase.

41. On Mr. Kamto’s second question, he said that he had perhaps not been sufficiently precise: the problem that had arisen in the *Avena* case had clearly been an issue of domestic law but had affected the implementation of a judgment rendered at international level. That was not an inevitable consequence of the federal system, but a general problem which that type of system had tended to aggravate. For example, when the Security Council imposed sanctions which, pursuant to Article 25 of the Charter of the United Nations, were legally binding on

²⁵⁸ General Assembly resolution 64/243 of 24 December 2009, part III, section 7, para. 72.

²⁵⁹ See footnote 255 above.

all Member States, it was up to each State to reconcile the problem of the compatibility of sanctions with its domestic law. That was the case with any system of government, but the problem was more complex in a federal system. In *Medellín v. Texas*, the Supreme Court of the United States had held that the Charter of the United Nations and the Statute of the International Court of Justice were not self-executing in domestic law and that, unless the legislative branch at federal level passed laws making their provisions binding, domestic courts did not have to enforce them. Ultimately, it was a question of the constitutional legal order inherent in a federal system.

42. Mr. VALENCIA-OSPINA asked whether the Court had tried to address the problem of the considerable increase in the number of cases brought before it and their growing complexity, as well as the increasing tendency of parties to submit technical and scientific evidence and the reports of experts which inevitably were contradictory. In the past, the Court had usually been able to avoid a detailed analysis of such documents and had focused on legal aspects, but it might happen that the technical and scientific evidence would play a decisive role in the final determination of a case.

43. Mr. OWADA (President of the International Court of Justice) said that in the case concerning *Pulp Mills on the River Uruguay*, the Court had not had to study technical aspects in detail because the main issues had been of a legal nature, but it was clear that this would not always be the case. The Court needed more objective experts than those chosen by the parties, but the question remained as to how such opinions could be obtained. That was an issue to which the Court must give all due attention, but it had not yet found an ideal solution.

44. Mr. NOLTE, referring to the issue of the implementation of the Court's judgments, said that there had been a case a year earlier in Germany that was very similar to the *Avena* case and which had concerned the 1963 Vienna Convention on Consular Relations. Germany also had a federal system, but fortunately a chamber of the German Constitutional Court had interpreted the Constitution as requiring that judgments of the ICJ be duly implemented by the domestic courts. He was concerned that the United States approach might become the model and had cited the above example to show that there were other ways of dealing with the judgments of the ICJ.

45. Mr. OWADA (President of the International Court of Justice) thanked Mr. Nolte for that information. The approach to which Mr. Nolte had referred had been adopted by many other States. Even in the United States, at any rate in jurisprudence, emphasis had been placed on the need to reconcile international obligations with the requirements of domestic law. Although that did not specifically concern the judgments of the ICJ, it was an encouraging sign.

46. Mr. VASCIANNIE, returning to the question of the workload of the Court, welcomed the creation of posts for law clerks to assist the judges and enquired whether other measures had been considered. In the United States, for example, the Supreme Court ultimately decided which cases it would hear. Another possibility would be to increase the number of judges or use more chambers.

47. Mr. OWADA (President of the International Court of Justice) said that various solutions had been examined, but none had been retained for both practical and theoretical reasons. As the world court and the principal judicial organ of the United Nations, the International Court of Justice must represent the world's major legal systems. If the Court was divided into chambers, the legitimacy and credibility of its decisions would no longer be guaranteed. The parties usually wanted the full Court to come to a judgment on behalf of the international legal community as a whole. Moreover, it was not conceivable for the ICJ to decide not to hear a case, as was done by the Supreme Court of the United States, because there were no different degrees of jurisdiction at the international level. States were sovereign, and for them, every case brought before the Court was important. A decision by the ICJ not to hear a given case might seem very arbitrary to the States concerned.

48. Mr. HMOUD asked whether the Court had given consideration to setting a maximum number of pages or documents admissible in each case. Such a solution, which could be applied to future cases, might also help to reduce the number of cases brought before the Court and thus lighten its workload.

49. Mr. OWADA (President of the International Court of Justice) said he thought that he had already answered the second question. On the first question, he reiterated that the Court could only formulate recommendations, but could not impose limitations on parties, because that would be tantamount to restricting their freedom to make their case.

50. The CHAIRPERSON thanked the President of the International Court of Justice for having taken the time to address the members of the Commission and to answer their questions.

Expulsion of aliens (*continued*)* (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

51. The CHAIRPERSON invited the Special Rapporteur to introduce the second part of his sixth report on the expulsion of aliens on expulsion proceedings (A/CN.4/625/Add.1).

52. Mr. KAMTO (Special Rapporteur) said that when he had introduced his sixth report on expulsion of aliens at the first part of the current session, he had indicated that at the second part of the session he would submit an addendum to the Commission covering the rest of the subject, namely a Part Two on expulsion procedures and a Part Three on the legal consequences of expulsion, in conformity with the provisional workplan.²⁶⁰ That work had been completed, but Part Three had not arrived at the Secretariat in time to be translated and thus would become

* Resumed from the 3044th meeting.

²⁶⁰ See footnote 24 above.

the seventh report, which the Commission could perhaps consider at the first part of its sixty-third session.

53. Addendum 1 to the sixth report on the expulsion of aliens was divided into three sections. Section I was devoted to the distinction between aliens who had legally entered the territory of a State (“legal aliens”) and aliens who had illegally entered the territory of a State (“illegal aliens”) (paras. 278–292) [paras. 2–16],²⁶¹ section II to procedures for the expulsion of aliens illegally entering the territory of a State (paras. 293–316) [paras. 17–40] and section III to an examination of the procedural rules applicable to aliens lawfully in the territory of a State (paras. 317–417) [paras. 41–126 and A/CN.4/625/Add.2, paras. 1–15]. International instruments that expressly stated the principle of a distinction between aliens legally and illegally present in a State were rare. It appeared that the 1951 Convention relating to the Status of Refugees was the only one that explicitly did so. The distinction was, however, implicit in other international conventions, above all on the basis of *a contrario* reasoning, and it was well established in practice. However, regardless of whether it was contemplated in the light of the rules of international law or on the basis of State practice, as it emerged from domestic law in particular, the impact of the distinction was limited, in his view, to the procedural rules of expulsion, because it could not be applicable with respect to the human rights of the expelled persons: whatever the conditions under which they entered and were present in the expelling State, they had the same right to the protection of the fundamental rights inherent to all human beings. Similarly, apart from the right of return of the illegally expelled alien, it did not seem to be legally well founded to apply that distinction in the framework of the legal consequences of expulsion, in particular with regard to the protection of the property of the expelled person, the expelled person’s right to diplomatic protection and the responsibility of the expelling State if the expulsion had been carried out illegally. Having postulated the principle of such a distinction, he had then sought to clarify the meaning of the concepts of a “resident” alien and an alien “lawfully” or “unlawfully” in the territory of a State. The conclusions that he had drawn in paragraph 291 [para. 15] of the report might help improve or enrich the definitions contained in draft article 2, which had been referred to the Drafting Committee in 2007.²⁶²

54. Procedures for the expulsion of aliens illegally entering the territory of a State varied enormously from one State to another, and the study of national legislation showed such diversity that it was not possible to identify a dominant trend. Some laws set different procedures for recent and long-term illegal aliens. In the final analysis, as the question of the expulsion of aliens illegally entering the territory of a State was related to the right of admission, which was a sovereign right of the State, and the right of expulsion, which was the right of the State exercised under international law, he had concluded that it was preferable to leave the establishment of such rules

to national legislation, without prejudice to the freedom of the expelling State to apply to “illegal” aliens the procedural rules applicable to the expulsion of “legal” aliens, if it so wished. In the light of the above considerations, he had proposed, in paragraph 316 [para. 40] of his report, draft article A1 (Scope of [the present] rules of procedure), which read:

“1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State.

“2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.”

55. Basically, he had sought to allow for the various situations under national legislation but without using them to establish a general binding rule for States, because the aliens in question had violated national law, and an obligation could not be imposed on an expelling State when the starting point was a violation of its own law. As to the form, the numbering A1, B1, C1 and so on of the draft articles, which would be continued in the seventh report, was merely intended to avoid confusion with the numbering used in paragraphs 42 and 276 of the first part of his sixth report (A, B). As he had already explained, a numbering which combined a letter and a numeral had come about because of the modification of the initial numbering following the reformulation, at the request of the Commission, of several articles at the previous session in 2009.²⁶³ The numbering would be harmonized by the Drafting Committee once all the draft articles had been considered.

56. With regard to the procedural rules applicable to aliens lawfully in the territory of a State, it was clear that an alien facing expulsion could claim the benefit of the procedural guarantees contained in international human rights conventions. Depending on the State, an expulsion order could be either administrative or judicial. Generally, expulsion procedures were not characterized as criminal proceedings; moreover, they provided significant guarantees based on international law and were solidly anchored in the domestic law of States and in legal theory.

57. The first of those guarantees was the requirement that the expulsion measure must be in conformity with the law. It was found in universal instruments, such as the 1948 Universal Declaration of Human Rights²⁶⁴ and the 1951 Convention relating to the Status of Refugees, and was supported by the jurisprudence of the Human Rights Committee, notably in the case concerning *Anna Maroufidou v. Sweden*. It had also been recognized in regional instruments such as the African Charter on Human and Peoples’ Rights (art. 12, para. 4), the American Convention on Human Rights: “Pact of San José, Costa Rica” (art. 22, para. 6) and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 1, para. 1). The rule was also

²⁶¹ The numbers between square brackets refer to the original numbering of the paragraphs in addenda 1 and 2 to the sixth report of the Special Rapporteur (A/CN.4/625), as they appear on the Commission’s website, before their publication in *Yearbook ... 2010*, vol. II (Part One).

²⁶² See *Yearbook ... 2007*, vol. II (Part Two), p. 61, para. 188, and p. 68, para. 258, footnote 327.

²⁶³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and *ibid.*, vol. II (Part Two), p. 129, para. 91.

²⁶⁴ See footnote 22 above.

established in the legislation of many States. The requirement concerning conformity with the law appeared as a principle underpinning the rule of law and according to which a State was expected to observe its own rules—*patere legem* or *patere regulam quam fecisti*—which in a sense was the counterpart of the principle of *pacta sunt servanda*, one of the cornerstones of international law. In the light of those considerations, he had proposed draft article B1 (Requirement for conformity with the law) (para. 340 of the report) [para. 64], which read:

“An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law.”

58. The second procedural rule was the obligation to inform the person subject to expulsion of the expulsion decision. Treaty law required that persons subject to expulsion be informed of the reasons for the expulsion decision as well as any available avenues for review. That obligation was also set out in the law of many States. It should be noted that, whereas international instruments made no distinction as to the requirement of notification of the expulsion decision, national legislation differed depending on whether the alien was lawfully present in a State or had entered the territory of a State illegally. However, according to Richard Plender,²⁶⁵ some authorities upheld the right of an alien, including an illegal alien, to be informed of the reasons for expulsion, because the obligation to inform extended to notification of the reason for expulsion, as confirmed by the African Commission on Human and Peoples' Rights in the *Amnesty International v. Zambia* case and as was also reflected in European Union law, in particular article 30, paragraph 2, of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.²⁶⁶ The obligation to communicate the reasons for expulsion was not consistently recognized at the national level, but an analysis of all available legal material left little doubt as to the existence in international law of an obligation to inform an alien subject to expulsion of the decision to expel and subsequently of the grounds for expulsion. Thirdly, the right of an alien to submit reasons against the expulsion was a procedural right expressly recognized in article 13 of the International Covenant on Civil and Political Rights, as well as in article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and in article 7 of the Convention of application of articles 55 and 56 of the Treaty instituting the Benelux Economic Union. It was also recognized in the national law of many States, as explained in paragraph 361 [para. 85] of the report. The right to submit arguments against expulsion could be exercised through the right to a hearing, as indicated in paragraphs 362 to 366 [paras. 86–90], or the right to be present, i.e. the right of the alien concerned to appear personally during consideration of the alien's potential expulsion. Fourthly, the right to effective review was the opportunity that must be given to the alien subject to expulsion to defend himself before a competent body provided by law. However, as was well known, the expelling State could derogate from that rule for “compelling reasons of national security”. The Human Rights Committee had

regularly examined that justification, including in the case *Eric Hammel v. Madagascar*, in which it had noted that the author had not been given an effective remedy to challenge his expulsion and that the State party had not shown that there had been compelling reasons of national security to deprive him of that remedy [para. 20]. In the case *Mansour Ahani v. Canada*, the Committee had held that the complainant, who had been placed in detention on the grounds that he posed a threat to internal security, had been justified in having the legality of his detention reviewed [para. 10.2]. Fifthly, the rule of non-discrimination in procedural guarantees stemmed in particular from the interpretation by the Human Rights Committee of article 13 of the Covenant to the effect that “[d]iscrimination may not be made between different categories of aliens in the application of article 13”.²⁶⁷ For its part, the Committee on the Elimination of Racial Discrimination had expressed concern regarding cases of racial discrimination in relation to the expulsion of foreigners, including in matters of procedural guarantees.²⁶⁸ Similarly, the Human Rights Committee had stressed the prohibition of gender discrimination with respect to the right of an alien to submit reasons against his expulsion.²⁶⁹ Sixthly, the right to consular protection was set forth in articles 36 and 38 of the Vienna Convention on Consular Relations. The ICJ had applied article 36 in the *Avena* and *LaGrand* cases; in his statement earlier, the President of the Court had referred to the difficulties in its application. That right was also set out in the Declaration on the human rights of individuals who are not nationals of the country in which they live, annexed to General Assembly resolution 40/144 of 13 December 1985, as well as in the legislation of many States. Thus, it was well established in international law. Seventhly, the right to counsel was also recognized in treaty law, notably in article 13 of the Covenant, and found support in international jurisprudence, for example that of the Committee against Torture in the case *Josu Arkauz Arana v. France* (although that “jurisprudence” could not be placed on an equal footing with the jurisprudence of the Court or international jurisdictions), as well as in most national legislation and in legal theory. Eighthly, the right to legal aid was recognized in European Union law, notably in article 12 of Council Directive 2003/109/EC of 25 November 2003 concerning the situation of third-country nationals who were long-term residents.²⁷⁰ The right to legal aid was also provided in the legislation of several States, as indicated in paragraph 388 [para. 112] of the report. Although such a right did not have a clear basis in treaty law or international legal jurisprudence, he believed that such a basis could be established, in line with the progressive development of international law, European Union practice and many national laws. The reasoning behind that proposition was that persons subject to expulsion were usually destitute and were unable to afford the services of counsel. The aim was to extend to them the benefit of judicial assistance

²⁶⁵ R. Plender, *International Migration Law*, 2nd rev. ed., Dordrecht, Martinus Nijhoff, 1988, p. 472.

²⁶⁶ *Official Journal of the European Union*, No. L 158, 30 April 2004, p. 77.

²⁶⁷ General Comment No. 15 [on the position of aliens under the Covenant], Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), vol. I, Annex VI, p. 119, para. 10.

²⁶⁸ *Ibid.*, *Forty-ninth Session, Supplement No. 18* (A/49/18), p. 25, para. 144.

²⁶⁹ General Comment No. 28 concerning article 3 (equality of rights between men and women), *ibid.*, *Fifty-fifth Session, Supplement No. 40* (A/55/40), vol. I, annex VI, p. 135, para. 17.

²⁷⁰ *Official Journal of the European Union*, No. L 16, 23 January 2004, p. 34.

provided to indigent persons under the legislation of most States. Lastly, as in the case of the right to legal aid, European Union law and most national legislation provided for the right to translation and interpretation, as shown by the examples cited in paragraph 391 [para. 115] of the report. That was clearly a principle of procedural law recognized by all nations and, unlike legal aid, on which national legislation sometimes differed or contained gaps, there was a general trend in the large majority of cases to recognize that right. If the concept of “the general principles of law recognized by civilized nations” set forth in Article 38 of the Statute of the International Court of Justice had meaning in international law, the right to translation and interpretation could be recognized in that context.

59. In the light of the analysis which he had briefly introduced, he proposed draft article C1 (Procedural rights of aliens facing expulsion), which read:

“1. An alien facing expulsion enjoys the following procedural rights:

“(a) the right to receive notice of the expulsion decision;

“(b) the right to challenge the expulsion [the expulsion decision];

“(c) the right to a hearing;

“(d) the right of access to effective remedies to challenge the expulsion decision without discrimination;

“(e) the right to consular protection;

“(f) the right to counsel;

“(g) the right to legal aid;

“(h) the right to interpretation and translation into a language he or she understands.

“2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.”

60. He had considered inserting the words “in particular” after “enjoys” in the *chapeau* of paragraph 1 to make it clear that the list of rights in question was not exhaustive and that other procedural rights which were not taken into account in the draft article could also be recognized. However, a consideration of the available international legal instruments had shown him that, in reality, only those rights which were enumerated were formally recognized at the current time or were likely to be recognized as part of progressive development. That said, he would have no objection if the Commission introduced the words “in particular” if it wished to specify that the list was not exhaustive.

The meeting rose at 12.35 p.m.

3063rd MEETING

Tuesday, 13 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the sixth report on expulsion of aliens and the addenda thereto (A/CN.4/625 and Add.1–2).

2. Mr. GAJA said that in this part, the Special Rapporteur viewed procedural guarantees as applying exclusively to regular or lawful aliens. The distinction between regular aliens and irregular or unlawful aliens was of undeniable importance when examining procedural issues. Many instruments were based on that distinction: article 13 of the International Covenant on Civil and Political Rights, for example, provided specific protection for aliens who were “lawfully” within the territory of the expelling State. To leave irregular aliens without any procedural protection, however, might jeopardize some of the substantive requirements that applied to them as well. Irregular aliens included millions of people with significant ties to an expelling State, which might be aware of and tolerate their presence without recognizing them as having lawful status until, because of a change in policy or for other reasons, it decided to target a given group or individual.

3. According to draft article A1, paragraph 2, a State “may also apply” to the expulsion of irregular aliens the procedural rules that protected regular aliens. It was obvious that a State was entitled to give irregular aliens all the protection it wished, but the question was whether it had any obligation to do so. One could argue that the expelling State was required to apply its law, a requirement based not necessarily on a kind of estoppel, as suggested in paragraph 338 [para. 62] of this second part of the report, but rather on the prohibition against the taking of arbitrary measures.

4. One could take the procedural protection of irregular aliens one step further and argue that, although expulsion was generally not characterized as a criminal sanction, it was a harsh measure to which one could apply by analogy the rule concerning the right to a fair trial in order to assert a right to a fair assessment of the conditions for expulsion.

5. Draft article C1 contained a long list of procedural guarantees for regular aliens, among which the right to be informed and the right to have the decision on expulsion reviewed by an independent body were essential. Another important right, which was not specified, was the right to have the execution of expulsion deferred until the review decision was handed down. That right, which might be subject to some conditions, was very important in practice, because most aliens would face great difficulties in returning once they had been sent back to a distant country. Article 13 of the International Covenant on Civil and Political Rights might provide an argument in favour of the existence of that right. It gave an alien the right to have his or her case reviewed and to be represented for that purpose before the competent authority unless there were “compelling reasons of national security”. The reference to national security could only be understood as relating to the presence of the alien on the expelling State’s territory; it followed that if the alien’s presence did not threaten national security, expulsion should be suspended until the review was completed.

6. State practice cited in support of the procedural guarantees listed in draft article C1 was not always relevant. The practice of States members of the European Union analysed in paragraphs 394 to 401 [paras. 118–125], in particular, was of little significance. European Union rules concerning aliens from third countries were certainly pertinent, but those that concerned the free movement of persons inside the European Union and gave rights to European Union nationals hardly seemed relevant when trying to establish a rule under international law. That remark applied for instance to the *Pecastaing* case, mentioned in paragraph 397 [para. 121], in which the Court of Justice of the European Communities had been confronted with a clash between the principle, always viewed in a positive light, of free movement of nationals of member States on the one hand, and a negative appraisal of the purpose of that movement in the case in hand.

7. In conclusion, he said that he had no objection to referring the three draft articles for further analysis to the Drafting Committee, provided that an additional text was drafted to give irregular aliens certain procedural guarantees.

The meeting rose at 10.15 a.m.

3064th MEETING

Wednesday, 14 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute)

[Agenda item 2]

1. The CHAIRPERSON said that the Commission was required to fill a casual vacancy. The election would take place, as was customary, in a private meeting.

The meeting was suspended at 10.05 a.m. and resumed at 10.15 a.m.

2. The CHAIRPERSON announced that the Commission had elected Mr. Huikang Huang (China) to fill the casual vacancy occasioned by the resignation of Ms. Xue.

Expulsion of aliens (*continued*) A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. The CHAIRPERSON invited the Commission to resume its consideration of the second part of the sixth report on expulsion of aliens (A/CN.4/625 and Add.1–2).

4. Mr. PERERA said that he wished to thank the Special Rapporteur for the second part to his sixth report on expulsion of aliens pertaining to expulsion procedures, which contained three draft articles, and for the useful introductory statement he had made the previous week. Before commenting on the draft articles, he had a few general observations on the approach that should be adopted in relation to expulsion procedures. Throughout the consideration of the topic, the Special Rapporteur had taken into account the fact that the conditions of entry, residence and expulsion of aliens were the sovereign prerogative of the State. The Commission’s task was to strike an appropriate balance between the State’s prerogatives in matters of expulsion and respect for due process *vis-à-vis* the alien subject to expulsion, so that minimum international standards were preserved in the exercise of such prerogatives.

5. Such considerations were particularly crucial with regard to expulsion procedures, a matter that was eminently within the domain of domestic legislation. In that regard, the Special Rapporteur very pertinently stated in paragraph 315 [39] of the addendum that

as the rules on the conditions of entry and residence of aliens are a matter of State sovereignty, it is legally and practically appropriate to leave the establishment of such rules up to the legislation of each State. With regard to the procedure for expelling aliens, we believe that the exercise of codification, possibly even the progressive development of international law, should be limited to the formulation of rules that are established indisputably in international law and international practice, or that derive from the clearly dominant trend of State practice.

6. Thus, the draft articles relating to expulsion procedures posed a critical challenge for the Commission, namely, on the one hand, to identify which general principles were “established indisputably” in international law and international practice and, on the other hand, to determine which rules, if any, were derived from “the clearly

dominant trend of State practice". In determining rules of procedure for expulsion, a clear distinction must be drawn between the expulsion of aliens lawfully present in the territory of a State and the expulsion of aliens who had entered the territory of a State illegally. The fundamental distinction between aliens lawfully in the territory of the expelling State and those unlawfully present was clearly recognized in the International Covenant on Civil and Political Rights and other relevant legal instruments; the Special Rapporteur had taken that into account when structuring the draft articles contained in this second part.

7. At the same time, the Special Rapporteur had attempted to strike a careful balance in draft article A1, on the scope of the rules of procedure, by seeking to extend some measure of protection to illegal aliens. While limiting the scope of the rules, in principle, to cases of expulsion of aliens lawfully in the territory of the expelling State, the draft article nevertheless allowed the expelling State some room for manoeuvre to apply the rules to illegal aliens as well, in the specific cases covered in paragraph 2.

8. In his statement at the previous meeting, Mr. Gaja had pertinently raised the issue of providing greater protection for illegal aliens. He himself could go along with that idea, as long as such protection was aimed at ensuring the observance of basic due process requirements such as the requirement for conformity with the law dealt with in draft article B1, and not at putting the two categories of aliens on the same level with regard to the range of procedural guarantees to be granted. If that was done, the fundamental distinction between the two categories provided for in other legal instruments would be obliterated.

9. In dealing with procedural guarantees applicable to aliens lawfully in the territory of the expelling State, article 13 of the International Covenant on Civil and Political Rights constituted the logical starting point:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Those elements constituted the principle criteria established in international law, with which domestic legal rules were required to conform. General principles of that nature should serve as the basic framework for formulating the procedural rights of aliens facing expulsion.

10. Draft article B1, setting out the requirement for conformity with the law, accurately reflected the principle that an alien could be expelled only in pursuance of a decision reached in accordance with law.

11. On the other hand, draft article C1, on procedural rights of aliens facing expulsion, set out a wide range of rights, some of which might not be considered as being "established indisputably in international law" or derived from "the clearly dominant trend in State practice". For example, the International Covenant on Civil and Political Rights did not expressly recognize the right

to a hearing, and the decisions of the national tribunals showed that they were divided on the issue, as underlined in paragraphs 365 and 366 [paras. 89–90]. It should also be recalled that for Commonwealth courts, an expulsion decision was purely administrative in character and not judicial or quasi-judicial. Concerning the right to legal aid, he noted that treaty law did not expressly provide a basis for it, although the Special Rapporteur contended that one could be established, in line with the progressive development of international law, by drawing on European community law. Whether procedural rules of general application could be formulated based on such limited experience was open to question, however. The institution of a right to legal aid, even in respect only of nationals, would raise serious resource problems, particularly for developing countries. The right to translation and interpretation services posed similar problems.

12. Accordingly, draft article C1 on procedural rights of aliens facing expulsion should confine itself to broad procedural guarantees relating to due process, such as those set out in paragraphs 1 (a) to (e), while avoiding being overprescriptive. Furthermore, it would be useful to include in the draft article the national security caveat set forth in article 13 of the International Covenant on Civil and Political Rights. The text should also expressly reiterate that it applied to aliens lawfully in the territory of the expelling State, in keeping with article 13 of the Covenant and the overall structure of Part Two of the draft articles, on the understanding that the basic guarantees extended to all aliens. In conclusion, he said that he was in favour of the referral of the three draft articles to the Drafting Committee.

13. Mr. HMOUD said that, at the outset, he would like to thank the Special Rapporteur for his report on expulsion procedures, which provided a thorough analysis of relevant treaty provisions, State and regional practice and judicial decisions. Part Two of his report on expulsion of aliens was important because it set out the practical guarantees for the protection of the rights of the alien in the process of expulsion and ensured that the process was transparent and in conformity with minimum standards of legality. The report showed clearly that in terms of procedural protection, a distinction had to be made between an alien facing expulsion who was legally in the territory of the expelling State and an alien who was not, it being understood, as Mr. Gaja and Mr. Perera had observed, that the latter must be given minimum procedural guarantees.

14. A State had the right and the duty to control entry, stay and residency in its territory, but the right of the State to expel an alien who was illegally present did not mean that the expulsion procedure was at its absolute discretion: it had the duty not to violate the alien's fundamental rights. As the Special Rapporteur indicated in paragraph 315 [39], since there was no uniform State practice on matters relating to the expulsion of aliens, the Commission should propose a set of minimum procedural guarantees as a form of progressive development so as to protect the fundamental rights of the individual regardless of whether he or she was legally present in the territory of a given State. On the other hand, an alien legally in the territory of a State should be entitled to additional procedural guarantees, as evidenced by the relevant

provisions of international instruments, international and regional practice and national and international judicial decisions.

15. He agreed that the legality of an alien's presence in the territory of a State must be determined in accordance with the laws of the State: that was a principle well-established in international law. However, the State should not abuse such a sovereign right *vis-à-vis* the alien in order to bypass the procedural guarantees applicable to expulsion. A State might well withdraw a residence permit, in full accord with its national laws, thereby making the presence of the alien in its territory illegal so that it was no longer obliged to provide the individual in question with the procedural guarantees to which a legal alien was entitled. For that reason, the draft articles should stipulate that a State could not change the status of an alien in order to avoid complying with the obligation to provide procedural guarantees.

16. As for draft article A1, its wording and position in the draft articles would depend on whether the Commission decided to adopt provisions on the expulsion procedure applicable to an alien illegally present in the territory of a State. Turning to the question of the conformity of the expulsion decision with the law, he said that the Special Rapporteur made it clear that there was a solid basis in international law for imposing such a condition. As a minimum, the State must uphold its own laws when carrying out the expulsion procedure. In that regard, no distinction should be drawn among aliens, whether they were legally present in the territory of a State or not. Thus, draft article B1 should apply to both categories. The procedural rights set out in the second part of the report were mainly based on international and regional instruments and national laws. While some rights could be extended to both legally present and illegally present aliens, other rights could prove difficult to apply in all cases. The right to be notified or informed of the expulsion decision could apply to both categories of aliens, although the extent of that right might vary. Nevertheless, the draft articles did not need to dwell on the matter, but merely to provide that aliens enjoyed such a right, whether they were legally or illegally present in the territory of a State.

17. In the same vein, any alien, regardless of his or her status under the law, must be able to understand the expulsion decision, and the expelling State must be obliged, as far as possible, to provide translation into a language that the alien can understand. The alien also had the right to communicate with the consular officers of his or her State of nationality—a right guaranteed by article 36 of the Vienna Convention on Consular Relations—whether or not he or she was legally present in the territory of the expelling State. The rights to challenge the expulsion decision and to have access to an effective remedy for that purpose were based on article 13 of the International Covenant on Civil and Political Rights, which provided legal grounds for granting such rights to aliens who were legally present in the territory of the expelling State. However, there was no support in international and State practice for extending those rights to aliens who were illegally present in a State's territory: those rights were not so fundamental in nature as to warrant their extension to that category of aliens.

18. Regarding the application of the principle of non-discrimination to the right of access to an effective remedy, he said that it was not clear whether the Special Rapporteur was referring to the treatment of nationals or to non-discrimination between different categories of aliens. The scope of the application of the principle should therefore be clearly defined. In his opinion, non-discrimination did not necessarily mean according aliens the same treatment as nationals in terms of guaranteeing access to effective remedies.

19. Clearly, the right to legal aid was not well established in international law and would place too many burdens on States. Accordingly, it should not be prescribed in absolute terms: States should be given some flexibility in granting legal aid. Lastly, he would like to know why the restriction on procedural guarantees for reasons of national security laid down in article 13 of the International Covenant on Civil and Political Rights had been dropped from draft article C1. The Special Rapporteur considered dispensing with the restriction to be a form of progressive development, yet national, regional and international judicial bodies considered that the restriction should remain part of the law. The Commission must decide to what extent the expelling State could restrict procedural guarantees for compelling national security reasons. In conclusion, he recommended that draft articles A1, B1 and C1 contained in the second part of the sixth report be referred to the Drafting Committee.

20. Mr. NOLTE said first of all that he wished to congratulate the Special Rapporteur on Part Two of his excellent sixth report; since procedural rights were essential for non-citizens who were subject to expulsion, the Special Rapporteur was also to be commended for focusing on that issue. As the Special Rapporteur pointed out, the distinction between "legal aliens" and "illegal aliens" was well established and should be taken into account, but always bearing in mind the statement in paragraph 286 [10] of the report that illegal aliens "remain human beings whatever the conditions under which they entered the expelling State". He agreed with Mr. Gaja that it was neither satisfactory nor appropriate that "illegal aliens" should have no procedural rights. Draft article A1, paragraph 2, merely indicated that a State could apply the rules relating to legal aliens to illegal aliens also. One possible source of inspiration for the formulation of the procedural rights of illegal aliens might be Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals.²⁷¹ The Directive was to be transposed into domestic legislation by member States of the European Union by the end of 2010 so that any discrepancies between the different laws of those States would disappear. In that connection, he wished to say that the description in paragraphs 294 to 296 [18–20] of the report of German legislation on the procedure for expulsion of illegal aliens was incomplete and might therefore be misleading. In Germany, illegal aliens were in fact entitled to procedural rights relating to the expulsion measures that must be applied when they would not leave the country voluntarily.

²⁷¹ *Official Journal of the European Union*, No. L 348, 24 December 2008, p. 98.

21. Draft article A1, paragraph 2, should not leave the procedural rights of illegal aliens completely open, even though it was not easy to formulate such rights. The European Union Directive he had just mentioned drew certain important distinctions. According to article 2, paragraph 2 (a), of the Directive, member States could decide not to apply the Directive

to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.²⁷²

The provision clearly showed that the problem of the procedural rights of illegal aliens was not one that could be solved by a simple rule. The Special Rapporteur recognized this when he stated in paragraph 309 [33] of his report that “it is apparent from national laws that a summary or special expulsion procedure may be applied when the alien manifestly has no chance of obtaining entry authorization” and in certain other cases. He therefore questioned whether draft article A1 could simply be referred to the Drafting Committee for a minor technical adjustment. Mr. Gaja had mentioned important considerations of principle, some of which he found convincing, but about which he still had some doubts, in particular the suggested analogy with criminal law. A more thorough discussion on the procedural rights of the category of “illegal aliens”, within which a number of distinctions needed to be drawn, seemed necessary.

22. Turning to the question of the procedural rights of aliens lawfully residing in the expelling State, he said that he agreed with draft article B1 and with most of the reasoning underpinning draft article C1, except when the Special Rapporteur based his reasoning on European Union legislation, which applied only to the free movement of citizens of the European Union within its territory (paras. 394–402 [118–126]). He noted with satisfaction, however, that the Special Rapporteur recognized, in principle, that the rules governing the expulsion of European Union citizens applicable among member States of the European Union could be different from the general rules when he stated in paragraph 309 [33] of his report that a “special procedure may also apply when the alien is not a national of a State having a special arrangement or relationship with the expelling State”. He himself felt it important to mention that point because of the debate in the Drafting Committee concerning the non-discrimination provision contained in draft article 10.

23. He endorsed the substance of the rules set forth in draft article C1 with respect to aliens lawfully residing in a given country. He was not sure what exactly was meant by the reference to discrimination in paragraph 1 (d), although he supposed that it was an implicit reference to draft article 10 on non-discrimination. He also wondered whether, rather than to speak of the “right to interpretation and translation into a language he or she understands”, it might not be better to refer to “a right to linguistic assistance”, since in practice it was sometimes difficult to determine which language a person understood. That

concern was probably more justified in the case of “illegal aliens” than with regard to non-citizens residing lawfully in a country, however.

24. Should the Commission really recognize a right to legal aid? It would not pose a problem for European States, since that right was already recognized in Directive 2008/115/EC, but would other States be prepared to recognize it as well? Perhaps it would be more appropriate to say that aliens had a right to legal aid without discrimination when such a right was granted under national legislation to other persons and in other situations. Lastly, he noted with interest Mr. Gaja’s proposal to add a right to the list in draft article C1 under which an expulsion decision would not be enforced until a review decision was handed down. Mr. Gaja based that proposal on an interpretation of article 13 of the International Covenant on Civil and Political Rights, but he himself considered that article 13 had a somewhat wider significance, in that it might provide justification for certain restrictions imposed on grounds of national security. He therefore suggested that a reference to national security should be included somewhere in the list of rights contained in draft article C1, along the lines of article 13 of the Covenant. All in all, he was in favour of referring draft articles B1 and C1 to the Drafting Committee but did not think that the question of the procedural rights of “illegal aliens” could simply be resolved by referring draft article A1 to the Drafting Committee. Like Mr. Gaja, he considered that the draft articles should recognize that “illegal aliens” should have procedural rights, but the Commission needed to look more closely at how such rights should be formulated; it should not leave it to the Drafting Committee to deal with that complicated issue.

25. Mr. CAFLISCH began his comments on the sixth report on expulsion of aliens by thanking the Special Rapporteur for the clarity of his very readable report and for the incredible amount of relevant background material that he had been able to find. He wished to make two general remarks, to be followed by comments on the draft articles. His first general remark concerned the sources consulted by the Special Rapporteur: general, regional and bilateral treaties; the resolutions of international organizations; and some general principles of law. As long as those texts ran along similar lines there was no problem, but that was not always the case, as the Special Rapporteur demonstrated, particularly in the lengthy descriptions of the grounds for expulsion in paragraphs 73 to 210 of the sixth report. The conclusions that could be drawn from those texts were sometimes questionable and to be viewed with caution; the prevailing uncertainty showed that the topic was perhaps not yet ripe for codification. There was nothing to prevent the Commission from identifying and recommending accepted standards supported by reasonably uniform practice in keeping with human rights precepts, but it was particularly important that the commentaries accompanying the draft articles should be clear and detailed.

26. Still on the subject of the sources consulted, and by way of a second general remark, he said that the Special Rapporteur had furnished some interesting information, particularly on national legislation and case law. Although a comprehensive overview could never be provided, the

²⁷² *Ibid.*, p. 101.

legislation and practice reviewed by the Special Rapporteur seemed to present a broad and representative range of practice.

27. The report of the Special Rapporteur was voluminous. That was by no means a criticism, but merely attested to the great complexity of the subject matter: indeed, the word “complex” was used several times.

28. The sixth report (A/CN.4/625 and Add.1–2) dealt essentially with substantive issues: the prohibition of disguised expulsion and of extradition disguised as expulsion, the grounds for expulsion and cases of expulsion contrary to public international law.

29. He could endorse the content of draft articles A and 8, which provided for the prohibition of disguised expulsion and the prohibition of extradition disguised as expulsion, respectively. His sole reservation concerned the adjective “disguised” (the English term “constructive” was more appropriate). The expression “*de facto* extradition” would be preferable, but it had already been used elsewhere (para. 46).

30. He greatly appreciated the Special Rapporteur’s extensive analysis of the lawful grounds for expulsion. Those relating to public order and public security subsumed most of the others, save perhaps, for historical reasons, grounds relating to public health. Obviously it was difficult to distinguish the permissible grounds from those that were not permissible, as shown, for example, by the difficulty in defining “the higher interest” of the State, for one very quickly reached the point where specifics got lost in generalities. Other lawful grounds for expulsion included illegal entry, breach of conditions for admission, economic grounds and preventive measures or deterrents. There were also unlawful grounds for expulsion, in other words, grounds that were contrary to international law, such as expulsion as a means of reprisal or “cultural” grounds, which worked to restrict the number of foreign workers in a country (paras. 177–180).

31. Draft article 9 summed up the Special Rapporteur’s lengthy analysis of the grounds for expulsion. He endorsed the provision, subject to two comments. First, he would separate public health grounds from the grounds of public order and public security. Second, he would be a little more explicit, if possible, either in the text or in the commentary, about the grounds for expulsion that were contrary to international law.

32. Draft article B concerned respect for human rights during enforcement of the expulsion decision. He endorsed its content.

33. The second part of the report laid down the procedures for expulsion. A distinction was drawn between “legal” and “illegal” aliens and, within the latter group, between aliens residing lawfully, with a residence permit, in a foreign country, and those residing without one. The distinction drawn between long-term illegal aliens and recent ones was likewise justified. In spite of their illegal status, the former were in general integrated into the local population and had made a life for themselves. For the latter, who had arrived recently, there was less at stake and

the territorial State must exercise its full sovereignty over them. He therefore endorsed the conclusion implicit in draft article A1 that provisions relating to expulsion procedures applied only to the expulsion of aliens who were lawfully present in the territory of the country concerned, meaning that they were not applicable to aliens who were unlawfully present. To stipulate anything in the contrary would be tantamount to rewarding unlawfulness, but it went without saying that all persons continued to enjoy their human rights, in particular procedural guarantees. Furthermore, as indicated in paragraph 315 [para. 39] of the report, it was difficult to find a thread that would help to identify rules generally applicable to illegal aliens on the basis of such exceedingly diverse and complex practice. Accordingly, he thought that draft article A1 could be referred to the Drafting Committee. The question of whether to refer to aliens “legally” or “lawfully” present was of secondary importance.

34. On the whole, he was also in favour of referring draft articles B1 and C1 to the Drafting Committee. As far as the procedural rights of aliens threatened with expulsion was concerned—he preferred that wording to “procedural rights of aliens facing expulsion”—the list in draft article C1 seemed acceptable. In paragraph 1 (*b*), it would be preferable to refer to the right to challenge the expulsion decision rather than the right to challenge the expulsion itself. As to paragraph 1 (*e*), the commentary thereto would no doubt make reference to article 5 (*e*) of the 1963 Vienna Convention on Consular Relations. All the draft articles could be referred to the Drafting Committee.

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

[Agenda item 3]

**FIFTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)****

35. The CHAIRPERSON invited the Special Rapporteur to introduce the rest of his fifteenth report (A/CN.4/624 and Add.1–2).

36. Mr. PELLET (Special Rapporteur) recalled that, during the first part of the session, the Commission had nearly completed its consideration of succession in respect of reservations (A/CN.4/626) and the effects of a valid reservation (paras. 1–95 [291–385]). The following section (paras. 96–224 [386–514]) concerned the effects of an invalid reservation—in other words, of a reservation that did not meet the conditions of form or substance defined by articles 19 to 23 of the 1969 and 1986 Vienna Conventions and spelled out in the second part of the Guide to Practice.

37. The problem did not arise, at least in practice, under the traditional system of unanimity. However, when the flexible system embodied in the Vienna Conventions had been adopted—in the light of the advisory opinion of 1951 on *Reservations to the Convention on Genocide*

* Resumed from the 3061st meeting.

** Resumed from the 3047th meeting.

and the Commission's change of heart thanks to Sir Humphrey Waldock's powers of persuasion²⁷³—it had been felt necessary to address certain reservations that were not valid *per se*, essentially because they were either prohibited by a treaty or were incompatible with its object and purpose, the situations covered by article 19 of the 1969 and 1986 Vienna Conventions.

38. The Commission had grappled for some time with the consequences of those substantive flaws, as he had shown in paragraphs 97 to 104 [387–394] of his report, only to achieve a result that was disappointing, to say the least: the question of the status of invalid reservations had been left out of the draft articles on the law of treaties of 1962 and 1966. That omission had been perpetuated at the United Nations Conference on the Law of Treaties of 1968–1969. As a result, the Vienna Conventions simply did not deal with the question of the effects (or absence of effects) of invalid reservations.

39. That was borne out by an important episode which had occurred at the Conference in 1968. Having noted the omission, the United States delegate had submitted an amendment²⁷⁴ to what was to become article 20, paragraph 4, of the Convention, intended to preclude the acceptance of reservations that were prohibited or incompatible with the object and purpose of the treaty [the text was contained in paragraph 105 [395] of the Special Rapporteur's report]. Although the amendment had been referred to the Drafting Committee, it had not been adopted after all, without any explanation as to why in the *travaux préparatoires* of the Conference,²⁷⁵ but with the clear result that the Convention was silent on that crucial problem—that silence being one of the main reasons why the Commission had once again taken up the question of reservations.

40. The Commission was not starting from scratch, however. First of all, practice had grown up around the silence of the Convention and it might be useful to study it, even if it was not always very revealing. Secondly, and most importantly, the Convention had an overall logic that had to be preserved and that provided a solid foundation for the general principles to be set forth while leaving room for the inevitable elements of the progressive development for which he invited his colleagues to be prepared to assume the responsibility.

41. Moreover, as disappointing as they were, the *travaux préparatoires* could be of some help in orienting

²⁷³ *Yearbook ... 1962*, vol. II, first report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur (A/CN.4/144 and Add.1), commentary to articles 17, 18 and 19, pp. 65–68, paras. (8)–(17), and Report of the Commission to the General Assembly (A/5209), draft articles on the law of treaties, commentary to articles 18, 19 and 20, pp. 178–181, paras. (7)–(23), and *Yearbook ... 1966*, vol. II, Report of the Commission to the General Assembly (A/6309/Rev.1), Part II, draft articles on the law of treaties, commentary to articles 16 and 17, p. 204, para. (7), and pp. 206–207, paras. (14)–(19).

²⁷⁴ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 21st meeting, p. 108, para. 11.

²⁷⁵ *Official Records of the United Nations Conference on the Law of Treaties ...* (A/CONF.39/11/Add.2) (see footnote 91 above), Report of the Plenary Commission (A/CONF.39/14), pp. 137–138, para. 186.

the Commission's approach to the problem. He was thinking in particular of Sir Humphrey Waldock's firm reply, in his capacity as Expert Consultant to the Conference, to a question from the representative of Canada, who had asked him whether the United States amendment was consistent with the intention of the International Law Commission regarding incompatible reservations. Sir Humphrey had replied: "Yes, since it would in effect restate the rule already laid down"²⁷⁶ in what would become article 19 of the 1969 Vienna Convention.

42. In other words, articles 19 and 20 functioned separately, an obvious point if they were to have any useful effects. That was the basic reason why he had taken up again in his fifteenth report a proposal that he had made in his tenth report,²⁷⁷ namely to include in Part 3 of the Guide to Practice draft guideline 3.3.2 on the nullity of reservations that did not fulfil the conditions for permissibility laid down in draft guideline 3.1: it reproduced the text of article 19 of the Vienna Conventions. At the time, the draft guideline had been fairly well received; however, it had been pointed out that it was premature and that it related more to the effects of a reservation than to its validity, so the Commission had deferred its consideration.

43. For the reasons he had given in paragraphs 118 and 119 [408–409] of his fifteenth report, he continued to believe that, from an intellectual standpoint, the issue was one of validity, but for purely practical reasons, he had ultimately decided to deal with it in Part 4 of the Guide to Practice, which covered effects, because nullity was the consequence of failure to comply with the formal and procedural requirements described in Part 2 as well as the conditions of permissibility covered in Part 3.

44. In any event, it seemed that in either situation, and particularly when the reservation was incompatible with the object and purpose of the treaty, there was no doubt that it was null and void. That was the idea expressed in draft guideline 4.5.1, reproduced in paragraph 129 [419] of the report, which read: "A reservation that does not meet the conditions of permissibility and validity set out in Parts II and III of the Guide to Practice is null and void."

45. That pronouncement was consistent not only with the few references that could be found in the *travaux préparatoires* and with the logic of the text, but also with practice which, it must be emphasized, was more varied than one might have thought. Such practice, as well as the positions expressed by States in the Sixth Committee, were described in paragraphs 123 to 125 [413–415].

46. While the pronouncement on nullity did not fully resolve all the problems relating to the effects of invalid reservations, it nonetheless had an obvious consequence, linked by definition to nullity: such a reservation was devoid of any legal effect. That was the intent of draft guideline 4.5.2, the text of which was contained in paragraph 144 [434] of the report.

²⁷⁶ *Official Records of the United Nations Conference on the Law of Treaties ...* (A/CONF.39/11) (see footnote 274 above), 25th meeting, p. 133, para. 4.

²⁷⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 187, para. 200.

47. In actual fact, the majority view in the Commission, the Sixth Committee and human rights bodies and the practice of States and of international organizations all confirmed that position. Without dwelling on the matter (it was all explained in paragraphs 131 to 143 [421–433] of the report), he merely wished to draw attention to the fact that, according to the Human Rights Committee's all-too-well-known General Comment No. 24,²⁷⁸ the author of a reservation that was incompatible with the object and purpose of the International Covenant on Civil and Political Rights did not have the benefit of the reservation—a principle applied to the *Kennedy v. Trinidad and Tobago* communication [para. 6.7]—and that was one of the few conclusions reached in General Comment No. 24 that the three “critical” States (France, the United Kingdom and the United States) had not seen fit to challenge. The rulings of the European Court of Human Rights and the Inter-American Court of Human Rights went solidly along the same lines.

48. Thus an invalid reservation was null and void, and that nullity prevented it from producing the effects derived from its formulation, but the effects of that failure to produce effects still had to be determined. The key question was fairly easy to formulate and involved the following two alternatives: “Was the author of an invalid reservation bound by the treaty ‘less the reservation’, or did the invalidity exclude it from the circle of States parties?” (unless otherwise specified, when he referred to “States”, he also meant international organizations).

49. The question was simple, but the answer was not—it was perhaps the most difficult of all the questions raised in the Commission's work on reservations. It was especially difficult since practice was so vague and fluid, and the Commission must therefore engage in progressive development in order to carry out its task. He had assumed his responsibilities by proposing a solution that represented a happy medium that he believed to be reasonable and in keeping with the spirit of the Vienna regime which, on the whole, was now being “recodified”. He expressed the dual hope that members of the Commission would likewise assume their responsibilities and not try to duck the issue, which was an open question that the Commission had to resolve, and that they would not lean towards an extreme solution even if, in their eyes, it had the attraction of abstract logic and the advantage of being in line with the political and ideological considerations they might espouse.

50. In that regard, he wished to say two things. First of all, the two alternatives were “almost” but not completely reconcilable through the principle of consent which, with a few unfortunate exceptions, had always guided the Commission. Everything depended on one's point of view: was it the integrity of the consent of the reserving State or the will of the other parties that should be preserved? Secondly, fairly evenly balanced elements could be found in practice to support either of the two alternatives.

51. The idea of participating in a treaty without the benefit of the reservation (the more erudite term of severability could be used), described in paragraphs 146 to 156 [436–446] of the report, was primarily attributable to the Nordic

countries (recently joined by other European States, and with the implicit support of the Council of Europe), which wished to give what was called “super-maximum” effect to their objections, in other words to be associated with the reserving State *without* the reservation; and it was in line, or at least seemed to be in line, with the decisions of the human rights bodies.

52. The other approach, which could be described as “pure consensualist”, was illustrated by the practice described in paragraphs 157 to 161 [447–451] of the report and consisted in taking the view, to quote the French reaction to General Comment No. 24:

that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.²⁷⁹

53. Nevertheless, the majority practice was not so clear-cut and, if truth were to be told, it was frankly incoherent: it amounted to stating, on the one hand, that a reservation was incompatible with the object and purpose of the treaty, and—or rather “but”—that such incompatibility did not prevent the treaty from entering into force between the author of the reservation and the author of the objection. In other words, one agreed to enter into treaty relations with a State that one deemed to have divested the treaty of its object and purpose. In addition, it could not be said that the replies received from States²⁸⁰ to the Commission's question on that subject in 2005²⁸¹ helped to clarify the matter.

54. As he had just said, the decisions of the human rights bodies *seemed* to confirm the severability theory. It was there, however, that one might find elements that would help, not to reconcile the points of view—ultimately they were not reconcilable—but to borrow components from both in order to reach the balanced solution that he earnestly hoped for.

55. He would start from the premise that was most favourable to the principle of consent: a State that had consented to be bound while accompanying the expression of its consent with a reservation could not be considered to be purely and simply bound without its reservation, even if the reservation was not valid. However, most of the time when the problem of whether a State was bound arose, it was too late to seek the State's opinion and such a solution, which was not unthinkable *de lege ferenda*, did not have even the beginnings of a reflection in practice. On the other hand, apart from in other rare cases, it was

²⁷⁹ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, annex VI, p. 119, para. 7.

²⁸⁰ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560), sect. G, paras. 213–225 (mimeographed; available on the Commission's website, documents of the fifty-eighth session) and Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat (A/CN.4/577 and Add.1–2), sect. C, paras. 45–63 (mimeographed; available on the Commission's website, documents of the fifty-ninth session).

²⁸¹ *Yearbook ... 2005*, vol. II (Part Two), p. 14, para. 29.

²⁷⁸ See footnote 83 above.

difficult to determine what the real position of the State had been when it had bound itself: had it been most interested in the adoption of the treaty and less interested in the reservation, or did it consider the latter to be of crucial importance?

56. Sometimes the matter of whether a State was bound could be determined more or less artificially, as the European Court of Human Rights had attempted to do in *Belilos v. Switzerland*, or, in an even more contrived manner, in *Loizidou v. Turkey*. In general, however, nothing could be inferred from the *travaux préparatoires* concerning the expression of consent to be bound, and it was necessary to rely on a presumption. Which presumption? That the State was bound by the whole treaty without its reservation or that it was not bound at all by the treaty?

57. He had hesitated for 15 years before proposing the first solution, as set forth in the first paragraph of draft guideline 4.5.3, reproduced in paragraph 191 [481] of the report:

When an invalid reservation has been formulated in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole, the treaty applies to the reserving State or to the reserving international organization, notwithstanding the reservation, unless a contrary intention of the said State or organization is established.

58. The presumption was thus in favour of severability, but it was a rebuttable presumption that would be set aside if the author of the reservation expressed a contrary intention.

59. The reasons why he had finally come down in favour of the solution were manifold and complex: they were summarized in paragraphs 177 to 182 [467–472] of the report. It seemed to him above all that, while reservations were indeed important, the will to be bound by a treaty was also important and it was normal to presume that when the State expressed its position, it did not wish to divest the treaty of its object and purpose. The reverse presumption would pose serious problems of legal stability and call for some juggling to fill in the time lag between the expression of consent to be bound and the determination of the nullity of the reservation. Lastly, the solution would facilitate the reservations dialogue which everyone fervently desired.

60. In a far more subjective vein, as he had said a few weeks earlier, the time had come for the Commission to “bury the hatchet” with the human rights treaty bodies without going back on the basic position it had adopted in 1997 in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.²⁸² It seemed to him that the solution he was proposing should make that possible.

61. It was all the more feasible and appropriate since such bodies had moved on, too. Apart from the case law of the European Court of Human Rights, which was much less categorical than people often thought, he had in mind recent statements by the human rights treaty bodies, including the Human Rights Committee, set forth in paragraphs 171 to 174 [461–464] of his report. During a

meeting with the Commission, the Committee’s members had stated that “there was no automatic conclusion of severability for inadmissible reservations but only a presumption”,²⁸³ a view expressed again during a meeting of the working group on reservations of the inter-committee meeting of the human rights treaty bodies. In 2006, the working group had acknowledged that the “consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation”,²⁸⁴ and that principle had been incorporated in recommendation No. 7, adopted at the sixth inter-committee meeting of the human rights treaty bodies.²⁸⁵ Nevertheless, he knew that it was not easy to determine “the intention of the State at the time it enters its reservation”. In paragraphs 184 to 188 [474–478] of the report, he explained the role that he thought a number of elements should play in determining the intention of the author of the reservation. They were, “including, *inter alia*”, as stated in the second paragraph of draft guideline 4.5.3, the wording of the reservation, the provision or provisions to which the reservation related and the object and purpose of the treaty, the declarations made by the author of the reservation when negotiating, signing or ratifying the treaty, the reactions of other contracting States and contracting organizations and the subsequent attitude of the author of the reservation. It was reasonable to believe that, on the basis of that group of indicators, the intention of the author of the reservation could be reconstructed and, if an honest quest for the intention of the author of the reservation did not yield conclusive results, the presumption reflected in the first paragraph of draft guideline 4.5.3 could come into play.

62. It remained to be seen what effects the acceptance of impermissible reservations and objections to them produced, or did not produce. Objections were dealt with in paragraphs 211 to 224 [501–514] of the report and in the draft guideline, which should perhaps be broken into two separate texts; the Drafting Committee could see to that. The first paragraph of draft guideline 4.5.4 read: “The effects of the nullity of an impermissible reservation do not depend on the reaction of a contracting State or of a contracting international organization.”

63. It was the logical and inescapable consequence of the very principle of the nullity of impermissible reservations: they were null and void, hence they were devoid of any effect. Accepting or rejecting them changed nothing, despite the vacillation of the ICJ described in paragraphs 212 to 214 [502–504] of the report. In its 2006 judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court had said two things that might seem contradictory but which, all things considered, complemented more than contradicted each other. It had stated, first, that the reservation by Rwanda to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide was not incompatible with the instrument; and only later, “that, when Rwanda acceded to the Genocide Convention

²⁸² See footnote 108 above.

²⁸³ “The practice of human rights treaty bodies with respect to reservations to international human rights treaties” (HRI/MC/2005/5 and Add.1), para. 37.

²⁸⁴ Report of the meeting of the working group on reservations (HRI/MC/2006/5/Rev.1), para. 16, recommendation 7, pp. 4–5.

²⁸⁵ Report of the meeting of the working group on reservations (HRI/MC/2007/5 and Add.1), p. 7.

and made the reservation in question, the [Democratic Republic of the Congo] made no objection to it” (para. 68 of the judgment). In other words, the reservation was not null and void *per se*—a position which accorded with the first paragraph of draft guideline 4.5.4—and in fact, the Democratic Republic of the Congo had made no objection to it. That was why, even if neither an acceptance, even an express one, nor an objection could render impermissible a reservation that was not permissible or establish the impermissibility of a reservation that was permissible—for example, because it was not “objectively” contrary to the object and purpose of the treaty—the fact remained that, as indicated in the second paragraph of the draft guideline, a “State or international organization which, having examined the permissibility of a reservation in accordance with the present Guide to Practice, considers that the reservation is impermissible, should nonetheless formulate a reasoned objection to that effect as soon as possible”. As he had tried to explain in paragraphs 212 to 223 [502–513] of his report, that was in the interests both of the author of the reservation, which was thus alerted to the problems the reservation raised, and of the objecting State, whose declaration had the same value as any “heteronormative unilateral act” (*acte unilatéral hétéronormateur*). It also provided important guidance that could be taken into consideration by third parties invited to rule on the permissibility of the reservation, as the European Court of Human Rights had done in the *Loizidou v. Turkey* case.

64. He wished quickly to revert to the issue of acceptance of impermissible reservations, which meant going back to the part of the report that dealt with the matter, starting with paragraph 195 [485]. It also meant going back in time, because he wished the Commission to reconsider draft guideline 3.3.3 (Effect of unilateral acceptance of an invalid reservation), which he had proposed for adoption in his tenth report on the permissibility of reservations in 2005, and which read: “Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.”²⁸⁶

65. He saw no need to rehearse the rationale behind the draft guideline, which was chiefly justified by the point made in draft guideline 4.5.1, namely that a reservation that did not meet the conditions of formal validity and permissibility set out in the Guide to Practice was “null and void”. If that had been the only problem, then there would be no need for a separate draft guideline and the same approach as for objections could be applied. However, it seemed to him that acceptance posed an additional problem that needed to be tackled in a separate guideline. An objection was the manifestation of disagreement, whereas acceptance, which in all cases was explicit, signified agreement. To go from there to assuming that there was a collateral agreement between the reserving State and the objecting State, an agreement which changed the treaty relations between the two, was only one step. That step could not be taken, however, for the basic reason that article 41, paragraph 1 (b) (ii), of the Vienna Conventions excluded any partial agreement that was “incompatible with the effective execution of the object and purpose

of the treaty as a whole”. That might hypothetically be the case if the agreement related to an impermissible reservation, but would probably not be the case if the reservation was merely formally invalid, a point to which he would revert later. One could imagine a situation, not inconceivable in the case of treaties with limited participation, in which all the contracting States, having been duly consulted by the depositary, expressed their acceptance of the reservation. There, as Sir Humphrey Waldock had observed,²⁸⁷ the parties always had the right to derogate from the treaty by agreement *inter se*, and it was no longer article 41 of the Vienna Conventions that came into play, but article 39. However, for that purpose, a “real” agreement was still required, an agreement whose existence could not be lightly presumed. That explained the rather heavy wording of draft guideline 3.3.4, likewise drawn from his tenth report, the slightly amended text of which was contained in paragraph 205 [495] of the current report. Without wishing to dwell too much on the matter, he pointed out that the position of the two draft guidelines posed a problem. When the Commission had first considered them in 2006, it had left them in abeyance pending future decisions on the effects of reservations.²⁸⁸ He had accordingly waited, but as explained in paragraphs 199 to 201 [489–491] of the report, he continued to think that those draft guidelines had a place in Part 3 of the Guide to Practice, which dealt with the permissibility of reservations, not their effects. They answered the question that had arisen earlier as to whether an acceptance could “validate” an impermissible reservation. Since the answer was in the negative, the question of effects did not arise and the reason put forward for including draft guideline 4.5.1 in Part 4 of the Guide to Practice was not valid, because draft guidelines 3.3.3 and 3.3.4 related exclusively to the impermissibility of reservations, not to formal defects.

66. Paragraphs 235 and 236 [525–526] proposed two alternative texts for draft guideline 4.6 on the absence of effect of a reservation on relations between contracting States and contracting organizations other than the author of the reservation. The first simply reproduced the text of article 21, paragraph 2, of the Vienna Conventions. In accordance with the Commission’s tradition, he believed that it did not pose a problem, particularly since the rule of the relativity of treaty relations laid down in that paragraph was the inevitable result of the flexible reservations regime introduced by the 1969 and 1986 Vienna Conventions and was in line with a practice firmly established since that regime had been introduced. The only question that might arise was whether there was a need explicitly to contemplate the case of an agreement between all the parties to adapt the application of the treaty to the reservation—a rare case, of which the footnote to paragraph 236 [526] gave an example. He did not think that was necessary, but the Commission might think differently, and he would like to hear its views on the subject.

67. The last section of the fifteenth report, on the effects of interpretative declarations, approvals, oppositions, silence and reclassifications (paras. 237–283 [527–573])

²⁸⁶ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188.

²⁸⁷ See the first report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 65, para. (9), and p. 60, art. 17, para. 1 (b).

²⁸⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 138, para. 157.

comprised five draft guidelines. As everyone was aware, the Vienna Conventions were silent on interpretative declarations, despite a few fruitless attempts to address them during the *travaux préparatoires*, described in paragraphs 238 to 240 [528–530]. However, the Conventions were not silent on the interpretation of treaties, and articles 31 and 32 provided useful indications about the effects of interpretative declarations. One thing was certain: they had no binding effect on other contracting States or bodies tasked with settling disputes among the parties with regard to the interpretation or application of the treaty, and such declarations could not modify the treaty, as indicated in paragraphs 244 to 246 [paras. 534–536] of the report. That did not mean, however, that they were devoid of meaning: as the French Constitutional Council had observed, they could contribute, in the case of a dispute, to a treaty's interpretation. That was the general principle expressed in draft guideline 4.7 (Effects of an interpretative declaration), which read:

“An interpretative declaration may not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to some of its provisions and, accordingly, may constitute an element to be taken into account as an aid to interpreting the treaty.”

68. There was still the case of conditional interpretative declarations, which were covered in draft guideline 4.7.4, contained in paragraph 248 [538] of the report. He had included it only “for the record”, because although such declarations were different from reservations, they had been shown to behave in all respects like them. As the Commission had agreed previously, it was not necessary to repeat that systematically in each part of the Guide to Practice. In conclusion, he requested the Commission to refer draft guidelines 3.3.3, 3.3.4, 4.5.1 to 4.5.4, 4.6 and 4.7 to 4.7.3 to the Drafting Committee.

The meeting was suspended at 11.45 a.m. and resumed at 12.05 p.m.

Cooperation with other bodies (*continued*)*

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE
ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

69. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian-African Legal Consultative Organization (AALCO), and invited him to address the Commission.

70. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that the Commission and AALCO had enjoyed a mutually beneficial relationship for more than 50 years; AALCO continued to attach great importance to that relationship. It was a statutory obligation for AALCO to consider the topics dealt with by the Commission and to forward the views of its member States to the Commission. Over the years, that had helped to foster closer ties between the two bodies, which were also customarily represented at each other's annual sessions. He invited all the members of the Commission

to participate as observers in the work of the forty-ninth annual session of AALCO, to be held in Dar es Salaam, United Republic of Tanzania, from 5 to 8 August 2010. During the session, a thematic debate, entitled “Making AALCO's participation in the work of the International Law Commission (ILC) More Effective and Meaningful”, would be held on 6 August 2010. He hoped that members of the Commission would participate in order to enrich the debate. The initiative for the debate had emerged after concerns had been expressed by AALCO member States that the current procedure for the consideration of the topics on the Commission's agenda was not the best means of consolidating and, where possible, presenting the views of member States as one voice to the United Nations and the Commission. Some member States had also proposed constituting a body akin to the Commission under the auspices of AALCO to consider the topics the Commission was dealing with, in depth at intersessional meetings of experts, prior to and after the Commission's annual sessions, and to assist AALCO member States in responding to the questionnaire prepared by the Commission on the topics under its consideration.

71. At its forty-eighth annual session, held at Putrajaya, Malaysia, from 17 to 20 August 2009, AALCO had adopted the Putrajaya Declaration on Revitalizing and Strengthening the Asian–African Legal Consultative Organization,²⁸⁹ in which it had recognized the significant contribution of AALCO towards strengthening Afro–Asian solidarity, particularly in the progressive development and codification of international law, and the important role played by international law as an indispensable instrument for shaping a just and equitable world order.

72. At the forty-seventh annual session of AALCO, some of the items on the agenda of the sixtieth session of the Commission had been discussed, and delegates, while appreciating the meticulous work of the special rapporteurs, had made comments and suggestions on the future work of the Commission. Concerning the protection of persons in the event of disasters, one delegate had emphasized that there was a need to put in place a detailed legal framework to provide expeditious relief to victims. Only a rights-based approach could guarantee the physical security and basic necessities of persons affected by disasters. As to reservations to treaties, it had been pointed out that the Commission should be cautious when discussing the competence of the treaty monitoring bodies to assess the validity of reservations and the consequences of such assessment, as the recommendations of those bodies did not have any binding force on States. On the topic of the immunity of State officials from foreign criminal jurisdiction, one delegate had observed that while applying the “act of State” and “non-justiciability” doctrines, the Commission might also consider dealing with the question of limitations on immunity. In addition, since all the immunities enjoyed by State officials were derived from the immunity of the State, it was necessary to approach the question of recognition with prudence, stressing the criteria that State

* Resumed from the 3062nd meeting.

²⁸⁹ AALCO, Report of the Secretary-General on the work of the Asian–African Legal Consultative Organization (AALCO/48/PUTRAJAYA/2009/ORG 1), annex.

officials must meet in order to be eligible for immunity. As far as the expulsion of aliens was concerned, it had been underlined that the main problem was to reconcile the right to expel with the rules of international law, in particular international human rights law. It was also necessary to define clearly the term “alien” and to draw a distinction between loss of nationality and denationalization. With regard to shared natural resources, one delegate considered that it was premature to envisage the adoption of a convention in that area, since the draft articles dealt with a mechanism for international cooperation for the joint protection and utilization of transboundary aquifers, something that was not based on international practice. As to the responsibility of international organizations, one delegate had observed that the countermeasures taken by international organizations might run counter to the functions for which the international community had constituted the organizations in question. In relation to the effects of armed conflicts on treaties, it had been stated that the Commission’s mandate was to supplement and not to modify existing law relating to the effects of armed conflicts. Since such instruments created *erga omnes* obligations, on its second reading of the draft articles, the Commission should take into consideration the principle of the inviolability of treaties establishing boundaries and thereby contributing to international peace and security.

73. In his opening remarks during a meeting held on 28 October 2009 at United Nations Headquarters on the theme of how AALCO could contribute to the work of the International Court of Justice and the Sixth Committee, the Secretary-General of AALCO had laid emphasis on the importance that AALCO attached to the work of the International Law Commission and other United Nations bodies. Speaking on that occasion, Mr. Valencia-Ospina, member of the Commission and Special Rapporteur on the topic “Protection of persons in the event of disasters,” had addressed the relationship between AALCO and the ICJ in the context of the draft articles that he had submitted to the General Assembly. He had remarked that AALCO should consider preparing a study on strengthening the compulsory jurisdiction of the ICJ which, in his opinion, would be extremely helpful in dealing with the peaceful settlement of disputes clauses in the articles.

74. The participation of the Asian and African States in the development and codification of international law must be strengthened, and he called upon the Commission to take note of the mechanisms, practices and principles applied by those States in implementing the work programme. It was encouraging to note that of the 34 elected members of the Commission, 12 were from AALCO member States. Praise was also due for the work done by the special rapporteurs of the Commission.

75. In 2011, AALCO would hold its fiftieth annual session, most likely in an Asian State. It would be an historic opportunity to rekindle the Bandung spirit of Afro-Asian solidarity, particularly in the progressive development and codification of international law. The essence of the Bandung spirit lay in understanding that it was incumbent not only on developing countries, but also on peoples and social movements across the world, to establish a just and equitable world order.

76. Mr. HASSOUNA noted that important events had taken place in Africa and Asia in the field of international law in recent years, including the establishment of bodies such as the African Union Commission on International Law. He asked how AALCO envisaged its relations with such bodies. He also wished to know what topics AALCO member States would like the Commission to consider.

77. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that AALCO kept abreast of the legal activities of the African Union, which was invited to its annual session, but that it had not yet envisaged the modalities of future cooperation between the two organizations.

78. Mr. PERERA asked whether it would be possible to organize AALCO intersessional meetings on topics considered by the Commission. The time at which AALCO held its annual session did not always allow for the full participation of African and Asian States. Perhaps it should be held after the Commission’s annual session and before the United Nations General Assembly.

79. Mr. NOLTE enquired whether any views had been expressed in AALCO on whether the draft articles on the responsibility of States for internationally wrongful acts²⁹⁰ should take the form of a draft convention or whether they should be retained in their current form and continue to exercise their influence through international, arbitral and judicial case law.

80. Sir Michael WOOD asked whether AALCO documentation on topics considered by the Commission was available in one form or another. Like Mr. Hassouna, he wondered what topics AALCO would like to see the Commission consider. As to the time at which the AALCO annual session was held, he said that the corresponding committee in the Council of Europe always held its sessions during the first or second week of September, before the United Nations General Assembly, something that had many advantages. While the establishment of regional legal organizations was welcome, it was nonetheless important to preserve the unity of international law.

81. Mr. MOHAMAD, replying to Mr. Perera, said that he had taken note of his two comments and that he intended to discuss with AALCO member States the possibility of holding intersessional meetings. The timing of the annual session was indeed a problem for many members.

82. Turning to Mr. Nolte’s question, he said that it was for member States and not the secretariat to decide on such matters. He informed Sir Michael Wood that AALCO documentation could be downloaded from its website.

83. Mr. VASCIANNIE, referring to the establishment of the African Union Commission on International Law, asked the Secretary-General of AALCO whether he believed that it could serve as a model for the establishment of a similar body by Asian countries, or whether the establishment of such a regional commission might undermine the unity of international law.

²⁹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

84. Mr. MOHAMAD said that it was for the Asian States to decide whether to establish such a body.

85. Mr. HMOUD asked whether there were any specific questions that AALCO wished the Commission to address and what AALCO would like its member States to do to assist it.

86. Mr. MOHAMAD replied that he intended to request AALCO member States to come up with priority topics and questions that it would like the Commission to consider.

The meeting rose at 12.50 p.m.

3065th MEETING

Thursday, 15 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the sixth report on expulsion of aliens and in particular the section on expulsion proceedings.

2. Sir Michael WOOD said that he was in favour of referring the three draft articles A1, B1 and C1 contained in the second part of the sixth report on expulsion of aliens to the Drafting Committee. This part was based on a wide range of sources and it set out proposals for the progressive development of international law, which was an important part of the Commission's mandate.

3. The expulsion of aliens was a depressing feature of the modern world. Some of the worst human rights abuses occurred during the expulsion process. Persons who were illegally present in the territory of a State had often experienced unbearable conditions in the places from which they had come; they were often victims of exploitation, were socially excluded and lived on the margins of society. Some of them abused their presence and that situation must be dealt with, but any action in that respect had to be in full conformity with internal law

and international human rights law. All persons within the jurisdiction of a State, whether their presence was lawful or unlawful, were entitled to full respect for their human rights. Anything that the Commission could do to draw attention to the abuses that took place in the context of the expulsion of aliens was to be welcomed, especially if the Commission could make reasonable proposals leading to the progressive development of international law in that field. Even if those proposals were not immediately accepted by States, they might point the way to a better future. That was the spirit in which the Special Rapporteur was working and the Commission should do likewise.

4. The report drew an important distinction between aliens lawfully in the territory of a State and those whose presence was unlawful. Many international instruments were based on that distinction and therefore applied only to the expulsion of persons who were legally present. It was perhaps a little misleading to suggest, as the Special Rapporteur did in paragraph 279 [3] of the second part of his report, that the 1951 Convention relating to the Status of Refugees was the only international instrument that explicitly drew such a distinction. Differentiating between the two categories of aliens would be important in the draft articles, because some forms of protection would be appropriate only for persons lawfully in the territory of a State. As Mr. Gaja had suggested, however, the Commission might need to consider to what extent persons who had been residing in a country for some time, even on an irregular basis, deserved some special consideration. He also supported Mr. Hmoud's suggestion concerning change of status.

5. Terminology was important, and the Commission should try to avoid expressions such as "illegal alien", which might be convenient shorthand, but which were unfortunate and even emotive. It was not the person who was illegal—he or she was not some kind of outlaw. It was the presence in the territory of a State that was in some way irregular.

6. The Special Rapporteur had endeavoured to describe the legal provisions in force in some countries. That was, of course, a difficult exercise, since legal systems differed widely and changed rapidly in the face of new circumstances. Unless the information was up to date and provided by a government or a local immigration expert, it was likely to be somewhat inaccurate. That was true, for example, of the description of the position in the United Kingdom contained in paragraphs 303 to 305 [27–29] of the second part of the report. The Commission should nevertheless take full account of the wealth of comments and information from Governments set out in document A/CN.4/628 and Add.1.

7. Turning to the three draft articles A1, B1 and C1, he said that draft article A1, paragraph 1, constituted a satisfactory introduction to the section. What mattered was the identification of the procedural safeguards that would be applicable to persons legally present in the territory of the expelling State. Like Mr. Gaja, he was doubtful about the usefulness of paragraph 2, although it did introduce the notion of persons who had been residing in the country for some time.

8. Draft article B1 establishing the basic procedural safeguard that an alien might be expelled only “in pursuance of a decision reached in accordance with law” should apply irrespective of whether that person was legally or illegally present in the territory. While the applicable law might differ, the principle that expulsion might take place only in accordance with the law surely held good for everyone. For that reason, that provision should not come under draft article A1.

9. As the Special Rapporteur acknowledged, draft article C1 was to some extent progressive development of the law. The Commission must consider how much detail that provision should include. Procedures and the accompanying safeguards varied greatly in different legal systems and were constantly changing within them. Although the Commission should not be overly prescriptive, it should lay down the core requirements that had to be met, without prejudice to such greater protection as might be available within particular legal systems.

10. It might be helpful if the Commission were to begin by setting out the basic objectives of expulsion procedures. Those objectives might be to ensure that expulsion decisions were reached in accordance with the law, that they were effective and that they were fair to the person subject to expulsion. If the Commission established the aims of the procedures in general terms, the list of procedural rights could be illustrative rather than comprehensive. Article 13 of the International Covenant on Civil and Political Rights was a good starting point but, for the purposes of the Commission’s exercise, it should not be the limit of its ambition. He agreed with those members who had suggested that the reference to national security contained in that article also be incorporated into the Commission’s draft text.

11. Limiting the application of draft article C1 to persons lawfully in the territory of a State might have a negative effect on the rights that other persons might enjoy under the laws of some States or under human rights treaties, for example under article 9 of the International Covenant on Civil and Political Rights, or under other texts regarding detention, which was often part of the expulsion process. Perhaps the commentary should make it clear that in draft article C1 the Commission was not seeking to imply that other persons did not enjoy similar rights.

12. A perusal of the sixth report and earlier reports indicated the extent to which State practice in the field of expulsion occurred within “special regimes”, to borrow the terminology of the Commission’s study of the fragmentation of international law.²⁹¹ Among those special regimes were the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, to which unfortunately not all States were parties; the legal order of the European Union; and the human rights systems of the Council of Europe. The first such regime was confined to refugees and the second to citizens

of the European Union, who therefore enjoyed free movement within the Union; the third was a regional system for the protection of human rights in the 47 member States of the Council of Europe. That situation prompted two thoughts. The first was that the Commission should be cautious about relying on the practice and case law which had developed within such special regimes. The second was that it might be advisable to include somewhere in the draft articles a saving clause to the effect that nothing in the draft articles was intended to diminish the protection offered by “special regimes” such as the Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

13. Ms. JACOBSSON commended the Special Rapporteur for addressing some sensitive semantic issues in the second part of his sixth report. Delicate reasoning was required to clarify the concepts of “resident aliens” or “aliens lawfully in the territory of a State”, on the one hand, and “aliens unlawfully in the territory of a State”, on the other. Persons in the latter category were variously referred to in practice as “irregular migrants”, “unregulated migrants”, “undocumented migrants”, “clandestine migrants” or “illegal migrants”. The International Organization for Migration said that all those expressions were used, but that there was no consensus on a single term. The Special Rapporteur had circumvented these semantic difficulties by referring to aliens “legally [lawfully] in the territory of the expelling State” and to aliens unlawfully in the territory of the expelling State. While that seemed to be a wise solution, it might not be the answer to all the issues that the Commission would face when drawing up procedural rules.

14. In paragraph 316 [40] of this second part, the Special Rapporteur was proposing a specific draft article devoted to the determination of the scope of the rules of procedure relating solely to aliens lawfully in the territory of the expelling State, but he did not address the issue of aliens who had entered its territory “illegally”. Although that was a logical starting point, it raised two questions. The first was whether it was always possible to determine when a person had entered or was remaining in the territory of the expelling State illegally. The second was whether it was satisfactory to allow a State the option of applying procedural guarantees of its own choice in such situations, as was implied by the words “a State may” in draft article A1, paragraph 2. She wondered whether international law did not require, or should not require, the upholding of certain minimum standards.

15. While the answer to the first question might appear to be “yes”, since it was sufficient to look at the law of the expelling State, there could well be situations where the law was vague, or where a State had acted in a manner that had led aliens to believe that their presence was tolerated *de facto*, by not enforcing its legislation or by even encouraging the presence of aliens in its territory. With respect to the second question, she agreed with Mr. Gaja and Sir Michael that the Commission should identify fundamental procedural guarantees applicable to all persons who were facing expulsion, including those who had entered the territory of the expelling State illegally. She concurred with the examples of guarantees suggested by Sir Michael.

²⁹¹ “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, report of the Study Group of the International Law Commission finalized by Martti Koskeniemi (A/CN.4/L.682 and Corr. 1 and Add.1) (available on the Commission’s website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

16. The legal grounds for such guarantees were related to the basic concept of the rule of law at both the national and international levels. That did not mean that persons who had entered the territory of the expelling State illegally had the right to stay there. The reason for addressing the issue was simply to give recognition to the principle that the basic concept of the rule of law must apply, with implications for the human rights of the individual. It was to be expected that in 2010 a sovereign State would be willing to exercise its sovereignty in full compliance with the rule of law in terms of due process and legal security. While it was correct to say that a sovereign State had a right of expulsion, as Mr. Hmoud had pointed out at the previous meeting, the expelling State did not have absolute discretion in procedural matters. The Commission had already set the standard in draft article 3 on the right of expulsion. Whether that requirement needed to be reiterated in draft article B1 was a matter to be debated.

17. Another odd aspect of draft article A1 was the wording of paragraph 2 establishing that a State “may also apply these rules to the expulsion of an alien who entered its territory illegally”, since it was clear that a State had such a right and the draft did no more than state the obvious. She also failed to understand the purpose of specifying that the rules could be applied “in particular” in the situations referred to, at the end of the draft article.

18. The Special Rapporteur’s dilemma was that he had to reconcile a State’s sovereign right to expel aliens with human rights considerations. What was really at stake, however, was the rule of law, in particular the right to due process. The Commission needed to signal more strongly that the procedural guarantees inherent in the rule of law must also be respected in the context of the expulsion of aliens not lawfully present in the territory of the expelling State. For that reason, draft article B1 should cover all aliens, whether legally or illegally present.

19. Although procedural guarantees were generally less extensive in expulsion proceedings than in criminal proceedings, there appeared to be a trend towards an acceptance of higher standards in administrative proceedings. That was only natural, since the concept of the rule of law and legal security had developed considerably since 1955 when the Secretariat had issued its first study on expulsion of immigrants.²⁹² At the same time, it must be acknowledged that the situations in which procedural guarantees were to be applied were in most cases fundamentally different in criminal and expulsion proceedings.

20. Draft articles B1 and C1 should be read together, although there was merit in having two separate articles: one that set out the general rule and another that listed the procedural guarantees. She agreed with Sir Michael that to have a basic rule embodying the Commission’s aim was the best way forward. Draft article C1 was a good summary of commonly accepted procedural rights and contained a few welcome elements of progressive development. Since the draft articles did not specify who was to pay for legal counsel or an interpreter, or whether the alien in question had a right to be present at the hearing,

those aspects should be clarified in the commentary. Draft article C1 should also expressly state that expulsion should not take place until the decision had become final and should include a clear reference to national security.

21. Another question was whether all aliens should be entitled to the same level of procedural guarantees, or if asylum seekers should enjoy stronger guarantees. The Special Rapporteur seemed to take the view that, in the light of General Comment No. 15 of the Human Rights Committee,²⁹³ no such discrimination should be made. In that case, the Commission should ensure that all aliens were able to avail themselves of at least the same procedural guarantees as those granted to an asylum seeker.

22. She was in favour of referring draft articles A1, B1 and C1 to the Drafting Committee, but she would also be prepared to envisage more in-depth discussion of draft article C1, either in plenary session or in a working group, as suggested by Mr. Nolte.

23. Mr. NOLTE said that the provision to which he had referred was draft article A1, paragraph 2, concerning aliens who were illegally present in the territory of the expelling State and their procedural rights. In his view, the Commission did not yet have a sufficient basis for identifying those rights. With regard to semantic issues, he had used the term “illegal aliens” merely as shorthand and agreed that more precise language was needed.

24. Mr. MELESCANU commended the Special Rapporteur on the balance that he had achieved in the second part of his sixth report between legal and political considerations and the main concern of the report, namely the protection of the human rights and fundamental freedoms of the persons covered by the draft articles he was proposing.

25. The Special Rapporteur began with a very interesting analysis of the distinction which could be drawn between “legal” and “illegal” aliens. For that purpose, he had relied on the Convention relating to the Status of Refugees which, according to the Special Rapporteur, was the only legal instrument that explicitly established such a distinction. However, he agreed with the Special Rapporteur that no distinction should be made when it came to respect for human rights, because the persons in question, regardless of the manner in which they had entered the expelling State, were human beings and, as such, entitled to the protection of all their human rights. If those rights were safeguarded, that would go some of the way towards meeting the concerns voiced by Sir Michael. The Commission should perhaps explain, either in the commentaries or in the draft articles themselves, that the law must be respected and applied even to persons who had entered a country illegally.

26. The second question of principle raised by the Special Rapporteur was whether any distinction should be made between aliens who had recently entered the territory of the expelling State illegally and those who had entered illegally but had been living there for a long time.

²⁹² *Study on Expulsion of Immigrants* (ST/SOA/22 and Corr.2, United Nations publication, Sales No. 1955.IV.6), New York, 1955.

²⁹³ *Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40)*, vol. I, annex VI, para. 10.

That was a matter within the discretion of the State in question. Legally speaking, if aliens were illegally present in the territory of a State, the length of their stay was irrelevant because it did not affect the illegal nature of their presence. Even if some countries, such as Denmark or Germany, applied more favourable rules in these cases, any such difference in treatment was a matter to be decided by a State in the free exercise of its sovereignty and therefore could not form the subject of uniform international rules, but could be regulated only at the national level. For those reasons, draft article A1 was the most that could be envisaged in that respect. It could be referred to the Drafting Committee, since further debate of the question in the plenary Commission would be pointless.

27. As for the rules of procedure applicable to aliens legally in the territory of a State, while he concurred with the Special Rapporteur that expulsion was not in theory a criminal penalty but rather an administrative act, an alien subject to expulsion proceedings should have the benefit of procedural guarantees precluding arbitrary exercise of power or abuse of authority. The procedural guarantees proposed by the Special Rapporteur seemed to be judicious and based on international human rights conventions, regional instruments, national laws and international practice.

28. He supported the referral of draft article B1 (Requirement of conformity with the law) to the Drafting Committee. In that connection he endorsed Sir Michael's suggestion regarding the introduction, in the commentary to the draft article or in the body of the draft article itself, of wording to indicate that the obligation covered all aliens irrespective of whether they were legally or illegally present in the territory of the expelling State. He was also in favour of referring draft article C1 (Procedural rights of aliens facing expulsion) to the Drafting Committee. At the same time, he agreed with the Special Rapporteur's suggestion that an expression such as "in particular" or "*inter alia*" should be inserted into the first line of the draft article in order to underscore the illustrative nature of the procedural rights listed in subparagraphs (a) to (h). Like Mr. Gaja, he was of the opinion that the execution of an expulsion decision should be deferred or suspended until the completion of any appeal against it. Mr. Gaja's arguments in that connection were entirely convincing in that they rested on article 13 of the International Covenant on Civil and Political Rights, which appeared to support that idea, "except when compelling reasons of national security otherwise require".

29. Mr. SABOIA noted that the Special Rapporteur had drawn attention to the fact that few international instruments, apart from the Convention relating to the Status of Refugees, drew a distinction between aliens who were lawfully present in the territory of a State and those whose presence there was unlawful. He had, however, also referred to article 13 of the International Covenant on Civil and Political Rights, the Convention relating to the Status of Stateless Persons and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and had rightly emphasized that, regardless of the conditions under which aliens had entered the expelling State, they were entitled to the protection of their human rights.

30. After examining the meaning of the terms "resident alien" or alien "lawfully" or "unlawfully" in the territory of a State, in paragraph 291 [15] the Special Rapporteur had reached certain conclusions regarding the distinction between the two categories of aliens, a distinction with which he personally had no special difficulty.

31. The principle of *non-refoulement*, which was a cornerstone of the protection of refugees, was also of importance in the context of the topic under consideration. It was obvious that persons seeking asylum in another country because they feared persecution for various reasons in their country of origin could not fulfil the requirements for legal entry into the country where they were seeking refuge. He therefore appealed to the Special Rapporteur to include a provision that would safeguard the right of an asylum seeker not to be expelled until his or her application for asylum had been considered.

32. The Special Rapporteur had concluded from his analysis of the law and practice of several countries that procedures for the expulsion of illegal aliens varied widely, that those procedures were usually quite summary and that they were conducted by administrative authorities, usually without the possibility of review by a judge. A number of factors might influence the authorities' decision, such as the person's degree of social integration, length of stay and family situation. It was a regrettable fact that few means of appeal were available to such persons, and it was well known that society and the State might turn a blind eye to their presence depending on the economic, political and social conditions prevailing in the country.

33. The expulsion of second-generation or long-term illegal immigrants, referred to in paragraph 314 [38] of the report, was aberrant. Fortunately, there was a positive tendency within certain institutions of the Council of Europe to consider such expulsion discriminatory. The Special Rapporteur stated in paragraph 315 [39] that State practice was so varied and depended so much on specific national conditions that it appeared virtually impossible to determine uniform rules of procedure for the expulsion of aliens. That was true, but the Commission could surely go further than to simply acknowledge the situation without recognizing the legal vacuum that could result in arbitrary treatment. He agreed with other speakers about the need to incorporate in the draft articles certain minimum standards regarding the treatment of unlawful aliens, among which should be guarantees that the expulsion would be carried out in accordance with the law, that the person being expelled would be informed of the reasons for expulsion and that he or she had the right to consular protection.

34. He agreed with the formulation of draft article A1, paragraph 1. In paragraph 2, however, which would have to be revisited if the Commission did decide to incorporate guarantees of minimum standards for the treatment of aliens, he queried the phrase "if the said alien has a special legal status in the country". The situation of adoptive children or adults facing expulsion deserved particular attention. The 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, which had been ratified by a great many countries worldwide, established that a child's receiving country must ensure that he or she enjoyed permanent residence status there.

That did not completely exclude the possibility of expulsion, but it did facilitate the acquisition of nationality by adopted persons. Nevertheless, cases continued to occur where a person who by reason of adoption had totally lost contact with his or her country of origin and biological family upon expulsion faced almost insurmountable obstacles in adapting to the new environment, even with the help of the country of origin and benevolent organizations. In the case of offenders, rehabilitation was nearly impossible. Such a case had occurred in Brazil with a person adopted before the United States had ratified the 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption. The difficulties caused by that case had led the Brazilian authorities to prohibit adoptions by prospective American parents until the United States had begun to comply with the Convention.

35. Subject to the comments made about the possible inclusion of procedural guarantees for unlawful aliens, he supported the procedural rules proposed in draft articles B1 and C1. He agreed with the proposal in paragraph 389 [113] that, on the basis of progressive development of international law, European Community law and the trend in State practice, a person being expelled should be accorded the right to legal aid during expulsion procedures. The right to consular protection should also be extended to any person subject to expulsion, whatever the nature of his or her presence in a country. The Special Rapporteur should consider the possibility of stating that the expelling State had an obligation to inform the person being expelled of the right to consular protection—a right of which many aliens might be unaware.

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

37. Mr. KAMTO (Special Rapporteur) said that if the Commission wished a provision or provisions providing certain procedural guarantees to unlawful aliens, the Drafting Committee and he himself needed some clarification of one question. The issue of aliens who had recently entered illegally the territory of a State was closely related to that of a State's sovereign right to grant or refuse admission into its territory. The question was when and under what conditions the State whose territory the alien had unlawfully entered could exercise that right. In his second report,²⁹⁴ he had gone so far as to propose that the definition of frontiers between countries should be addressed. One could question whether an alien who had only just entered territory of the State illegally and was only perhaps one kilometre from the frontier should enjoy the same procedural guarantees as an alien who had been in the country for months or years, had integrated into the society and had found a job, or as an alien who had entered legally but, because his or her residence permit had expired and had not been renewed, was now in an irregular situation. The legal problem with which the Commission must grapple was whether it should be stipulated that all aliens who entered a territory illegally enjoyed procedural guarantees, or whether an exception should be made to allow a State in some instances to exercise its right to grant or refuse admission.

38. Mr. McRAE said that the second part of the sixth report contained a thorough and careful description and evaluation of practice, showing where it was inconsistent but also where broad conclusions could be drawn. Overall, the proposed draft articles dealt well with the procedural aspects of protection of the rights of aliens facing expulsion, but as others had suggested, the Commission might need to go beyond existing practice and propose the progressive development of international law in that area.

39. As the Special Rapporteur had just pointed out, it was not a simple task to make a distinction between aliens who were lawfully present in the territory of the expelling State and those who were not, but if the distinction was to be made, definitions were needed. Aliens lawfully present could be defined along the lines of paragraph 291 (c) [15 (c)], as those that had been admitted according to the laws of the State in which they were present. As for aliens not lawfully present, it would probably be necessary, as the Special Rapporteur had suggested, to distinguish between those who were just arriving and those who had been in the country for some time. Despite the difficulties involved, he agreed with others that some kind of procedural protection must be provided to the different subcategories of aliens unlawfully present in a country.

40. In that regard, draft article A1, paragraph 2, gave the State the option, if it so desired, of applying the procedural protections for aliens lawfully present to those who were not. That "opt-in" provision merely recognized the discretion of the expelling State, and it was not enough. Perhaps an "opt-out" approach should be taken: to say that the same procedural protections should be available to aliens unlawfully present unless a State, for good reasons such as national security, decided otherwise. Although that might be going a bit too far, it did open up a way of coping with the problem. One might also, for aliens not lawfully present in a country, draft a shorter list of procedural protections than those in draft article C1, distinguishing between aliens who had been in a country for a considerable period of time and those that had not. He accordingly encouraged the Special Rapporteur, in the light of the discussion, to produce a new draft article, perhaps along the lines suggested by Mr. Nolte, dealing with aliens not lawfully present in a country and making legitimate distinctions among them.

41. With respect to the obligation to expel only in accordance with the law, set out in draft article B1, the bracketed word "lawfully" should be deleted so that the provision covered all aliens. All aliens were entitled to have the law respected in the event of their expulsion, even if it provided only minimal guarantees or if the only law applicable was the international law stipulating that their human rights must be respected.

42. Each of the procedural guarantees listed in draft article C1 was supported by a considerable amount of State practice, so the list, although only indicative, was a good starting point. Like Mr. Hmoud, however, he wondered about the implications of the phrase "without discrimination" in paragraph 1 (d), with reference to the right of access to effective remedies. As Mr. Hmoud had suggested, it could not be a reference to national treatment of aliens, since aliens did not have the right to precisely

²⁹⁴ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573, pp. 248–249, paras. 183–186.

the same remedies as nationals. In any event, the notion of non-discrimination underlay all the provisions in the draft, although not in that sense. That point should be made clear, and the phrase “without discrimination” should be deleted.

43. He also queried the unqualified reference to legal aid: not all States were in a position to provide it to their nationals, let alone to aliens being expelled. To impose an unqualified obligation on States to provide legal aid to persons subject to expulsion might place too onerous a burden on States and might be a prescription that was likely to be ignored. The issue there was actually one of national treatment: to the extent that a legal aid scheme was provided by a State, an alien subject to expulsion should be entitled to access to that aid on a non-discriminatory basis. Paragraph 1 (g) should therefore refer to the right to access to legal aid, as opposed to some guarantee of legal aid that could not always be implemented in practice. The scope of the right could be explained in the commentary.

44. He agreed with Mr. Gaja that a provision should be added to cover the deferral of expulsion until final review had been completed. Procedural protections were rendered irrelevant if the alien could be expelled before the final review of the case had been carried out.

45. Subject to those comments, including the suggestion that additional draft articles should be produced, he supported sending the draft articles to the Drafting Committee.

46. Mr. NIEHAUS said that drawing a clear distinction between aliens legally and illegally present was important but not easy. The legal or illegal nature of an alien's presence in the territory of a State was related to, though not identical with, the concept of residence, and what was meant by residence therefore had to be spelled out. On that subject, paragraph 287 [11] of the second part of the report referred to an explanation by the Steering Committee for Human Rights of the Committee of Ministers of the Council of Europe that the word “resident” included neither an alien who had arrived in a State but had not passed through the immigration control, nor a person in transit for a limited period. That conflicted with the conclusion drawn in paragraph 291 (a) [15 (a)] of the report that an alien was considered a “resident” of a State when he or she had passed through immigration controls at the entry points of that State. For the sake of clarity, the text should rather say that the alien must have completed the designated residence requirements and received the corresponding authorization for prolonged residence, in the juridical sense of the term, in accordance with the legislation of the State and the principles of customary international law. Paragraph 291 (c) [15 (c)] might be construed as saying precisely that, since it referred to fulfilment of the conditions for entry or stay established by law, but the same expressions could also apply to tourists and therefore created confusion.

47. As pointed out in paragraph 287 [11] of the second part, article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms applied not only to aliens who had entered a territory

lawfully but also to those who had entered unlawfully and whose position had been subsequently regularized. However, a person who no longer met the conditions for admission and stay as determined by the laws of the State party could not be regarded as being still lawfully present.

48. On the basis of State sovereignty, it was entirely logical and acceptable that it should be the administrative authorities that were competent to make decisions regarding the expulsion of aliens who had illegally entered the territory of a State. The same was true as to the entry of aliens into a State's territory. Refusal of entry was in many ways similar, though not identical, to expulsion. There was no doubt that the State had the sovereign right to decide whether to admit aliens to its territory, but problems and injustice might be the result of such measures. The application of the Schengen system in Europe, for example, created grave problems of human rights. The vast majority of Latin American citizens travelling to the European Union entered through Spain; the presence of large numbers of Latin American immigrants in that country was a well-known problem. Often, for purely subjective reasons, an administrative official might decide on economic, social, ethnic and even xenophobic grounds to refuse admittance into Spain to persons who in most cases were tourists or in transit to another country of the European Union. The whole issue was a delicate matter pertaining to State sovereignty, and he was not suggesting provisions that would challenge that sovereignty. However, with a view to avoiding arbitrary treatment, consideration might be given to allowing for administrative review, upon request, of decisions of that nature.

49. It was interesting to see that the legislation of some countries distinguished between aliens who had recently entered illegally and illegal aliens who had resided for a prolonged period in the expelling State. The resulting differences in expulsion procedures, which provided the latter category of aliens with some guarantees of their rights, in particular the possibility of arguing their case before a competent authority, he found reasonable and acceptable.

50. He endorsed draft article A1 on the scope of the rules of procedure, except that the phrase “for some time” at the end of paragraph 2 was quite vague; the Drafting Committee might wish to look into that problem. Draft article B1, on the requirement for conformity with the law, was very clear and accurate. Draft article C1, on the procedural rights of aliens facing expulsion, set out eight rights that were essential to defence of the interests of the individual. All three draft articles could be referred to the Drafting Committee.

51. Mr. FOMBA said that making a distinction between lawful and unlawful aliens in establishing the legal regime for expulsion was appropriate and welcome. Domestic law had a prominent place owing to the nature of the subject, but that should not be seen as sufficient cause for not seeking to place international law on a more secure and dynamic footing. In the process of identifying the legal implications of the distinction, “illegal” aliens must not be left without protection. It must be made clear that the distinction did not apply with regard to the obligation to respect the human rights of all persons being expelled, whatever their category. The clarification of terminology in paragraph 291 [15] was

useful and, as the Special Rapporteur suggested, might help to improve draft article 2, which had already been referred to the Drafting Committee.

52. It was logical that distinguishing among “illegal” aliens based on the length of their stay might give rise to some differences in expulsion procedures, in particular with respect to guarantees. In any event, the legal consequences were a matter of State sovereignty. The question was whether or to what extent international law could or should lay down minimum rules. It seemed appropriate to codify rules that were established incontrovertibly in international law or that derived from a clearly dominant trend in State practice as, on the one hand, ordinary law governing the procedure for the expulsion of aliens lawfully present and, on the other, “soft law” pertaining to aliens unlawfully present. The question remained, however, whether or to what extent it would be possible to raise the threshold of legal protection for certain specific categories of aliens unlawfully present.

53. He agreed with the arguments put forward by the Special Rapporteur in support of draft article A1. As for the wording, the square brackets around the words “the present” in the title could be removed. In paragraph 1, the word “legally” could be retained and the word “lawfully” deleted even though they were essentially interchangeable. He endorsed the aim of paragraph 2, which was to ensure a minimum of legal protection for “illegal” aliens, while leaving the matter to the discretion of the State. The wording was satisfactory, but it might be worthwhile, in the interests of progressive development, to consider whether or to what extent it was possible to posit an obligation of protection for “illegal” aliens who had a special status or had been residing in the country for some time.

54. With regard to the procedural rules applicable to aliens lawfully present, paragraph 323 [47] of the second part of the report made the useful point that one could not say that there were rules of customary law on the subject. The question was what that meant in terms of the approach to be taken. An attempt should be made, despite the inherent differences, to apply by analogy certain procedural rules that existed for criminal proceedings. He agreed with the statement in paragraph 339 [63] linking the requirement of conformity with the law to the requirement of respect for international norms and standards, and he endorsed the interpretation given to the possibility of derogating from such requirements.

55. With regard to draft article B1, it was clear that the provision it contained was well established in international treaty law and in the legislation of many States. The only change he could propose was that the word “lawfully” between square brackets should be deleted.

56. He agreed with the view expressed by the Special Rapporteur in paragraph 343 [67] of the second part of the report that the safeguards being considered within the framework of the currently developing European citizenship could serve to inspire rules of more universal application.

57. With regard to the requirements that aliens be notified of the expulsion decision and that they be notified of the

reasons for the decision, the question arose as to how the two requirements related to each other. One way of looking at it might be to consider that the requirement to provide the reasons for the expulsion decision entailed *ipso jure* and/or *ipso facto*, the requirement to notify. He supported the view set forth in paragraph 356 [80] that the fulfilment of the requirement to inform aliens subject to expulsion of the decision to expel was the condition needed for aliens to invoke the other procedural guarantees.

58. As to the right to be present, the Special Rapporteur rightly concluded that State practice was too limited for it to be possible to infer any rule on the matter. That said, it nevertheless remained a practical requirement whose exercise might, in some cases, prove necessary. As indicated in paragraph 368 [92], the right to effective review constituted an important rule that was well established in international law. With regard to the right to consular protection, he agreed with the interpretation of the scope of the relevant provisions of the Vienna Convention on Consular Relations and the Declaration on the human rights of individuals who are not nationals of the country in which they live, adopted by the General Assembly in its resolution 40/144 of 13 December 1985. On the issue of the right to legal aid, he agreed with the conclusion that, although treaty law did not explicitly provide a basis for that right, the Commission could establish it as part of the progressive development of international law.

59. With regard to draft article C1, he concurred with the conclusion reached in paragraph 402 [126] of the second part of the report. Paragraph 1 contained a number of important procedural rights that needed to be presented as logically and coherently as possible, as indeed they were. The “without prejudice” clause in paragraph 2 was useful in that it set the parameters for the debate on the question of which specific rights would eventually be included in the list. In the light of the Special Rapporteur’s cogent explanations, he himself was of the view that, if it was considered necessary to extend the scope of draft article C1, it would be wise to do it discriminately, retaining only those rights that were genuinely applicable.

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

61. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with the Special Rapporteur on the need to make a distinction between aliens residing in a State in conformity with laws on the entry and residence of foreigners and those who were present in a State in violation of those laws. Nevertheless, with regard to terminology, it was important that, in its work on the topic, the Commission should refrain from using the terms “illegal alien” or “illegal immigrant”. It should not use—much less embody in an instrument—terms that had a pejorative connotation and were legally incorrect. As Sir Michael had rightly pointed out, it was a person’s presence in the territory of a State—not the person himself—which should be considered as lawful or unlawful. In that connection, it was of interest to note that article 40 of the new Constitution of Ecuador, which had been adopted by popular referendum in 2008, provided that no individual could be identified as, or considered to be, “illegal” on the basis of his or her migration status. In draft article A1, paragraph 1, the Special

Rapporteur proposed a choice between “an alien legally in the territory of the expelling State” and “an alien lawfully in the territory of the expelling State”. His preference would be for the second of the two options proposed.

62. Beyond issues of terminology, it was important to stress that the right or power of the State to regulate the entry, stay and residence of aliens in its territory, and hence its exercise of the right of expulsion, could not be completely discretionary but must be consistent with the applicable rules and principles of international law, in particular those relating to human rights, whether substantive or procedural in nature. Consequently, in the case of aliens facing expulsion, the procedural safeguards accorded at the international level, as well as those provided by the domestic law of the State in question, must be respected.

63. In draft article A1, the Special Rapporteur distinguished between two situations in which aliens could find themselves, proposing that the draft articles—and by extension the procedural guarantees they embodied—outlined in that section of the project should apply only in the case of the expulsion of an alien lawfully in the territory of the expelling State and leaving it entirely to the discretion of the State in question as to whether to also apply them in the case of the expulsion of an alien unlawfully present.

64. Nevertheless, as had been pointed out, for example, by Mr. Hmoud, there were some procedural guarantees that also applied to aliens unlawfully present. He agreed with Mr. Gaja that to leave such aliens with no protection at all when facing expulsion proceedings was to disregard a number of guarantees that also applied to aliens unlawfully present. That was all the more true in cases in which such aliens had already been residing in the receiving State for some time, in recognition of the fact that they had already achieved some degree of integration in the host society or had significant ties to the State in question, which might tolerate their presence without formally recognizing their status as lawful.

65. Therefore, while it was generally recognized in international instruments and State practice that aliens lawfully present were entitled to additional procedural guarantees, the Commission should identify all the procedural guarantees that applied when States exercised the right of expulsion, whether the aliens in question were lawfully or unlawfully present (so as to prevent arbitrary decisions in either case). The Commission should also determine the additional procedural guarantees to which aliens lawfully present were entitled. Both sets of guarantees should be regarded as minimum indicative standards to be applied by States. The three draft articles A1, B1 and C1 should be reformulated along those lines.

66. Draft article B1 provided that an alien lawfully in the territory of a State party could be expelled therefrom only in pursuance of a decision reached in accordance with law. That was correct; however, there was no question but that the principle also applied to an alien unlawfully in the territory. The principle of legality was a fundamental principle of the rule of law, requiring full compliance with the laws of the State in question, including applicable international law. It applied as well to aliens who had just entered the territory of a State.

67. Moreover, as the Special Rapporteur stated in his preliminary report,

a logical rule holds that if a State has the right to regulate the conditions for immigration into its territory without thereby infringing any rule of international law, it also is obliged to act in conformity with the rules which it has adopted or to which it has agreed concerning the expulsion of persons whom it deems that it cannot receive or retain in its territory.²⁹⁵

68. In that connection, it was important to stress, as the Special Rapporteur explained in paragraph 339 [63] of the second part of his sixth report, that in terms of the expulsion of aliens, the requirement for conformity with the law was based on the implicit requirement that domestic rules of procedure for expulsion should be in conformity with relevant international rules and standards, and that a State could therefore not establish procedural rules that were inconsistent with the latter. It was clear that, in the area of human rights, States could only deviate from the international standards binding on them in the direction of greater protection of the rights of aliens facing expulsion.

69. With regard to draft article C1, several of the rights in the list of procedural guarantees for aliens facing expulsion applied even to aliens unlawfully present. Those included the right to be notified of the expulsion decision, including the reasons for the decision; the right to consular protection; and the right to interpretation and translation into a language understood by the alien. He agreed with the various arguments presented by Mr. Hmoud in that regard. As stressed in the report, article 13 of the International Covenant on Civil and Political Rights prescribed procedural guarantees only in the case of aliens lawfully in the territory of a State party. However, in its General Comment No. 15,²⁹⁶ the Human Rights Committee held that the procedural guarantees contained in article 13 should also apply if the legality of an alien's entry or stay was in dispute.

70. On another point, he supported Mr. Gaja's proposal to include in the draft an additional procedural safeguard for a stay of execution of the expulsion decision in cases where an appeal for review of the expulsion decision was pending. The purpose of the safeguard would be to ensure that the exercise of the right to challenge the expulsion was able to produce its effects, in the event that the competent authority ruled in favour of the appellant.

71. As recalled in the memorandum by the Secretariat on the topic,²⁹⁷ the principle of non-discrimination was relevant not only with regard to the adoption of a decision whether to expel the alien but also with regard to the procedural guarantees that must be respected, as had been recognized by the human rights treaty bodies.

72. He was in favour of referring the three draft articles A1, B1 and C1 to the Drafting Committee, provided that they were reformulated to include a set of procedural guarantees common to both cases: the expulsion of aliens lawfully present and that of aliens unlawfully present.

²⁹⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/554, p. 198, para. 23.

²⁹⁶ See footnote 293 above.

²⁹⁷ A/CN.4/565 and Corr.1 (see footnote 42 above).

73. Mr. VASCIANNIE said that, in his efforts to present three draft articles on the rules of procedure that should be applicable to persons subject to expulsion, the Special Rapporteur had undertaken a review of various sources of law, notably the domestic law of a number of countries. At least two general issues were implicit in that approach, the first of which was a problem of perspective. Although the domestic law of virtually all States provided for the possibility of expulsion, in many instances safeguards available to persons facing expulsion were not found together with provisions affirming a State's sovereign right to expel a person from its territory. Moreover, whereas the rules on expulsion were apt to be found conveniently in one place, namely the State's immigration law, rules concerning procedural and other safeguards to be enjoyed by individuals were widely scattered among human rights provisions, broad principles of constitutional and other domestic law and international instruments. Therefore, when reviewing the material, there was a risk that more attention might be given to the readily available rules that allowed expulsion from the State simply because those rules were easier to find. It was a tribute to the Special Rapporteur that he had not fallen into that trap, but rather had maintained the balance between individual rights and State prerogatives that was necessary for the project.

74. A second problem relating to sources of law was that there was, in general, a greater abundance of information pertaining to Western countries than to the rest of the world. Consequently, if the Commission was not careful, it could end up giving greater emphasis to approaches to expulsion adopted by a relatively small group of countries. To some extent, the Special Rapporteur had avoided that problem by including references to the position of a variety of States, and he should be encouraged strongly to maintain that approach. The perspective on expulsion of a small developing country with high unemployment might differ considerably from that of a developed country. In the same way, the perspective of a former colony might differ from that of a former colonial power.

75. The point was that if the Commission was searching for an *opinio juris* or at least State attitudes towards expulsion issues, it should be prepared to look beyond the domestic legislation on expulsion of a small group of countries. Greater consideration should therefore be given to the positions of Latin American, Caribbean, African, Asian and Pacific States on safeguards relating to expulsion proceedings, as well as to those of the United States and Canada. Such a study did not need to entail a detailed review of national legislation; it might encompass statements made at multilateral forums, positions adopted in treaties concerning the deportation of convicted persons and the *travaux préparatoires* of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and State practice with regard to the expulsion of migrant workers. Such information would help to paint a broader picture and guide the Commission more reliably in terms of identifying the provisions that represented *lex lata* and those that were adopted *de lege ferenda*.

76. With respect to specific draft articles, draft article A1 maintained the distinction between aliens lawfully in the territory of an expelling State and aliens who had entered

the State's territory illegally. That distinction was plausible, but it seemed to suggest that almost no safeguards were available to aliens who had entered a State illegally (especially if they had not resided in the country for a long period of time). He shared the view of those who recommended reconsidering that approach. The Commission might wish to consider having, at a minimum, a tripartite scheme covering persons lawfully in the territory; persons not lawfully in the territory, but who had been present there for some time; and persons who had just arrived and had no lawful basis for entry. In such a scheme, some safeguards would be available to all three categories, but a higher level of protection would be afforded to persons lawfully in the territory and perhaps those unlawfully in the territory but who had been there for some time. To the extent that the above scheme appeared to be implicit in the Special Rapporteur's approach, his own remarks should be regarded as a request for an elaboration of the implications of draft article A1.

77. With regard to draft article B1, the word "lawfully" between square brackets should be deleted, so that all aliens—whether lawfully or unlawfully present in the territory—would be entitled to the safeguard envisaged by that provision. Alternatively, and out of an abundance of caution, he proposed that the provision might begin: "An alien, whether lawfully in the territory of a State Party or not, may be expelled". That would avoid *a contrario* arguments that would inevitably arise if the current formulation were retained with the square brackets removed.

78. Lastly, with regard to draft article C1, he supported the safeguards listed by the Special Rapporteur, with perhaps one exception. He agreed, in particular, with the rights listed in paragraphs 1 (a) to 1 (f) and 1 (h). His hesitation concerned the right to legal aid in 1 (g), which, as others had noted, might pose a challenge to some States owing to resource constraints, as was the case with a number of Caribbean States. On the other hand, it was desirable for persons subject to expulsion to have access to legal aid. He therefore proposed that draft article C1 should contain a provision to the effect that legal aid should be provided to the fullest extent possible having regard to resource considerations in the expelling State.

79. Although draft article C1 did not seek to distinguish between aliens lawfully in the territory of a State and other aliens, the distinction would apparently be made in draft article A1. If the Special Rapporteur decided to provide for a different level of protection for aliens lawfully present than for those unlawfully present, those distinctions might be made in draft article C1. For example, it might provide that a person lawfully residing in the State was entitled to all the procedural rights listed in paragraph 1 (a) to (f) and (h), while a person not lawfully present but present for some time was entitled to some of those rights. Ultimately, however, his preference would be for the rights listed in paragraph 1 (a) to (f) and 1 (h) of C1 to be available to all aliens, regardless of their situation.

80. Mr. NOLTE said that he was among those Commission members who proposed that the draft articles should recognize that aliens illegally present in the territory of a State had some procedural rights. He had suggested not sending the draft article addressing that situation to the

Drafting Committee on the reasoning that the provision required further elaboration. He supported Mr. McRae's proposal that the Special Rapporteur should propose a new draft article relating to aliens illegally present in the territory of the State and that it should be formulated during the Special Rapporteur's summing up of the debate, which would allow Commission members to react to it immediately and to refer it to the Drafting Committee without further delay. While the matter perhaps did not require a full new debate, it nevertheless involved an issue that should not be discussed exclusively within the Drafting Committee.

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

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

81. The CHAIRPERSON invited the members to continue their consideration of the fifteenth report on reservations to treaties, in particular the addenda thereto (A/CN.4/624/Add.1 and 2).

82. Mr. GAJA said that the Special Rapporteur's thinking had evolved over the course of the 15 years that he had been working on the topic of reservations to treaties. That had led to results that were very much in keeping with the 1969 Vienna Convention on the Law of Treaties, despite the regrettable silence of the latter on the issue of the consequences of invalid reservations. The Commission had now reached the heart of the problem of reservations to treaties.

83. One conclusion reached by the Special Rapporteur in that regard was that articles 20 and 21 of the Vienna Convention concerning acceptances of, and objections to, reservations and legal effects of reservations and objections to reservations, respectively, did not apply to invalid reservations. That conclusion was confirmed by the *chapeau* of article 21, which concerned only "a reservation established with regard to another party in accordance with articles 19, 20 and 23". An invalid reservation certainly could not be considered a reservation established in accordance with article 19, or, with regard to procedural rules, with article 23.

84. At first glance that position did not seem to be supported by State practice, which tended to treat reservations considered incompatible with the object and purpose of the treaty as if they were valid reservations. However, in analysing the practice more closely, it was possible to identify elements that confirmed the non-applicability of articles 20 and 21 to objections to, and acceptances of, invalid reservations. For example, one could refer to the numerous cases in which an objection to the invalidity of a reservation was raised after expiry of the 12-month time period following notification prescribed in article 20, paragraph 5, of the Vienna Convention. The States that had entered those objections clearly did not consider paragraph 5 also to apply also to objections to invalid reservations. They therefore made a distinction between valid and invalid reservations and did not consider paragraph 5 to

express a general rule. One particular noteworthy example was that provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in relation to which some 19 States had raised an objection to the validity of certain reservations after the end of the time period set out in article 20, paragraph 5. They represented nearly all the States that had adopted the practice of raising objections. Thus, while there were few States that entered objections, those that did so obviously thought that there was a different rule that applied to invalid reservations. The above considerations supported the Special Rapporteur's conclusion.

85. It was necessary to express more clearly in draft guidelines 2.6.13 (Time period for formulating an objection) and 2.8.0 (Forms of acceptance of reservations) that they applied only to reservations considered valid. As those two draft articles were currently worded, they seemed to be more general in scope and to apply to any type of reservation. The Commission should avoid giving the impression that the expiry of the 12-month time period after notification of a reservation could imply the acceptance of an invalid reservation.

86. A second important conclusion reached by the Special Rapporteur was that the invalidity of a reservation for whatever reason, including its impermissibility on the grounds of incompatibility with the object and purpose of the treaty, always produced the same legal effects. In draft guideline 4.5.1, the Special Rapporteur posited that such reservations were null and void, adding in draft guideline 4.5.2 that such a reservation was "devoid of legal effects". That conclusion would be justified if the question of the validity of the reservation was referred to an international tribunal competent to issue a binding decision, but, in most cases, the validity of such reservations was assessed by the contracting States. Even if they applied objective criteria, they might well draw different conclusions. It could be said that the reservation was null and void, but only for the States that deemed it invalid. As far as the other States were concerned, the reservation was not invalid and produced legal effects.

87. From the standpoint of States which considered a given reservation to be invalid, the reservation produced no effect, in the sense that it did not produce its intended effect, namely that of enabling the reserving State to become a party to the treaty with the benefit of the reservation. However, the question remained whether the reservation should therefore be considered as unwritten or whether it prevented the reserving State from becoming a party to the treaty—the alternatives set forth in paragraphs 145 [435] *et seq.* of the report. The first alternative (severability of the reservation) had been upheld by the European Court of Human Rights in its judgement in the *Belilos* case on the grounds that the intention of the State to be a party to the treaty prevailed over its desire to maintain a reservation that would prevent it from being a party. In other decisions by the same Court (*Weber v. Switzerland*) and by other bodies, such as the Inter-American Court of Human Rights (*Hilaire v. Trinidad and Tobago*), and the Human Rights Committee (*Kennedy v. Trinidad and Tobago*), the tendency had been to ignore the intention of the reserving State and simply to rule out the effect of a reservation deemed invalid as if it had never existed.

He agreed with the Special Rapporteur that only the existence of the intention to be a party to a treaty without the benefit of the reservation considered invalid could be reconciled with the principle of consent to be bound, which was the basis of any obligation under a treaty.

88. As noted in paragraph 173 [463] of the report, the human rights bodies had come to recognize the need to determine the real intention of the reserving State; however, as indicated in paragraph 174 [464], they maintained that there was a strong presumption that the author of the reservation would prefer to remain or become a party to the treaty, even without the benefit of the reservation. In paragraph 191 [481], the Special Rapporteur set forth a similar but more qualified presumption, whereas the presumption posited by the human rights bodies could hardly be rebutted.

89. One could well understand the attitude of the human rights bodies, whose objective was to provide the broadest possible protection of the rights guaranteed under a given treaty. Nevertheless, the consequence of the presumption they advocated was not to give any effect to a specific declaration made by the reserving State at the time of ratification purporting to limit its scope. Moreover, with regard to the States parties which considered the reservation to be valid, the reservation produced its effects; thus, the reserving State could be a party to the treaty with the benefit of the reservation. He wondered why it should be presumed that the State in question would accept the obligations under the treaty in a more comprehensive manner in its relations to States that had objected to the validity of the reservation. There seemed to be valid reasons for reversing the presumption. It would suffice to state that a reservation was to be considered as not having been formulated, or in other words could be disregarded, if that was the intention of the reserving State, without establishing any presumption whatsoever.

90. In conclusion, the section on invalid reservations raised crucial issues that warranted further, detailed debate in the Commission so as to ensure that generally accepted solutions were found. Since it had taken more than 15 years for the Commission to reach the current stage in its work on the topic, it did not seem unreasonable to request that more time be allocated for that purpose. His main point of disagreement with the Special Rapporteur was the idea that a reservation could be treated as null and void once it had been deemed invalid by one or more States or by bodies that were not competent to take a decision that would be binding on all States parties to the treaty.

91. Sir Michael WOOD said that the section under consideration addressed what was perhaps the most difficult issue of the whole project—the effects of an invalid reservation. The Commission must try to resolve the issue, lest there be something missing at the heart of the Guide to Practice, and decide whether the Special Rapporteur's proposal was the right one, or rather the least bad one, or whether the Commission should adopt a different approach.

92. In this section, the Special Rapporteur described in detail both the theory and practice relating to the effects of invalid reservations in a masterly way, which, in itself,

was a major contribution to thinking in the difficult field. He then proposed a pragmatic solution that sought to reconcile the theory with the often unclear and inconsistent State practice. Steering clear of the extreme positions taken by some States, he proposed a rebuttable presumption, namely that the reserving State intended to become a party to the treaty, and that if its reservation was impermissible, or otherwise invalid, and thus null and void, the reserving State could be presumed to have intended to become a party without the reservation.

93. His main concern was the practical application of the Special Rapporteur's proposal. As Mr. Gaja had observed, in the absence of compulsory third-party decision-making procedures, it was difficult to establish whether a reservation was impermissible. An objecting State might well claim that it was impermissible, but that did not necessarily mean that it was so.

94. If the Commission members agreed with the Special Rapporteur's analysis, as he did, there were three options. The first was the Special Rapporteur's proposal (the positive presumption); the second was the opposite presumption (the negative presumption); the third was to have no presumption at all. Nevertheless, while there could be no doubt that an impermissible reservation was null and void, it did not inevitably follow that because a reservation was null and void it could be severed, and the reserving State could be bound by the treaty without the benefit of the reservation. There were important objections, both theoretical and practical, to that proposition.

95. As far as the theory was concerned, the proposition might run counter to the cardinal principle of the law of treaties to which the Commission had always attached great importance—the requirement of consent; there could also be implications at the level of constitutional law. For example, a State that had submitted the proposed reservation to its legislature as part of the domestic ratification process would wish to be guaranteed that it would not become a party to the treaty in question without the reservation and without its consent. He welcomed the Special Rapporteur's efforts to avoid that objection by developing a rule based on a presumption that had the intention of the reserving State as its central point. Likewise, he welcomed the onus that would be placed on the reserving State to make its position clear.

96. The question, however, was whether the Special Rapporteur's presumption was the right one, for it seemed to contradict the basic thrust of the arguments he had put forward in paragraphs 177 to 182 [467–472] in favour of the positive presumption. For instance, he was not certain that the positive presumption would facilitate the “reservations dialogue”. He also queried the assertion in paragraph 179 [469] that the importance of a reservation must not be overestimated—for some States the reservation might be crucial. Moreover, while he endorsed the Special Rapporteur's point in paragraph 181 [471] that the presumption of entry into force provided legal certainty by helping to fill the legal vacuum between the formulation of the reservation and the declaration of its nullity, it should be noted that the declaration of nullity might never be made; thus, the legal vacuum could last indefinitely. In brief, the arguments put forward by the Special

Rapporteur in those paragraphs could lead equally well to the positive presumption or to the negative one.

97. On a practical level, unless the question of permissibility could be tested in court, the positive presumption would seem to have the effect of privileging the unilateral viewpoint of some contracting States and imposing it on the reserving State. He feared that it would prove very difficult in practice to hold a reserving State to a treaty obligation in the absence of third-party mechanisms. The State that had entered the reservation might not accept that the reservation had vanished; the *Belilos* case was an exception.

98. For all those reasons, he suggested that the Commission should consider whether the correct presumption—again a rebuttable one—might not instead be that the reserving State did not intend to become a party to the treaty without the benefit of the reservation, in other words, the negative presumption. The practical result might not be any different in most cases, but the principle of consent would be preserved, which was important not only for the topic under consideration, but in the wider context of the law of treaties and international law.

99. It was easier to state the options than to choose between them. The Special Rapporteur had made his recommendation, which, despite certain problems, had many points in its favour. He had made it clear that the proposal did not reflect existing treaty law, so if the Commission adopted it the question of its retroactive application would arise. At the present juncture, however, what was important was that the Commission should adopt a clear and workable proposal and await the reactions of Member States. He would welcome the views of other Commission members on the matter too. His preference was for the negative presumption. Having said that, he would be ready to join a consensus based on the proposal for a positive presumption, although in that case the Commission should consider what it could do, in addition to what the Special Rapporteur had attempted in draft guideline 4.5.4 (Reactions to an impermissible reservation), to ensure that the proposal was workable in practice.

100. The following section of the the fifteenth report, on the effects of interpretative declarations, approvals, oppositions, silence and reclassifications, provided a very good account of the nature and effects of interpretative declarations to treaties. He had no comment on draft guideline 4.7.4 (Effects of a conditional interpretative declaration). Draft guidelines 4.7 (Effects of an interpretative declaration), 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration) and 4.7.3 (Effects of an interpretative declaration approved by all the contracting States and contracting organizations), which dealt with treaty interpretation, were acceptable. Perhaps draft guideline 4.7 alone would be sufficient, but if the Commission considered that the three draft guidelines were useful, he would have no objection. However, he considered that draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author) should not be included in the Guide to Practice. The analysis leading to the proposal was brief and unconvincing. If the draft guideline was adopted, it would mean that a State which made an interpretative declaration would not be able to

invoke an interpretation contrary to that contained in its declaration. It would therefore be precluded from making an alternative interpretation to the one in its interpretative declaration, even where the alternative interpretation was correct. There could be cases where an interpretative declaration gave rise to an estoppel or form of preclusion, but such cases were unlikely to be frequent.

101. In conclusion, he was in favour of referring all the draft guidelines proposed in the last two sections of the fifteenth report to the Drafting Committee, with the exception of draft guideline 4.7.2. The Drafting Committee might need to examine more carefully draft guidelines 4.5.3 ([Application of the treaty in the case of an impermissible reservation] [Effects of the nullity of a reservation on consent to be bound by the treaty]) and 4.5.4, either to reverse the positive presumption or to seek to clarify how the Special Rapporteur's proposal would work in practice.

102. Mr. McRAE said that, in general, he had no substantive problems with the Special Rapporteur's treatment of invalid reservations. Mr. Gaja had raised the difficult issue of the point at which a reservation could be considered null and void. Long before the matter was decided by an independent tribunal, the parties to the treaty might be making their own determination. He was not certain that further reflection would necessarily provide an easy solution. Perhaps the best to be hoped for was that the Guide to Practice would provide guidance to individual States in assessing whether a reservation was null and void; if objections were raised, the matter might then come before an independent body for decision.

103. He questioned the need for both draft guideline 4.5.1 (Nullity of an invalid reservation) and draft guideline 4.5.2 (Absence of legal effect of an impermissible reservation), since to say that a reservation was null and void seemed synonymous with saying that it was devoid of legal effects. The matter should be followed up by the Drafting Committee.

104. On the more substantive matter of draft guideline 4.5.3, he considered that the Special Rapporteur's proposal for a positive presumption, namely severance of an invalid reservation unless the reserving party expressed an intention to the contrary, was in principle better than the other alternatives. Sir Michael had drawn attention to the practical problems posed by such a proposal and had stated his preference for the negative presumption. However, he suspected that it might give rise to exactly the same problems as the positive presumption and that further debate would merely highlight the advantages and disadvantages only to obtain the same result. The advantage of the positive presumption was that it focused on the intention of the reserving State. The assumption that it intended to be a party to the treaty seemed a better starting point than the assumption that it did not wish to be a party, since it furthered treaty participation.

105. Turning to the section on the effects of interpretative declarations, approvals, oppositions, silence and reclassifications, he welcomed the fact that the Special Rapporteur treated conditional interpretative declarations as having the same effects as reservations, although that

view had not been supported by all Commission members in the past. He expressed support for all the draft articles proposed by the Special Rapporteur with the exception of draft guideline 4.7.2, regarding which he shared the concerns expressed by Sir Michael. The draft guideline purported to prevent the author of an interpretative declaration from asserting an interpretation contrary to the one set forth in the declaration. Although it was not explicitly stated in the draft guideline, it was implicit in the report that the author could withdraw or modify the interpretative declaration at any time. He failed to understand why the author was unable to retract the declaration without formally withdrawing or modifying it, and he did not follow the Special Rapporteur's reasoning in that regard.

106. In paragraph 255 [545], the Special Rapporteur justified the approach "as a corollary of the principle of good faith", claiming that it was not necessarily based on estoppel; yet in paragraph 257 [547], he asserted that the author had created an expectation in the other contracting parties who, acting in good faith, might take cognizance of and place confidence in it, and that sounded very much like estoppel. The draft guideline was too broad in scope. There might well be circumstances in which parties to a treaty had relied on an interpretative declaration by a State and, without expressly accepting it, adapted their behaviour in accordance with that declaration. In such circumstances, the author should not be able to express a contrary view and might in fact be bound by it, although probably as a result of subsequent practice under the treaty and not because of the binding nature of the declaration itself. The author of the interpretative declaration could always withdraw it, but it could still be bound as a result of the behaviour it had generated among the treaty partners.

107. However, where a State made an interpretative declaration and there was no evidence of reliance on it, and indeed subsequent events, such as a judicial decision, made the interpretation proposed in the declaration less plausible, he wondered why that State, which many years later might have forgotten about its original interpretative declaration, should be prevented from adopting a contrary position. The approach adopted in draft guideline 4.7.2 had a somewhat perverse outcome in the sense that an act which had no legal effect for other States had a boomerang-like legal effect for its author. Although in paragraph 256 [546] the Special Rapporteur denied that the author of an interpretative declaration was bound by the interpretation it put forward, implicitly that was what happened.

108. Notwithstanding the title of the draft guideline, in paragraph 258 [548] the Special Rapporteur explained that the limitation applied not only to the author, but also to any State or organization that approved the interpretation put forward in the interpretative declaration, which must also refrain from invoking a different interpretation. The provision went too far in the absence of a case of estoppel, and, even if there was estoppel, it might apply only between the author and the approving State, not even to third States. He did not agree with Sir Michael that the draft guideline should be deleted, but would suggest that its scope should be limited by adding the following phrase at the end of the provision: "where other contracting parties have relied on that interpretation and acted accordingly".

109. Mr. PELLET (Special Rapporteur) said that, in order to forestall any further debate on draft guideline 4.7.2, he declared himself convinced that the current version of the provision was too broad in scope and should be amended. He would not, however, be in favour of its deletion.

The meeting rose at 1 p.m.

3066th MEETING

Friday, 16 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to resume the debate on his sixth report on expulsion of aliens (A/CN.4/625 and Add.1–2).
2. Mr. KAMTO (Special Rapporteur) said that before summarizing the debate itself, he would first touch on several comments of a general nature made by members of the Commission, then respond to methodological and substantive questions raised by certain States and referred to by several members of the Commission, and lastly address the proposal to restructure the draft articles.
3. Two members of the Commission had reiterated their well-known view that the Commission should not consider the topic of expulsion of aliens: one had argued that there were no general rules of international law in the area and that therefore the subject was a matter for the domestic law of States, and not for international law, and the other had contended that the subject was dealt with in diplomatic negotiations and thus was unrelated to the technical work expected of the Commission. Those two members echoed the position expressed in that regard by two or three delegations in the Sixth Committee.
4. In response to the persistence of that opinion, he pointed out, first, that all topics considered by the Commission were, without exception, subject to negotiation. He was not aware of a sole case in which draft articles elaborated by the Commission, however admirable they

might have been, had immediately become treaty provisions without first going through a diplomatic conference. If that had been the case for treaty law, of which it could be said that it concerned general rules and legal techniques, and not a concrete, factual subject, then it certainly should be true for other topics. After all, the work of the Commission on international crimes²⁹⁸ had helped with the elaboration of the Rome Statute of the International Criminal Court, and its work on international watercourses²⁹⁹ had also been subject to negotiation.

5. Secondly, was it really correct to say that the only existing rules on the expulsion of aliens were those established in international law and that the draft articles proposed until now were merely a collection of *lex ferenda*? In accordance with Article 38 of the Statute of the International Court of Justice, there were four sources of codifiable rules: international conventions; custom; general principles of international law recognized by nations; and judicial decisions and doctrine. He was proceeding on the basis of those four sources, and it was only when a rule did not stem from a universal or regional treaty source, an unquestionable customary source or international jurisprudence that he proposed a rule for progressive development—either because it was based solely on a few examples of converging national practice, or because it derived from regional jurisprudence not confirmed in other regions or at a universal level.

6. The second comment of a general nature made by some members concerned methodology. Methodological questions underlay the statements of certain States in the Sixth Committee and the comments of a number of members of the Commission. During the consideration of the annual report of the Commission to the General Assembly, one State in the Sixth Committee had criticized him for codifying European law,³⁰⁰ because he had relied heavily on the jurisprudence of the European Court of Human Rights and because he had drawn on what was called the “jurisprudence” of the Human Rights Committee³⁰¹ and other United Nations treaty bodies. The same State and several others had asked that greater attention be given to the comparative study of national law in the area.

7. He was surprised by that criticism, because in his fifth report,³⁰² which had essentially been devoted to the protection of the human rights of the person being expelled, he had started out each time with an analysis of the relevant international conventions before considering how a particular provision of those conventions had been interpreted by the Human Rights Committee and other treaty bodies as well as by regional human rights jurisdictions, in the current case the European Court of Human Rights, but also the Inter-American Court of Human Rights and, occasionally, the African Commission on Human and Peoples’ Rights. The study of national law

had played only a very limited role in that area, because rules were concerned that were well established in international treaty law and had been confirmed by international jurisprudence. Another member of the Commission had expressed the view that, given the difficulty of consulting all relevant legislation of States, and developing States in particular, the *travaux préparatoires* of international conventions, for example those relating to migrant workers, should be employed. He had taken due note of that proposal, and he asked that member of the Commission whether, in the course of his studies, he had been able to identify, in statements by representatives of States, any elements concerning the *travaux préparatoires* in question which could be used.

8. In any case, the sixth report, as could be seen, gave much greater attention to the study of national practice as reflected in legislation and jurisprudence. It should be noted, however, that national practice only served as the basis for proposed draft articles for progressive development if the question raised was not regulated by international legal instruments or international jurisprudence and if the practice of States was convergent. Two members of the Commission had also criticized the working method; one had argued that the sources used were very old, and even outdated, and the other had criticized that unreliable sources had been cited and that selective use had been made of information concerning a particular country.

9. With regard to the age of the sources, he was not aware that there was a time limit at the expiry of which research studies should no longer be used. If there was such a time limit, he would appreciate it if someone told him what it was, at least for the future. More specifically, he failed to see how a study on the expulsion of aliens could be criticized for being based on work carried out at the end of the nineteenth century, a period in which the subject had witnessed a boom in national legislation and had given rise to a rich arbitral jurisprudence that had laid down the first principles of international law in the area. It was in that period that the topic had first become the focus of major studies. Even the Institute of International Law had devoted a resolution to it, in 1892.³⁰³ Arbitral awards, for example in the *Ben Tillett* and *Daniel Dillon* cases, should also be borne in mind. Evoking the facts and rules of a past period did not mean that they were used to propose draft articles. It served to show the evolution of the subject and to establish either that the proposed rule had already been recognized and was clearly of a customary nature or, on the contrary, that it had become outdated. For example, expulsion on grounds recognized at the end of the nineteenth and the beginning of the twentieth century, such as public health, begging, vagrancy or disorderliness, were no longer accepted today because of fundamental changes in the area of human rights.

10. As to the seriousness of the information used in the sixth report and the “selective” nature of the approach, suffice it to say that the information in question came from recognized NGOs active in the defence of the rights of aliens and had been cited each time with complete references.

²⁹⁸ *Yearbook ... 1996*, vol. II (Part Two), Draft code of crimes against the peace and security of mankind, p. 17, para. 50.

²⁹⁹ *Yearbook ... 1994*, vol. II (Part Two), Draft articles on the law of the non-navigational uses of international watercourses, p. 89, para. 222.

³⁰⁰ *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 25th meeting (A/C.6/65/SR.25)*, para. 7.

³⁰¹ *Ibid.*, para. 11.

³⁰² See footnote 26 above.

³⁰³ “Règles internationales sur l’admission et l’expulsion des étrangers proposées par l’Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892”, *Annuaire de l’Institut de droit international*, vol. XII (1892–1894), p. 218.

He had not been aware that a Special Rapporteur was only allowed to use official information when he wrote about the practice of a State. The accusation of the supposed selective nature of his approach was serious and in bad faith. It was serious because it suggested that he had something special or personal against the State in question, which obviously was not the case. It was in bad faith for two reasons: first, because in paragraph 214 he had taken the precaution of indicating that the examples of detention conditions of aliens who were being expelled had been cited purely as illustrations and solely because of their availability—one member of the Commission had in fact drawn attention to that point; and second, because, with regard to the State concerned, namely Germany, he had referred to the historical facts, but also to recent legislation (1990 and 1993). He had also taken care to say that “[i]t has not been possible, however, to gain access to information on the conditions in those centres” [para. 215]. Apparently his precautions had been to no avail. On such a complex subject, errors were inevitable, and he would always welcome any correction or additional information which States and members of the Commission might contribute, but he rejected the accusation that he had been selective.

11. The third comment of a general nature concerned the proposal by one member of the Commission to restructure the draft articles, whereupon an informal working group had been established. The proposal was certainly well-founded, but a restructuring at the current stage would be premature, which the informal working group had had to concede, because it had not succeeded in producing anything specific in that regard. However, he had taken due note of the proposal and would undertake to propose a restructuring at the beginning of the 2011 session.

12. Turning to the actual summary of the debate on the sixth report on expulsion of aliens, he noted that draft article A (Prohibition of disguised expulsion) had given rise to two main comments. The first concerned the title of the draft article. Some members had thought that the words “disguised expulsion” were unclear and imprecise, that the phrase was used in journalism but not in law, and that it would be preferable to employ words in line with the English formulation “constructive expulsion”. However, as indicated in paragraphs 37 and 38 of the sixth report, the Eritrea–Ethiopia Claims Commission and the Iran–United States Claims Tribunal in the *Short v. Iran* case had both referred to disguised expulsion. He worked in French and thus had difficulty finding a good translation of the English; he was open to suggestions.

13. The second general comment concerned the relationship between draft article A and the definition of expulsion in draft article 2 (Definitions). He agreed that draft article A, paragraph 2, reproduced that definition and that it could be deleted as necessary. On the other hand, it was absolutely essential to retain paragraph 1, because although draft article 2 defined that form of expulsion, nowhere in the draft articles was it specified that it was prohibited. Yet it was in fact prohibited, because it violated all procedural rules and did not allow any protection of the human rights of the expelled person.

14. With regard to draft article 8 (Prohibition of extradition disguised as expulsion), several members of the

Commission had pointed out that, as worded, the draft article did not fall within the scope of the topic and that in any case, it did not take into consideration the case in which expulsion was carried out on the basis of a cooperation agreement. More importantly, they had argued that nothing prohibited a State from expelling a person who was the subject of an extradition request if the conditions required for expulsion had been met. He had thus reformulated draft article 8 to take those useful comments into account, and it had been agreed that the draft article could be referred to the Drafting Committee. The title would be amended accordingly and would read: “Expulsion in relation to extradition” (*L’expulsion en rapport avec l’extradition*).

15. One member of the Commission had asked whether he intended to include in draft article 8 a provision relating to the competence of national jurisdictions in cases of disguised extradition, on the basis of the jurisprudence of a number of countries, notably that of South Africa, which had cited decisions of British Israeli and United States jurisdictions in the *Eichmann* case, or that of the Supreme Court of Zimbabwe. He did not think that it was necessary to draft a normative provision on that question, but he would reflect that concern in the commentaries.

16. On draft article 9 (Grounds for expulsion), one member of the Commission had said that the only two grounds which should be retained were public order and public security, because all grounds were related to them in one form or another. He had thought so too at first, but further study had shown that it would be unwise to reduce everything to those two grounds, and several members of the Commission had also argued along those lines. Consequently, the formulation of draft article 9 left an opening by specifying that a State could invoke any other ground provided that it was not contrary to international law. However, he took note of the information provided by the member in question on the contribution of the jurisprudence of the ICJ concerning the concept of “national security”, which would add to the commentary on draft article 9.

17. On the other hand, it was incorrect to say, as that same member had, that on that point he had followed too closely the grounds enunciated in the memorandum by the Secretariat on expulsion of aliens.³⁰⁴ One need only reread the two documents to see what his report had contributed in that regard.

18. On draft article B (Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion), he recalled that he had proposed the deletion of paragraph 1, which seemed to be redundant with draft article 8 (recast in the Drafting Committee together with draft article 9). Some members had found draft article B to be too detailed, in particular when it said in paragraph 2 (a) that the detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty were detained. He conceded that this might in fact be too detailed, but the rule stemmed from jurisprudence, and it was that detail or indication which made it possible to highlight the fact that the expulsion decision was not punitive in nature and that

³⁰⁴ A/CN.4/565 and Corr.1 (see footnote 42 above).

the person who was the subject of the expulsion decision was not being punished. It would be up to the Drafting Committee to decide whether a more general formulation could be found.

19. Only draft article 8 had raised very clear reservations among the majority of members of the Commission. Those reservations had been dispelled after the draft article had been formulated, and the Commission had decided that all the draft articles contained in the first part of the sixth report, namely draft article A, draft article 8 in its new version, draft article 9 and draft article B, would be referred to the Drafting Committee.

20. Concerning the comments on the second part of his sixth report, on expulsion proceedings, the Special Rapporteur noted that all the members of the Commission who had spoken on the subject had approved the overall thrust of the document and the effort to draw a distinction between aliens lawfully in the territory of the expelling State and those who were there unlawfully. In actual fact, that distinction was more subtle, because within the category of unlawful aliens it was still necessary to distinguish between recent and long-term illegal aliens.

21. He drew attention to those distinctions because it had been criticized that no specific procedural guarantees had been provided for aliens unlawfully in the territory of the expelling State; he had amended draft article A1 (Procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State) to respond to that point. Paragraph 1 sought to take into account the situation of illegal aliens who had entered the territory at a recent date; the guarantee was minimal in that it simply referred to the law. The other category of unlawful aliens in the expelling State could benefit from greater protection, the difficulty being to find the right balance when drawing a distinction between the procedural guarantees provided for lawful aliens and those provided for recent illegal aliens. Draft article A1, as modified, thus read:

“1. The expulsion of an alien who entered illegally [at a recent date] the territory of the expelling State [or within a period of less than six months] takes place in accordance with the law.

“2. The expulsion of an illegal alien who has a special legal status in the country or has been residing in the country for some time [at least six months?] takes place in pursuance of a decision taken in conformity with the law and the [respect] of the following procedural rights:

“(a) the right to receive notice of the expulsion decision;

“(b) the right to challenge the expulsion [the expulsion decision];

“(c) the right to a hearing;

“(d) the right of access to effective remedies to challenge the expulsion decision;

“(e) the right to consular protection.”

22. There then followed procedural guarantees for the expulsion of aliens lawfully in the territory of the expelling State: draft article B1 (Requirement for conformity with the law) and draft article C1 (Procedural rights of the alien facing expulsion). Some members of the Commission had proposed the deletion in draft article B1 of the word “lawfully” so that the question of conformity with the law would cover both illegal and lawful aliens, but it was perhaps unwise to adopt that approach, because the phrase “in conformity with the law” appeared in the International Covenant on Civil and Political Rights, and the deletion of the word “lawfully” might create confusion. It was therefore preferable to have repetition.

23. Draft article B1 had received virtually unanimous support from the members of the Commission.

24. The principle of draft article C1 had not been contested, but rather the legal appropriateness of some of its provisions in promoting progressive development. That was the case, for example, with the right to legal aid and even, for some members, the right to interpretation and translation services. The members who had raised the latter objection had referred to the costs that such services would incur for the expelling State. However, the right to interpretation and translation was well established in international law and could even be codified as a general principle of law, because it was recognized in the legislation of virtually all States. With regard to legal aid, he had made it very clear that progressive development was concerned. Noting that one member had proposed the principle of the suspensive effect of an appeal against an expulsion measure, he said that he had examined the question at great length in the report to be considered by the Commission at its 2011 session and had concluded that the rule on suspensive effect essentially stemmed from European law, notably the jurisprudence of the European Court of Human Rights, as it had emerged in the judgments rendered in the *Jabari v. Turkey* (2000) and *Mamatkulov and Askarov v. Turkey* (2005) cases on the basis of an interpretation of article 13 of the European Convention on Human Rights. In 2001, the Council of Europe’s Commissioner for Human Rights had made recommendations to its member States in favour of that procedural guarantee. It should be noted, however, that this guarantee, which was well established in European regional law, was not recognized in general international law. The Institute of International Law had been opposed to it in its 1892 resolution. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families merely created the possibility, for the migrant worker being expelled, to request a suspension of the decision; it did not introduce a rule for the suspensive nature of the request. He had not made the above points in order to oppose the wishes of the members of the Commission on the subject but to stress that he had not lost sight of the question and that if the Commission retained the rule, it would of course be with a view to promoting the progressive development of international law. One member of the Commission had proposed the codification of a rule drawn from the interpretation by the Human Rights Committee of article 13 of the International Covenant on Civil and Political Rights; according to that interpretation, the procedural guarantees provided for by that article should also be applied if the person concerned contested the expulsion

decision itself. He had taken due note of that proposal but thought that it would be preferable to reflect the idea in the commentary to draft article A1 or draft article C1. He hoped that the reformulation of draft article A1 addressed the objection of principle raised by some members and that the Commission would agree to refer the set of draft articles to the Drafting Committee.

25. Mr. SABOIA said that he much preferred the original version of draft article 8 on the prohibition of extradition disguised as expulsion, which the Special Rapporteur had said that he had reformulated in response to observations made during the debate. Extradition was usually a legal procedure involving the participation of both parties: if the executive power decided to expel a person to the State requesting that person's extradition, it would be committing an act contrary to the procedural guarantees under that procedure. With regard to draft article A1, he was pleased to note that the Special Rapporteur had taken into account the objections raised during the debate, but in accordance with the new version of the draft article, which drew a distinction between recent and long-standing unlawful aliens, only the latter had the right to consular protection. That right should be extended to all unlawful aliens, not only because of legal considerations, but also because it was above all during the short period of time when the authorities were deciding whether to expel an alien that consular protection was needed to protect the rights of the person concerned.

26. Mr. NOLTE said that he was in favour of referring the new draft article A1 to the Drafting Committee. He wished to point out that he had not intended to say that the Special Rapporteur had deliberately made a selective use of information concerning one country, but that the description given had not provided a full picture of the situation. He had certainly not intended to cast doubt on the Special Rapporteur's good faith.

27. Mr. HASSOUNA said that, clearly, none of the criticism voiced by members of the Commission had been at a personal level and that neither the Special Rapporteur's competence nor his dedication had been called into question. Noting that some of the debate had taken place in the first part of the session, he hoped that in the future, the Commission would allow for enough time so that the Special Rapporteur could give his summary of any debate immediately following the discussions, when the proposals made and criticism expressed were still fresh in everyone's mind.

28. Mr. VÁZQUEZ-BERMÚDEZ, thanking the Special Rapporteur for so quickly preparing a new draft article A1 enunciating procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State, said that, for the sake of consistency, the words "illegal aliens" in the title of the English version should be replaced by "aliens unlawfully". Unlike Mr. Hassouna, he thought that the Special Rapporteur should be given time after the debate to reflect on the observations, criticisms and proposals made so that he could summarize them and respond.

29. Mr. CAFLISCH said that it was impossible to summarize a debate right after it had finished, because it took

time to digest the statements made and to prepare any proposals. Ideally, one day was needed to do so.

30. Mr. GAJA agreed with Mr. Hassouna that it would have been preferable if the debate in the first part of the session had been summarized right away and not several weeks later. Needless to say, that was a simple question of organization of work and not a criticism of the Special Rapporteur. He noted with satisfaction that the Special Rapporteur had elaborated two new draft articles to take into account some of the concerns voiced, but found it a bit strange for members to be asked to consider an entirely new text and to be requested to refer it to the Drafting Committee without opening a debate. Draft article A1 posed a major practical problem: illegal aliens were rarely in possession of documents establishing the exact moment when they entered the territory, and thus it was very difficult to know whether someone had been in a State for a long time or not, unless the person's identity papers had been checked shortly after crossing the border. It would therefore be useful for the Commission to be able to have a substantive discussion before referring the text to the Drafting Committee. Like Mr. Saboia, he had doubts about whether the new draft article 8 should be referred to the Drafting Committee. The proposed text, upon which the Commission had not had the opportunity to comment, provided in substance that expulsion must take place in conformity with international law, i.e. in accordance with the rules concerning expulsion, whereas it should reflect the particular situation of the persons who were the subject of an extradition order—but not in the form of a prohibition, as in the initial version of the draft article. The Commission should be able to have a substantive discussion on draft article 8 as well before referring it to the Drafting Committee.

31. Mr. KAMTO (Special Rapporteur) said that he had not taken the comments personally, but regarded them as methodological criticism. Some critical remarks had concerned the treatment, or lack of treatment, of the subject by the Commission—there was nothing personal about that—and others, on selectivity, had caused a misunderstanding, which Mr. Nolte had dispelled. Of course, it was always possible to have endless discussions on any draft article. In preparing the first version of draft article 8, he had started with the jurisprudence of the European Court of Human Rights in its *Bozano v. France* and *Öcalan v. Turkey* judgments. The Court had come to different conclusions in the two cases, the reason being that in the latter case, it had considered an accusation of terrorism and thus had placed itself on a different plane. In reality, however, the facts had not been very far from those in the *Bozano v. France* case, and thus the impression had arisen that the jurisdiction of the Court had prohibited disguised extradition. The Commission had reminded him that the subject had not been disguised extradition, but the expulsion of aliens, and that to continue with that approach would be tantamount to saying that even when the conditions had been met for the expulsion of a person who had been the subject of an extradition request, that person could not be expelled. That point had been well taken, and he had reversed the logic to ensure that the topic had a stronger focus on the expulsion of aliens and dealt with expulsion only in relation to a person who was the subject of an extradition request.

32. Mr. DUGARD, speaking on a point of order, said that the purpose of the current meeting was for the Commission to hear the summary of the debate on the expulsion of aliens and to decide whether to refer the draft articles to the Drafting Committee, and not to reopen the debate, even if a new draft article had been submitted.

33. The CHAIRPERSON said that all the members had taken note of the comments made by members, including by Mr. Saboia and Mr. Gaja, and he asked whether the Commission wished to refer draft articles A, 9, B1 and C1, contained in the sixth report of the Special Rapporteur, draft articles B and 8, as revised by the Special Rapporteur,³⁰⁵ and draft article A1, as revised by the Special Rapporteur at the current meeting (document without a symbol, circulated at the meeting), to the Drafting Committee.

34. Sir Michael WOOD wondered whether, from a procedural point of view, the Commission should not refer all the draft articles contained in the Special Rapporteur's reports to the Drafting Committee and leave it to the Drafting Committee to consider the new draft articles submitted at the current meeting and on which the Special Rapporteur had made proposals to take into account the comments by members of the Commission.

35. Mr. KAMTO (Special Rapporteur) said that he was not in favour of proceeding in that manner. Draft article 8 had been made available to the members of the Commission at the first part of the current session, and everyone had had time to make substantive comments.

36. Mr. GAJA recalled that there had not been any debate on the new draft article 8.

37. The CHAIRPERSON said that the Commission must indicate whether it decided to refer to the Drafting Committee those draft articles that had not given rise to substantive objections. He therefore proposed that the Commission should refer all the draft articles to the Drafting Committee, with the exception of draft article 8 and the new draft article A1. If he heard no objection, he would take it that this proposal was accepted.

It was so decided.

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

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

38. The CHAIRPERSON invited the members of the Commission to resume the debate on the last sections of the Special Rapporteur's fifteenth report on invalid reservations and effects of interpretive declarations, approvals, oppositions, silence and reclassifications (A/CN.4/624 and Add.1–2).

39. Ms. JACOBSSON said that the crucial question was how to deal with the application of a treaty in the case of an impermissible reservation, at the same time taking due account of State practice and the absence of rules in the 1969 and 1986 Vienna Conventions. The Special Rapporteur attempted to strike a balance between, on the one hand, the presumption of acceptance of an objection, with the automatic consequence of “super-maximum” effect, which “apparently purports to require that the author of the reservation should be bound by the treaty without benefit of its reservation simply because the reservation is impermissible” (para. 189 [479]) and, on the other hand, the presumption of consent. To that end, he had removed the automatic nature of the consequence of presumption and had retained consent, which he had associated with the intention of the author of the objection; that was an intelligent and elegant solution. The Special Rapporteur had provided a large number of recent examples of State practice—and there were many others, both modern and older—and in paragraph 162 [452] he set out majority practice, which was so extensive that it could not be neglected. Some members had proposed that the presumption of entry into force in draft guideline 4.5.3 be reversed, but without clearly indicating how the draft guideline would then be worded, and she therefore did not see how it would apply in practice: should the intention of the reserving State first be established before the objecting State drew its own conclusions on the effects of the reservation, or should the objecting State ask the reserving State directly? In either case, the reversal of presumption would place the obligation to act on the reserving State, which was certainly not the best way of achieving stable treaty relations. A State could have various reasons for making what was considered to be an impermissible reservation while at the same time expressing its intention to be bound by a treaty, notably for domestic reasons. The last thing that a State would want to do was to have to spell out the consequences. Rather, it might prefer to live with the uncertainty until a real case arose. It was the intention to be bound that was the driving force for the reserving State. By reversing the presumption, the Commission would disrupt what could be stable treaty relations and would prevent a constructive dialogue, and it would also disregard the practice of States, court judgments and decisions by treaty bodies. Moreover, as noted by the Special Rapporteur, a presumption of entry into force provided legal certainty, particularly against the background of draft guideline 2.1.9 (Statement of reasons). In addition, how would a reverse presumption relate to existing State practice? If the presumption were reversed, the Commission would introduce a new procedure which, to her knowledge, had not been used by States. None of the States concerned was likely to be willing to accept to have that practice declared unacceptable by the Commission's draft guidelines, particularly since experience showed that States subject to the severability doctrine had never protested, even if they were not required to do so; that was an important point. The objective of the Commission was to elaborate a Guide to Practice to assist States in their treaty relations, and such guidelines must reflect State practice and the *opinio juris* of the States concerned. State practice demonstrated that the criterion of intention and the will of the author was part of the assessment. Admittedly, regional jurisdictions such as the European Court of Human Rights and the Inter-American Court of Human

³⁰⁵ Documents ILC (LXII)/EA/CRP.1–2, distribution limited to the members of the Commission.

Rights had taken into consideration the specific nature of the instruments that they were mandated to enforce, but although that was understandable and justified, it was not a decisive argument in elaborating the draft guidelines. Moreover, nothing justified a treatment of human rights instruments as a separate case, because other treaties, such as disarmament treaties or treaties regulating the laws of armed conflict, were also of a specific nature.

40. The decisive factor was the intention of the State that was the author of an impermissible reservation, and she agreed with the statement by the Special Rapporteur in paragraph 189 [479] of his fifteenth report that “the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author”. She was in favour of referring all the draft guidelines to the Drafting Committee.

41. Mr. DUGARD, referring first to the section on invalid reservations, said that the Special Rapporteur began with an introduction that set out the problems arising from the failure of the Vienna Convention to contain any provision on the effects of invalid reservations. Draft guideline 4.5.1 (Nullity of an invalid reservation) was an obvious starting point for chapter IV, as was draft guideline 4.5.2 (Absence of legal effect of an impermissible reservation). The two draft guidelines laid the foundation for draft guideline 4.5.3, which was perhaps the most important provision of all and which dealt with the most controversial issue, one which had divided lawyers ever since 1994, when the Human Rights Committee had issued its General Comment No. 24.³⁰⁶ Draft guideline 4.5.3 contained a masterly compromise between the severability approach and the consent approach. The difficulty for the Special Rapporteur was that State practice was inconsistent, uncertain and confusing. It was uncertain in that the position of most States towards impermissible reservations, with the exception of the European and Latin American States, was unknown. In Europe and Latin America, the regional courts had given “super-maximum” effect to objections, but it was not clear what the attitude was of States in other regions. There was also uncertainty about the position of most reserving States as well as that of States which formulated objections, because they did not indicate what the consequences of those objections were. There were also inconsistencies because, as pointed out by the Special Rapporteur, States sometimes adopted both positions, as shown by the example of the Netherlands, cited in paragraphs 148 [438] and 161 [451] of the report. Those uncertainties and inconsistencies had created confusion, and the Special Rapporteur had cited the dissenting opinion of Judge Hersch Lauterpacht in the *Interhandel* case. That opinion had guided the thoughts of many jurists, but it must be borne in mind that the question at issue there had not concerned reservations to treaties but reservations to the optional clause on the compulsory jurisdiction of the ICJ, which, despite similarities, could not be described as a treaty.

42. The Special Rapporteur had found a compromise between severability and consent on the basis of

inconsistent and uncertain practice, to which he had probably given more credit than it deserved, and had also taken account of applicable principles and legal decisions. Thus, the notion the Special Rapporteur had adopted, that of a rebuttable presumption, was the right one: it allowed States that really did not wish to continue as parties to a treaty without their reservations to withdraw, and it set out a number of sensible factors that should be considered in connection with that presumption. In his own view, the presumption should stay as it was and should not be reversed. In 1997, when the debate had started,³⁰⁷ he had been a hardliner in favour of severability, but he now believed that the Special Rapporteur’s approach was correct. The Special Rapporteur had taken some time to reach that conclusion, having consulted with the treaty monitoring bodies and considered the position of States, and his solution accorded with the advisory opinion of the ICJ in *Reservations to the Convention on Genocide* in that it encouraged as many States as possible to remain parties to multilateral treaties. It was also in keeping with the spirit of the 1969 Vienna Convention, and he wholeheartedly agreed with draft guideline 4.5.3. He also endorsed draft guidelines 3.3.3 (Effect of unilateral acceptance of an invalid reservation) and 3.4.1 (Substantive validity of the acceptance of a reservation). Draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation) had little State practice to support it, and although the Special Rapporteur cited the debate in the League of Nations on the reservation of neutrality formulated by Switzerland, that was an ancient precedent which had arisen at a time when reservations to treaties had not been accepted. Nevertheless, draft guideline 3.3.4 was acceptable. He also agreed to draft guideline 4.5.4 (Reactions to an impermissible reservation), which gave effect to the judgment of the ICJ in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case and the judgement of the European Court of Human Rights in the *Loizidou* case. With regard to draft guideline 4.6 (Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author), he preferred the first option proposed by the Special Rapporteur, but could go along with the second one if necessary.

43. The last section, on the effects of interpretive declarations, approvals, oppositions, silence and reclassifications, enunciated interesting guidelines that concerned not only reservations to treaties but also the interpretation of treaties. He endorsed draft guidelines 4.7 (Effects of an interpretative declaration) and 4.7.4 (Effects of a conditional interpretative declaration), but was not quite sure about draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author) and agreed with the view of Bowett,³⁰⁸ set out in paragraph 256 [546], that States should not be bound by an interpretative declaration, as it was a question of law rather than a question of fact, and he wondered whether that was not a case for a presumption in favour of the State making such a declaration. Unfortunately, draft guideline 4.7.2 was framed in a rather categorical manner that did not allow for exceptions.

³⁰⁷ *Yearbook ... 1997*, vol. II (Part Two), chap. V, pp. 46–48, paras. 65–74.

³⁰⁸ D. W. Bowett, “Estoppel before international tribunals and its relation to acquiescence”, *BYBIL*, 1957, vol. 33, pp. 176–202.

³⁰⁶ See footnote 83 above.

44. He endorsed draft guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration), which simply gave effect to the general rule relating the interpretation of treaties, namely that treaties should be interpreted in the context of all relevant elements. He also agreed with draft guideline 4.7.3 (Effects of an interpretative declaration approved by all the contracting States and contracting organizations). In his opinion, all the draft guidelines contained in the two last sections under consideration should be referred to the Drafting Committee.

45. Mr. FOMBA, referring to the section on invalid reservations, said that he agreed with the points made in paragraphs 110 to 112 [400–402], namely that: the Vienna Conventions did not contain clear, specific rules concerning the effects of an impermissible reservation; the 1969 Vienna Convention had not frozen the law; that state of affairs did not mean, at the methodological level, that the Commission should enact legislation and create *ex nihilo* rules concerning the effects of a reservation that did not meet the criteria for permissibility; and State practice, international jurisprudence and doctrine could guide the Commission's work. During the debates on the question in 2006,³⁰⁹ he had argued with others that the nullity of an impermissible reservation was well founded, convincing and useful, and he continued to maintain that position of principle.

46. Draft guideline 3.3.3 did not pose any difficulties, and the point made in paragraph 199 [489] concerning its aim and its title was useful. As to draft guideline 3.3.4, he subscribed to the basic argument set out in paragraph 204 [494]. The wording was acceptable, and the second paragraph was important and useful in the framework of the reservations dialogue, which the Special Rapporteur had said would be the subject of a future report. Logically, the draft guideline should appear in Part 3 of the Guide, on the permissibility of reservations.

47. He endorsed the reasoning behind draft guideline 4.5.1, which was in line with his position in 2006. Its wording did not call for any particular comment. As to draft guideline 4.5.2, the distinction drawn in paragraph 130 [420] between nullity and the effects of nullity, which might seem somewhat difficult to grasp from a theoretical point of view, proved on closer analysis to be relevant and useful. Draft guideline 4.5.2 had a sufficient foundation in practice, and its wording did not pose any problem. For the sake of consistency, it could be inserted as a second paragraph of draft guideline 4.5.1, which it followed logically.

48. He agreed with the point made by the Special Rapporteur in paragraph 165 [455] to the effect that the principle of consent was the key to the problem. In paragraph 171 [461], the difference between the “normal” consequences and the “abnormal” consequences of an impermissible reservation was odd and difficult to apply, to say the least. He shared the doubts voiced by the Special Rapporteur in paragraph 176 [466] as to the nature of the presumption. Intellectually at any rate, it might very well mean one thing or the contrary: it might be presumed either that the treaty would enter into force or that it would not enter into force. The argument set out in

paragraph 181 [471] to the effect that a positive presumption could provide legal certainty was worth considering.

49. He endorsed the Special Rapporteur's recommendation in paragraph 182 [472] that the Commission support the idea of a relative and rebuttable presumption, because a positive presumption was consistent with the principle of consent and legal certainty. With regard to the criteria of intention, he agreed with the conclusion reached in paragraph 188 [478]. In that connection, the clarification provided in the following paragraph on the difference between a presumption and an objection with “super-maximum” effect was interesting and useful.

50. He approved the insertion in draft guideline 4.5.3 for the reasons explained by the Special Rapporteur. As to its title, the first alternative in square brackets could be retained, but since section 4.5 was entitled “Effects of an invalid reservation”, it was tempting, for the sake of consistency, to retain the second alternative, on the understanding that, in any case, the first paragraph dealt with the application of a treaty. At first glance, the first paragraph did not pose any problem; as to the second paragraph, the list of criteria was acceptable in that it defined the most relevant essential elements, its non-exhaustive nature having been clearly established by the words “including, *inter alia*”. As to the question of the date on which the treaty entered into force, the argument put forth in paragraph 192 [482] was pertinent and convincing.

51. Concerning reactions to an impermissible reservation, the analysis in paragraph 193 [483] of the dialectic or causal link between impermissibility, nullity and the absence of effect on the treaty was useful.

52. He agreed with the opinion expressed in paragraph 223 [513] on draft guideline 4.5.4. Paragraph 1 of that draft guideline was acceptable, as was paragraph 2, but a reference should perhaps be inserted at the end to the reservations dialogue; he therefore proposed that paragraph 2 should end with the words “in order to promote the reservations dialogue” (*afin de favoriser le dialogue réservataire*).

53. As to draft guideline 4.6, which simply repeated the wording of article 21, paragraph 2, of the 1969 and 1986 Vienna Conventions, he said that, to continue along the logic of the principle of consent and to make the point more completely and clearly, the draft guideline should provide for an exception to the principles set out in that joint provision of the Vienna Conventions by retaining the second alternative, in which case the square brackets would be removed.

54. Turning to the last section of the report, he said that the postulate according to which the effect of an interpretative declaration was essentially produced through the process of interpretation was correct, but there seemed to be a contradiction between the comment preceding the opinion of Mr. McRae,³¹⁰ cited in paragraph 247 [537], and the opinion itself. Moreover, it was surprising that the draft guidelines were not presented in a logical or chronological order.

³⁰⁹ Yearbook ... 2006, vol. I, 2890th meeting, p. 139, para. 10.

³¹⁰ D. M. McRae, “The legal effect of interpretative declarations”, BYBIL, 1978, vol. 49, pp. 155–173.

55. The wording of draft guideline 4.7 was acceptable and did not pose any particular problem.

56. The logic underlying draft guideline 4.7.1 was clear and relevant, its wording was acceptable and its structure was balanced; in its second sentence, the criteria for determining how much weight should be given to an interpretative declaration were very useful.

57. The basic substantive question in draft guideline 4.7.2 was how to reconcile the principles of consent and legal stability and certainty, on the one hand, with the limits posed on the principle of consent, on the other. At first glance, the draft guideline might seem acceptable, because it appeared to be based on a balanced application of the principle of good faith. However, in the course of the debate, it had given rise to a number of problems: Sir Michael had expressed serious doubts and had argued that the analysis in paragraphs 255 to 258 [545–548] was not convincing, and Mr. McRae had criticized the draft guideline for not being sufficiently nuanced and for producing distorted results. On closer examination, the scope of draft guideline 4.7.2 did not seem to be in line with that of draft guidelines 2.4.9 and 2.5.12 concerning modification and withdrawal of an interpretative declaration, respectively.

58. Draft guidelines 4.7.3 and 4.7.4 were both acceptable, the latter in that it proposed a clear answer to a long-standing unresolved question.

59. He was in favour of referring to the Drafting Committee all the draft guidelines in the sections of the fifteenth report on invalid reservations and effects of interpretative declarations, approvals, oppositions, silence and reclassifications. The proposal by Sir Michael to delete draft guideline 4.7.2 was too radical. Mr. McRae argued that it should be modified, and his proposal should be considered. The Special Rapporteur acknowledged that the criticism was well founded, but was opposed to the deletion of the draft guideline; for him, the solution would be to modify or limit its scope, as appropriate. That proposal was sensible and acceptable.

60. Mr. NOLTE said that he would focus in his comments on the most important question, namely whether there should be a positive or negative presumption with respect to the severability of an impermissible reservation from the consent of the reserving State to be bound by the treaty. Whereas he agreed with most of the Special Rapporteur's research and analysis, he was not fully persuaded by his conclusion of a positive presumption. One reason for his doubts had been articulated by Mr. Gaja and Sir Michael: the lack of an objective institution for most treaties for determining whether a reservation was actually contrary to the object and purpose of a treaty and was therefore impermissible.

61. He also wondered whether the logic of the human rights treaty bodies could be extended to the general law of treaties. After all, the reason why human rights treaty bodies had arrived at the conclusion that impermissible reservations were void and severable essentially lay in the special nature of human rights treaties. Such treaties had a double characteristic: they usually had a treaty body that

was able to a certain extent to make an objective determination, and they constituted an objective order of values or a special kind of community. Both characteristics spoke in favour of a presumption that a State which consented to be bound by them did not wish to make that consent dependent on the permissibility of its reservations.

62. However, most other treaties did not have that double characteristic of human rights treaties, which defined their nature. That was why he believed that the "nature of the treaty" should be included in any list of criteria for establishing whether a treaty was subject to a positive or negative presumption, as the Special Rapporteur suggested in paragraph 191 [481] of his report. A mere reference to "the object and purpose" of the treaty was insufficient. After all, a treaty might have different objects and purposes, and whereas the presence of an institution for an independent assessment was not always identified as being an essential part of the object and purpose of a treaty, it was clear that such an institution was an essential element that determined the nature of the treaty. He therefore proposed the inclusion of "the nature of the treaty" in any list which served to establish whether a positive or negative presumption of severability should apply. That would make it possible to carefully extend the positive presumption, as it was now recognized for human rights treaties, to other treaties of a similar nature, namely those treaties that protected other common goods or common values and where the permissibility of a reservation, in particular its compatibility with its object and purpose, could be determined objectively. Thus, referring to the nature of the treaty would have the advantage that neither a positive nor a negative presumption would be too strong, and it would leave some leeway for a differentiated development of practice.

63. Another important consideration which made him hesitate to accept a broad positive presumption was that it could have an inappropriate retroactive effect. Sir Michael had already hinted at that problem. A positive presumption that went beyond human rights treaties would be a new rule of international law, a progressive development. However, such a new rule should not necessarily be applied retroactively to reserving States, which could not reasonably expect that the rule would be applied to them. Indeed, the Special Rapporteur demonstrated in his report that the human rights treaty bodies had painstakingly explained, for example in the *Belilos* and *Loizidou* cases, why the reserving States had run the risk that their reservations would be considered to be severable from their consent to be bound by the treaty. Thus, if the Commission accepted that there was a positive presumption beyond human rights treaties, it should be made clear that this presumption did not apply retroactively.

64. A further reason for his doubts concerning a positive presumption had to do with the consequences that such a rule was likely to have in the reality of international relations. For example, if it was assumed that the positive presumption which the Special Rapporteur proposed now had already been adopted by the Commission in 1990, it was likely that the issue would have been raised in the United States during the ratification process, completed in 1992, of the International Covenant on Civil and Political Rights. Members of the United States Congress would probably

have insisted that the United States make it clear that its reservations were the conditions for its consent to be bound by the treaty. Such a clarification would have made it less likely that other States would have formulated objections to the permissibility of certain reservations made by the United States, as they had done. Thus, the effect of a positive presumption in that case would have been the opposite of what could have been expected, namely a more limited reservations dialogue and more reservations of doubtful permissibility which remained unchallenged because other States wanted the United States to be bound by that human rights treaty. In such a situation, a treaty body would have less *opinio juris* to rely on for a possible conclusion that the reservation was impermissible. He wondered whether such bodies always had enough authority to declare a reservation to be impermissible without the support of other States. In any event, such bodies would probably hesitate to declare a reservation impermissible if the reserving State had made it clear that its consent to be bound by the treaty was dependent on the reservation.

65. On the other hand, a positive presumption would probably have the opposite effect on States whose legislature was less determined than the one in the United States and which were more inclined, for various reasons, to accede to certain treaties. Such States would hesitate to expressly formulate the condition that their consent to be bound was dependent on their reservations. A positive presumption might incite other States to formulate objections, thus casting even more doubt on the validity of the reservations concerned. A positive presumption might have the—clearly unintended—effect of privileging powerful States and putting weak States under additional pressure. It would also raise the problem for independent decision makers and third parties of how to apply equal standards with respect to similar reservations, some of which were expressly considered to be conditions for consent to be bound, whereas others were not. A negative presumption had the virtue of not forcing such a question to be answered immediately and of leaving the situation somewhat ambiguous so that the reservations dialogue had time to resolve differences without an immediate confrontation.

66. He was aware that some of his arguments were not purely doctrinal, but since the Commission was confronted with the question of whether it should engage in progressive development, or at least in progressive clarification, it should also consider the consequences of a rule that seemed seductive for lawyers, with their inclination to favour legal security, and for international lawyers, who were inclined to promote the progressive development of international law by moving from subjective assessments by individual States to objective determinations by independent third party decision makers. He shared both inclinations, but cautioned against overburdening the consent of States to be bound by a treaty with “objective” considerations. Although he shared the Special Rapporteur’s declared intention to find a middle way between the two approaches, he thought that a true middle way would be to refer mainly to the “nature of the treaty” and to leave open the possibility of further development.

67. He agreed with Mr. Gaja and Sir Michael that draft guideline 4.7.2 went too far in formalizing a binding effect of an interpretative declaration. In his view, draft

guideline 4.7.2 was inconsistent with the limited effects which the Special Rapporteur attributed to interpretative declarations compared to reservations.

68. Mr. CANDIOTI said that it was not the task of the Commission to consider whether the rule set out in draft guideline 4.5.3 was retroactive. In the framework of its work on reservations to treaties, the Commission was not codifying rules of international law, nor was it promoting progressive development: it was enunciating guidelines, in other words, non-binding rules (“soft law”). It should be borne in mind that its objective was to produce a Guide to Practice.

69. Mr. MELESCANU said that with the fifteenth report on reservations to treaties, the Commission was at the heart of the matter. The previous reports had focused more on the development, clarification and drafting of guidelines based on the more or less explicit rules of the 1969 and 1986 Vienna Conventions. As these Conventions were silent on the questions under consideration, the aim at present was to elaborate rules—or rather guidelines, as noted by Mr. Candiotti.

70. With regard to the effects of the nullity of the reservation on the consent of its author to be bound by the treaty, two alternatives were open to the Special Rapporteur: either severability of the impermissible reservation from the consent to be bound by the treaty, or the idea that if reservations were deemed incompatible with the object and purpose of the treaty, the consent of the reserving State was not valid, and that State was not party to the international instrument. The report had provided an impressive amount of information on those questions drawn from international practice: declarations of States, treaty provisions, decisions of international bodies and opinions of experts, all of which were arguments for or against one of the two options. Without favouring one or the other, the Special Rapporteur proposed a pragmatic approach by setting out a relative and rebuttable presumption according to which, in the absence of a contrary intention of the party concerned, the treaty applied to the State or the international organization that was the author of the impermissible reservation, notwithstanding the reservation. In that connection, the double compromise proposed by Mr. Nolte did not seem to be appropriate for a Guide to Practice, which must be pragmatic and functional. It would be preferable to retain the ingenious procedural solution proposed by the Special Rapporteur. Draft guideline 4.5.3 could be referred to the Drafting Committee and finalized on the basis of the text proposed in paragraph 191 [481] of the report.

71. With regard to draft guideline 4.7.2, he fully agreed that an interpretative declaration was a unilateral declaration expressing its author’s intention to accept a certain interpretation of the treaty or its provisions. In conformity with the principle of good faith, the expectation that the depositary had created with the other contracting parties must be respected. However, nothing prevented a sovereign State from changing its position, provided that it did so following the rules enunciated in the Guide to Practice. In view of the above, he proposed the insertion, at the end of draft guideline 4.7.2, of the following phrase: “until after officially withdrawing or modifying it in conformity with

draft guidelines 2.4.9 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of an interpretative declaration)” [qu’après l’avoir officiellement retirée ou modifiée en conformité avec les directives 2.4.9 (Modification d’une déclaration interprétative) et 2.5.12 (Retrait d’une déclaration interprétative)]. Finally, he agreed that draft guideline 4.7.1 was necessary, even more so since the judgment rendered by the ICJ in the *Maritime Delimitation in the Black Sea* case, which was not consistent with the logic of the Commission’s work on guidelines for reservations. An interpretative declaration must be assessed taking due account of the approval of and opposition to it by the other contracting parties. For that reason, it was absolutely scandalous to affirm, as the Court had done in that case, that an interpretative declaration had no effect on the interpretation of the Court. That was tantamount to depriving interpretative declarations of any usefulness. He was in favour of referring to the Drafting Committee the draft guidelines contained in the sections of the report on invalid reservations and effects of interpretive declarations, approvals, oppositions, silence and reclassifications.

72. Mr. KAMTO commended the Special Rapporteur for the excellent quality of the last sections of his fifteenth report on reservations to treaties; they did not pose any particular problem. He had just a few brief comments, essentially concerning draft guideline 4.5.3 and draft guideline 3.3.4. Draft guideline 4.5.3 introduced a particularly important rule in terms of its legal consequences. Although it did not give rise to any scientific objection, he agreed with those members who had contested the conclusions stemming from the theory of severability. In the area of treaties, it was the expression of consent to be bound that formed the basis of a State’s commitment or obligation. However, the wording of draft guideline 4.5.3 clearly showed that the assessment of the validity of the reservation and thus of its nullity depended on the other States parties or a competent third body. The other States could infer from that assessment that, as the contrary intention of the reserving State had not been established, the treaty was applicable to it in its entirety, notwithstanding its reservation; that would be a source of conflict.

73. However, even if the reservation was impermissible, it could not be ignored that at the time that it was formulated by the reserving State, the latter considered it to be permissible and that in any case the reservation was the condition of its consent to be bound by the treaty. The risk of the instability of the treaty could not be allowed to prevail over what constituted the cornerstone, the very basis of the existence of the treaty, namely the consent of the State to be bound. There was, of course, the safety net of the contrary intention, but who better than the author could determine its intention in a particular case? The safety net could be strengthened by modifying the phrase at the end of draft guideline 4.5.3 to read: “unless a contrary intention is affirmed by the reserving State or established by a competent body” [sauf si l’intention contraire est affirmée par l’État auteur de la réserve ou établie par une instance compétente]. That would rule out a self-assessment, and a third body would intervene in the event of a challenge. However, it was also conceivable—to continue in the logic of the foundation of treaty law, which was the expression of consent to be bound rather than self-assessment—that another State party to

the treaty might ask the reserving State whether that was in fact its intention and, if the reserving State declined to reply or in the event of a challenge, that other State might request that the matter be referred to an impartial body.

74. With regard to draft guideline 3.3.4, he noted that the title referred to acceptance, but the content had more to do with the formulation of a reservation. To bring the content into line with the title, he proposed that the draft guideline be amended to read:

“A reservation formulated by a State or an international organization that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose is deemed to be valid if none of the other contracting States or contracting organizations objects to it after having been expressly consulted by the depositary.” [Une réserve interdite expressément ou implicitement par le traité, ou incompatible avec son objet et son but, formulée par un État ou une organisation internationale, est réputée valide si aucun des États contractants ou organisations contractantes n’y fait objection après consultation expresse par le dépositaire.]

75. Mr. HMOUD said that the last two sections of the fifteenth report on reservations to treaties were well researched. They detailed the history of the Vienna Conventions and scholarly work on the effects of invalid reservations and on interpretative declarations and provided practical and intellectually consistent draft guidelines. With the conclusion of consideration of those two questions, the Guide to Practice would be nearly finalized. It would be useful to governments, international organizations, lawyers and all those involved in elaborating and applying treaties. The Guide would clarify the rules of treaty reservations and assist in overcoming uncertainties.

76. It was clear from the *travaux préparatoires* of the Vienna Conventions (implicitly) that the Commission and the drafters had been unable to make a decision on the effects of invalid reservations. That was not surprising, given that the implementation of treaty relations had always been—and still was—dependent on the parties to the treaty themselves and not on a dispute settlement body for assessing the validity of a reservation. The parties themselves decided how to treat an invalid reservation in their treaty relations, including the effect that such a reservation had on the reserving State’s consent to be bound by the treaty. The silence of the Vienna Conventions on that point had led to divergent practice among States and international organizations, including the depositaries, with significant practical consequences. Objections with “super-maximum” effect had developed as a tool to deal with such reservations, even when the reservation was not actually against the object and purpose of the treaty or when the objecting State decided to determine what it considered to be the treaty’s object and purpose.

77. Treaty monitoring bodies were totally dependent on the concept of invalid reservation in dealing with reservations, insofar as the reserving State was left with no option but to accept that it was bound by the treaty without the benefit of its reservations and the Vienna Conventions strictly limited the possibility of withdrawal. The

principle of consent was central to treaty relations: the fact that reservations were only allowed when the reserving State consented to be bound by the treaty clearly showed that the reservation was an integral part of the notification by that State of such consent. That was a condition for the reserving State's acceptance of the treaty. The State should not be compelled to be bound by the treaty if it could not benefit from its reservation. At the same time, the stability of treaty relations required that, in the case of an invalid reservation, withdrawal from the treaty should not be encouraged. There was no easy solution to the problem; establishing a presumption of the consent of the reserving State to be bound by the treaty without the benefit of its invalid reservation was insufficient.

78. Addressing the problem was primarily a matter of policy. Putting forward concrete arguments, the Special Rapporteur proposed to act on the rebuttable presumption that a State had consented to be bound without the benefit of its reservations. However, that solution, although generally neutral, only reflected the position of some States and international organizations. According to the practice of other States and depositaries as well as judicial pronouncements at variance with that approach, the invalidity or invalidation of the reservation undermined the consent of the State to be bound by the treaty. It was one thing to read into the common intention of the drafters when interpreting a treaty, and another to read into the presumed intention of a single State. The consent to be bound, with or without the benefit of the reservation, was a matter that should be left for the reserving State to decide, not for a body which it had not entrusted with interpreting its will and certainly not for the other States parties to the treaty.

79. With the inherent difficulty of interpreting the presumed intention of the State, resort would be more frequent to elements unrelated to the will of the State, such as the nature of the treaty and its object and purpose, in other words criteria taken into consideration in draft guideline 4.5.3 to determine whether the reserving State intended to be bound by a treaty without the benefit of its reservation. Those criteria were based on the pronouncements of certain treaty bodies which seemed to place emphasis on the nature of the treaty rather than on the intention of the author of the reservation. According to the presumption retained by the Special Rapporteur, a reserving State would be deemed to have accepted to be bound by a treaty unless it demonstrated otherwise; that would place it at an untenable disadvantage if its reservation was not in conformity with the object and purpose of the treaty. Although the Special Rapporteur argued that the presumption of consent to be bound of the State that was the author of the invalid reservation was not meant to encourage the practice of objections with "super-maximum" effect, it actually did, because States and bodies which resorted to it would have no reason not to do so.

80. That could be avoided by not making any presumption, one way or the other, and by determining the reserving State's intention on the basis of a set of criteria, including most of those listed in draft guideline 4.5.3. It should be stressed that the issue of the State's intention would not arise unless there was a dispute concerning the validity of a reservation, and provided that a body existed to interpret the will of that State. Such a body would interpret the

intention of the reserving State without proceeding from any presumption, but rather on the basis of the relevant criteria, such as the reserving State's acts in relation to its reservation, its declarations and its reactions, or lack thereof, to objections with "super-maximum" effect, or its practice with other treaties to which it had formulated similar reservations. If the body was not entrusted with interpreting the will of the State, it could only make a pronouncement on the validity of the reservation, not on the consent to be bound without the benefit of the reservation. In such a case, and with a view to promoting progressive development, the Commission could propose that a State whose reservation was declared invalid by a competent body was under an obligation to indicate, within a certain period of time, whether it intended to be bound by the treaty with or without the benefit of its reservation. That clarification would be taken into account by the other parties to the treaty, which could determine their treaty relations with that State accordingly.

81. The presumption enunciated in draft guideline 4.5.3 did not add much to the stability of treaty relations, because a reserving State could still show that it had intended to be bound by a treaty without the benefit of its reservation. In such a case, the treaty relations between that State and the other parties, from the moment it became a party until the moment it declared that its consent to be bound did not exist, would still be void, with all the undesired consequences that this entailed. The suggestion not to make a presumption but to determine the will of the reserving State on the basis of a set of criteria would not make much difference in terms of treaty stability if the consent to be bound was found to be contingent on the benefit of an invalid reservation. However, that option had the advantage of preserving the principle of consent in treaty relations. It did not privilege either the defence of the principle of severability of an invalid reservation from the reserving State's consent, or the argument that the invalid reservation was part of consent. If one purpose of the positive presumption was to encourage the reserving State to clarify its position on its consent to be bound once its reservation had been objected to or had been considered invalid, that would be achieved without the presumption by using the criterion of intention, which took into account the State's subsequent practice, its reactions to objections and its declarations. The proposed approach also encouraged the reservations dialogue, as the reserving State would have an interest in clarifying whether or not it consented to be bound by the treaty with or without the benefit of its reservation. Instead of treating all cases with one hypothetical solution until proof of the contrary, as was done with positive presumption, the proposed approach differentiated from the outset between different situations involving reservations.

82. In any event, if the Commission wanted to retain positive presumption, it should also consider granting the State whose reservation had been declared invalid by a treaty body the right to withdraw from the treaty. Withdrawal was limited under article 56 of the Vienna Conventions which, as had been seen, did not cover the effects of invalid reservations. Accordingly, it could not be argued that such a right was inconsistent with those instruments. The right to withdraw would definitely counterbalance the effect that positive presumption had on many treaty

regimes. It should also be noted that the object and purpose of the treaty was not an element that was independent of the reserving State's intention, and for the reasons explained earlier, it should not be used to judge intention. The intention of the State should be deduced from its conduct, its pronouncements and its acts, not from a regime that was distinct from its personality.

83. He had two brief points to make on the last section of the report. With regard to draft guideline 4.7.4 (Effects of a conditional interpretative declaration), he agreed that such declarations were reservations in terms of their effects and that draft guidelines 4.1 to 4.6 applied to them, with the exception, in his view, of draft guideline 4.5.3. Clearly, a State that formulated a conditional interpretative declaration was making its intention to be bound by the treaty conditional upon a certain interpretation of that treaty. If, for whatever reason, that interpretation was invalid, it could not be said that the State was deemed to be bound by the treaty of its own will or that a set of criteria must be applied to determine its intention. That intention had been clear from the outset, when it had formulated its interpretation: not to be bound without the benefit of its declaration. That was not a matter of acceptance by other States, but a condition for consent which, by its nature, undermined such consent.

84. On the validity of an interpretative declaration in respect of its author, it seemed logical that when a State was granted the right to modify or withdraw an interpretative declaration (draft guidelines 2.4.9 and 2.5.12), it had the right to invoke a contrary interpretation, provided that this right was not unrestricted. He did not see why the Commission should not adopt the approach taken in the 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,³¹¹ namely that the right to revoke a declaration was a function of the extent to which the other parties relied on the declaration. He therefore supported Mr. McRae's suggestion to amend the draft guideline concerned and to provide that the author of the declaration or the party approving it could not invoke a contrary interpretation *vis-à-vis* the party that had relied on it in its treaty relations with the interpreting State. He recommended that the draft guidelines should be referred to the Drafting Committee, pending a decision by the Commission on how to proceed with the content of draft guideline 4.5.3.

The meeting rose at 12.55 p.m.

3067th MEETING

Tuesday, 20 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, 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. Wako, Sir Michael Wood.

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

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the last two sections of the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2).

2. Mr. VÁZQUEZ-BERMÚDEZ said that, in general, he endorsed the pragmatic and sound solutions proposed by the Special Rapporteur in the draft guidelines contained in the last two sections of his fifteenth report.

3. With reference to the section on invalid reservations, he endorsed the basic thrust of draft guidelines 4.5.1 and 4.5.2, which, as the Special Rapporteur had demonstrated, were supported by international jurisprudence and practice. He would suggest that the two draft guidelines be merged under the title "Nullity and absence of legal effects of an invalid reservation". The text of the new draft guideline might read:

"A reservation that does not meet the conditions of formal validity and permissibility set out in Parts II and III of the Guide to Practice is null and void and is therefore devoid of legal effects."

Furthermore, since the current title of section 4.5 of the Guide to Practice (Effects of an invalid reservation) seemed to contradict the content of the subsequent draft guidelines, which said that an invalid reservation had no effects, the title "Consequences of an invalid reservation" would be more appropriate. In connection with the material in this section, it should be recalled that the Commission had already adopted guideline 3.2 on assessment of the permissibility of reservations and paragraph (1) of the commentary thereto.

4. Following 15 years of in-depth analysis, during which time there had been important developments in jurisprudence and practice, the Special Rapporteur presented the Commission with draft guideline 4.5.4 (Reactions to an impermissible reservation) concerning treaty relations between the author of an invalid reservation and other contracting parties—a complex and important subject on which the 1969 and 1986 Vienna Conventions were silent. After a detailed and well-argued presentation of the facts, the Special Rapporteur proposed a solution, which he referred to as a middle ground between two irreconcilable positions: viewing the author of the invalid reservation as a contracting party without the benefit of the reservation or viewing the reservation as a condition *sine qua non* for

³¹¹ *Yearbook ... 2006*, vol. II (Part Two), p. 161, para. 176.

the reserving State's consent to be bound by the treaty, so that, if the condition was invalid, there was no consent on the part of the author.

5. The solution proposed by the Special Rapporteur in draft guideline 4.5.3 was to establish a presumption, that the treaty—when it entered into force—would apply in its entirety to the author of the reservation, unless a contrary intention of the author was established. The Special Rapporteur's proposal seemed to be reasonable: it upheld the basic principle of consent to be bound, since it focused on the intention of the author. Furthermore, it contributed towards legal certainty and should help to promote a reservations dialogue. He supported the proposal to add a reference to the nature of the treaty to the list of factors for determining the intention of the author. He also agreed that the nullity of an invalid reservation did not depend on acceptance of or objection to it, as indicated in draft guideline 4.5.4. He preferred the first version of draft guideline 4.6 (Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author), which did not allow for exception and reproduced the text of article 21, paragraph 2, of the Vienna Conventions.

6. He endorsed the basic thrust of the draft guidelines contained in the section of the report on effects of interpretive declarations, approvals, oppositions, silence and reclassifications, particularly since the Special Rapporteur had already said that he agreed with the criticisms of draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author). He was in favour of referring all the draft guidelines proposed in the two last sections of the report to the Drafting Committee.

7. Mr. PELLET (Special Rapporteur), summing up the debate on the last two sections of his fifteenth report, said that, as the Commission attempted to adopt the Guide to Practice on first reading, it was paradoxical and frustrating to reach the end of the long saga and to be pressed for time. However, the sense of urgency had obliged Commission members to focus clearly on two essential points: the advisability of establishing a presumption to fill the gap in the Vienna Conventions concerning the consequences of the invalidity of a reservation and the criticism surrounding draft guideline 4.7.2, the wording of which was admittedly too radical. Apart from those two stumbling blocks, his general approach in the two sections had met with unanimous approval, with one important exception.

8. There were six main steps in the reasoning set forth in the section on invalid reservations regarding the effects (or consequences, as had just been suggested) of the nullity of an invalid reservation. First, there was a need to fill the gap in the Vienna Conventions on the matter. In that connection, he thanked the Commission member who had pointed out that most late objections to reservations deemed invalid confirmed that the effects of such reservations were not covered by the Vienna Conventions. Second, in the absence of clear practice, it was up to the Commission to fill the gap. Third, the Commission should be guided, as far as possible, by the principle of consent—in other words, the intention of the author of the reservation was the crux of the matter. Fourth, since there was no magic recipe for determining the intention of the author

of the reservation, it could only be done by reference to a set of factors. Unless he was mistaken, his reasoning up to that point had not been challenged.

9. Fifth, since there was no guarantee that the intention of the author of the reservation could be determined, even with a broad range of factors on which to base it, it was necessary to establish a presumption, either that the author of the reservation was not bound by the treaty in question (negative presumption), or that the author was bound by the treaty in its entirety without the benefit of the reservation (positive presumption). Sixth, for both logical and practical reasons, he proposed that the Commission opt for the positive presumption, given that it was eminently rebuttable and would be applied only if the real intention of the author of the reservation could not be established.

10. The fifth step in his reasoning—the need to establish a presumption—had been challenged by only two or three Commission members. According to Mr. Gaja, draft guidelines 4.5.1 (Nullity of an invalid reservation) and 4.5.2 (Absence of legal effect of an impermissible reservation) were too categorical: the nullity of invalid reservations and their absence of effects could not be corroborated unless the question of validity was assessed by an independent body competent to decide on the matter. In the absence of such a mechanism, it was for each contracting party to decide, and the reservation would be null and void only for those parties which considered it so.

11. He could not accept the generalized relativism resulting from such a position, since it would undermine all the work that had led to what he had understood to be the Commission's consensus on a crucial point, namely that a reservation was valid or invalid irrespective of the stance taken by individual parties towards it and that the nullity of the reservation must therefore be determined, not subjectively or relatively, but objectively. The reactions of the other parties were not unimportant, but that question was addressed in the set of draft guidelines under section 4.3 (Effect of an objection to a valid reservation), which had already been adopted. As Special Rapporteur, he did not have the right to veto a particular position, but if the Commission did adopt such a position, all his efforts to promote a coherent and rational approach would be undermined. The whole point of the exercise was to guide practice, not to give contracting parties *carte blanche* to take any stance whatsoever on the validity of reservations.

12. For the sake of intellectual honesty, he would read out Mr. Gaja's proposal for the text of guideline 4.5.2:

“An invalid reservation does not produce the effects intended by its author. However, a State or international organization party to the treaty may consider that the treaty should apply with benefit of the reservation in its treaty relations with the author of the reservation.”

Such a proposal was not possible unless the Commission wished to introduce the generalized intersubjectivity against which he had battled for some years, and which was not compatible with article 19 of the Vienna Conventions and several of the guidelines already adopted. Fortunately, Mr. Gaja's proposal had not been taken up by others, and although he was willing to mention it in

the commentaries to draft guidelines 4.5.1 and 4.5.2, he hoped that it would not receive the Commission's support. If there was any doubt in that regard, which for the time being did not seem to be the case, he would ask for the proposal to be put to the vote.

13. The statements by the other two members had, to some extent, been along similar lines. Challenging the need for a presumption, they considered that, in accordance with the principle of consent, it was for the author of reservation to decide on the matter. Accordingly, one of those two members had proposed that the phrase "unless the contrary intention is clearly stated by the author of the reservation or by a competent body" should be added to the end of draft guideline 4.5.3. He had no particular problem with the reference to a competent body, although it would not be acceptable in isolation because it would lead to the same pitfalls as Mr. Gaja's proposal. The problem was when exactly the author of the reservation should state its intention. If it was at the time of formulating or drafting the reservation, that would be acceptable and consistent with his own proposals; however, it would be a different matter if the intention was stated after the dispute had arisen. In that connection, he referred the Commission to the reasoning of the European Court of Human Rights in its judgement in the *Loizidou* case.

14. According to the more fully developed statement of the "extreme consensualist" position, if after a series of tests, which should be more comprehensive than those proposed in draft guideline 4.5.3, an independent body declared the reservation to be null and void, the matter should be held in abeyance to give the author time to clarify its position, which was a means of encouraging the reservations dialogue.

15. He was less alarmed by that proposal than by Mr. Gaja's; indeed, he had made a proposal along similar lines in his second report,³¹² which had led in 1997 to the adoption of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.³¹³ However, that was done long ago, before the Commission's lengthy dialogue with the human rights bodies and his realization that a reasonable intermediate solution based on a presumption was possible. Furthermore, as he had stated in his introduction to the fifteenth report, while such a solution was not unthinkable *de lege ferenda*, it would give rise to serious problems in practice. He was especially reluctant to pursue such a solution because it went beyond the scope of what one would expect of a non-binding instrument like the Guide to Practice. He wondered what the legal basis for a decision by an international court or tribunal would be. It would not constitute progressive development of the law, but rather international law-making *ex nihilo*.

16. For the same reason, although he was rather attracted by the idea of making the conditions for withdrawing from a treaty more flexible in the case of invalid reservations, he was not in favour of its adoption. It could be argued that since the Vienna Conventions were silent on the matter, the Commission was allowed to set

up new mechanisms. However, it would be working without any safety net; it could not invoke any precedents; in fact, there was ample practice to the contrary. Moreover, it would entail the Commission's moving very far from the law on reservations to treaties into other realms of treaty law and adding a codicil to article 56 of the Vienna Conventions, which would seem to exceed its mandate.

17. Setting aside those extreme, albeit interesting, theories, which had not garnered support, the plenary Commission must decide two questions of principle: whether a presumption was necessary and, in the affirmative, whether it would choose the positive presumption that he recommended or the negative presumption favoured by some other members.

18. With respect to the first question, with the exception of three members, whose views he hoped he had described accurately, the principle of establishing a presumption had met with general approval. In the opinion of another member, the best solution would be not to adopt any position at all, but to supplement the list of factors or criteria for determining the intention of the author of the reservation and to allow practice to develop by leaving the matter open. Frankly, by avoiding the issue in that way the Commission would be shirking its responsibilities.

19. If it was agreed that the Commission would assume its responsibilities, the question remained as to whether the presumption should be negative or positive. As one member, whose very nuanced statement had been a brilliant balancing act, had commented, it was "easier to state the options than to choose between them". The arguments put forward by various speakers in favour of one or other presumption were by and large the same. Those in favour of the negative presumption (that the author of an invalid reservation was not bound by the treaty in the absence of a contrary intention) claimed that it was the only one in keeping with the principle of consent. Those in favour of the positive presumption (that the author of an invalid reservation was bound by the treaty without the benefit of the reservation in the absence of a contrary intention) argued that the negative presumption ignored the equally important fact that, even though the party concerned had formulated a reservation, it had intended to be bound by the treaty.

20. Moreover, giving full effect to the author's intent did not mean allowing it to do anything it pleased. A treaty was not valid if it was contrary to *jus cogens* or if it met one of the conditions for invalidity laid down in the Vienna Conventions, and a treaty reflected the intention of at least two parties. There was no reason why the situation should be different for an invalid reservation—a unilateral act, moreover, attached to the treaty, which could be detached. Both the supporters of the positive presumption and the supporters of the negative one asserted that the presumption they favoured encouraged the reservations dialogue and invoked elements of practice to prove it. Objectively, in terms of significant practice, the point should be awarded to the advocates of the positive presumption. Not only was the practice of the human rights treaty bodies well established along those lines, but, as had been rightly observed during the debate, objections with "super-maximum" effect, which were increasingly common, had never been challenged in principle. In that

³¹² See footnote 107 above.

³¹³ See footnote 108 above.

regard he had taken due note of an older example of practice than the ones he had given in the fifteenth report, namely the objections by the United Kingdom to some reservations to the Geneva Conventions for the protection of war victims.

21. Both camps had cited the practical advantages offered by their preferred solution from the standpoint of legal certainty and the stability of treaty relations. Yet he had great difficulty in understanding how the negative presumption could be presented as contributing towards those aims. For example, a treaty to which an invalid reservation had been formulated might have been applied for 100 years until one day a problem arose and the reservation was declared invalid by a competent body. It seemed self-evident that the negative presumption, which would necessitate reviewing 100 years of treaty practice, would be considerably more destabilizing than the positive presumption, which might only require an examination of the possible effects produced by the reservation. Contrary to what one rather too conciliatory colleague had said, the match was not a draw, even in purely technical terms. He still believed that the positive presumption had much more to recommend it than the negative one, particularly since, by choosing the positive presumption, the Commission would be working towards the progressive development of the law, which would allow it to take considerations of timeliness into account, as one of his main critics had recognized. Moreover, for reasons of pragmatism, ideological and doctrinal harmony and general acceptability, the positive presumption was the more favourable solution. He would stress that it was a rebuttable presumption, provided that one could determine the contrary intention of the author of the reservation, even in the absence of a specific declaration to that effect.

22. He fully shared the views expressed by one member on the retroactive application of the “rules” contained in the Guide to Practice and the presumption that would be adopted by the plenary Commission. As had been explained, the Commission’s guidelines were not rules to be applied in the future (still less retroactively) with regard to reservations. As indicated by its title, the Guide to Practice was not a legally binding instrument; it was intended to provide guidance to decision makers, not to replace them. He recalled that the Commission had already discussed the possibility of drafting a protocol to the Vienna Conventions³¹⁴ and had dismissed it.³¹⁵ He did hope that the Guide would help to strengthen or reshape certain practices, but he had no further ambition for it. If a judge found that the presumption should not be applied for one reason or another, that position would prevail.

23. Turning to various comments on points of detail in the section on invalid reservations, he said that, apart from Mr. Gaja’s proposed amendment to draft guideline 4.5.2, draft guidelines 4.5.1 and 4.5.2 had not been the subject of major criticism. On the contrary, a number of speakers had emphasized their usefulness as a basis for what followed. He had no objection to the proposal to merge the two guidelines, which, however, should be left to the Drafting Committee to decide.

24. Regarding the proposal to add a reference to the nature of the treaty to the list of factors in the second paragraph of draft guideline 4.5.3, he was surprised at the attempts by some members to reintroduce a distinction concerning the nature of treaties, particularly human rights treaties, when it had been agreed some considerable time previously that such a distinction was not appropriate in the context of the rules on reservations. The Commission was not in the process of discussing human rights treaties as such, although the practice of the treaty bodies should be taken into consideration. That said, since there had been support for the proposal, he would not oppose it, if the majority of the Drafting Committee was in favour. Personally, he was not in favour of the proposal for two reasons: adding a reference to the nature of the treaty in a sentence that already referred to the object and purpose of the treaty would do nothing to clarify the different concepts; and he objected to the idea of the nature of the treaty being introduced surreptitiously into the text.

25. Draft guidelines 4.5.4 (Reactions to an impermissible reservation) and 3.3.3 (Effect of unilateral acceptance of an invalid reservation) had elicited few comments. He was not keen on the idea of including a reference to promoting the reservations dialogue in draft guideline 4.5.4, since he intended to submit to the sixty-third session, in addition to the revised and consolidated version of the Guide to Practice, a report dealing with the reservations dialogue, which would probably conclude with a proposal to add an annex to the Guide on the subject.

26. In connection with draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he had been reproached for referring to the case of the accession of Switzerland to the League of Nations in paragraph 206 [para. 496]. While he had given that example for want of something better, he maintained that it was a relevant one, since the reservation by Switzerland regarding its neutrality had clearly been contrary to the Covenant of the League of Nations, which prohibited reservations. The unanimous acceptance of the reservation had therefore neutralized its impermissibility. He had no difficulty with the proposal to replace the words “may be formulated” by the words “is deemed permissible”, which could be considered by the Drafting Committee.

27. Only two members had referred to draft guideline 4.6 (Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author), each one stating a slight preference for a different version, but also a willingness to be accommodating in that regard. The choice could be left to the Drafting Committee.

28. Turning to the section of the fifteenth report which examined the legal effects of interpretative declarations and possible reactions to them, he noted that, with the exception of draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author), there had been little comment on the draft guidelines that he had proposed. He did not interpret that silence as complete approval, but more as an indication that, if there were any objections, they were editorial in nature and were a matter for the Drafting Committee, not for plenary debate.

³¹⁴ *Yearbook ... 1995*, vol. II (Part Two), p. 102, para. 431.

³¹⁵ *Ibid.*, p. 108, para. 487 (b) and (d).

29. In connection with draft guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration), while the Commission should not speak ill of the judges of the ICJ (especially as they had issued what was on the whole a noteworthy judgment), their treatment of the declaration by Romania in the case concerning *Maritime Delimitation in the Black Sea* was, if not outrageous, at least extremely cavalier and unconvincing.

30. As he had indicated at the beginning of the debate on draft guideline 4.7.2, he regarded the almost unanimous criticism of that draft article as well-founded, because its wording was too radical and too sweeping. There was therefore good reason to thoroughly amend the draft guideline, but not to abandon it completely, the solution proposed by one speaker. Another member had proposed an alternative text which read:

“The author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in its declaration until it has officially withdrawn or amended it in conformity with guidelines 2.4.9 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of an interpretative declaration).”

31. That wording seemed to be consistent with the wishes of all the members who had spoken on that point, for the two guidelines in question offered ample opportunity for withdrawal or modification. He would not, however, have any objection to firmer wording. In that context, the Commission could also base itself on the tenth of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which it had adopted in 2006.³¹⁶ That principle was designed to prevent the arbitrary revocation of such declarations, especially when the declaration in question had led its addressees to rely on it.

32. In the light of the foregoing, he requested the members of the Commission to refer to the Drafting Committee draft guidelines 4.7 (Effects of an interpretative declaration), 4.7.1, 4.7.2 (which the Committee should be instructed to revise in accordance with the considerations which he had just outlined) and 4.7.3 (Effects of an interpretative declaration approved by all the contracting States and contracting organizations). At the end of his presentation, he had not suggested the referral of draft guideline 4.7.4 (Effects of a conditional interpretative declaration) and he still thought that it would serve little purpose. The draft guideline simply noted that, as far as their effects were concerned, conditional interpretative declarations were governed by the same legal rules as reservations. The Commission had agreed at the outset that the equivalence of legal rules governing all aspects of the topic covered in the Guide to Practice would be recorded in a single guideline. He therefore saw no point in wasting precious time discussing the precise wording of that draft guideline, which would quickly be put in square brackets and deleted the following year. However, he would not throw himself into Lake Geneva if members insisted on referring draft guideline 4.7.4 to the Drafting Committee.

33. Since no one had objected to the referral to the Drafting Committee of draft guidelines 3.3.3, 3.3.4, 4.5.1 to 4.5.4 and 4.6, doing so was probably a mere formality, although, as he had pointed out, some of those guidelines raised matters of principle that should not be left to the Drafting Committee to resolve, because they went far beyond mere editorial issues. Since only a minority of members had opposed draft guidelines 4.5.1, 4.5.2 and 4.5.3, the Commission could send them to the Drafting Committee and ask it to improve their wording without altering their substance or main thrust. If some members disagreed with that suggestion, he reserved the right to request an indicative or formal vote, because it was essential that the Commission meeting in plenary session take the responsibility for deciding such crucial questions. He wished to make it clear that he was not requesting a vote, as long as it was understood that referral of those guidelines to the Drafting Committee meant that it should retain their original thrust and in particular the positive rebuttable presumption contained in draft guideline 4.5.3.

34. Mr. HMOUD said that he did not object to the setting forth of a positive presumption in draft guideline 4.5.3, although he had proposed that no presumption be established and that reference be made only to the factors for determining the author's intention which were listed by the Special Rapporteur in that draft guideline. He noted that the Special Rapporteur was not opposed to his proposal concerning the withdrawal option and he therefore hoped that the Drafting Committee would discuss it.

35. The CHAIRPERSON said that he took it that the Commission wished to refer draft guidelines 3.3.3, 3.3.4, 4.5.1, 4.5.2, 4.5.3, 4.5.4, 4.6, 4.7, 4.7.1, 4.7.2 and 4.7.3 to the Drafting Committee.

It was so decided.

36. Mr. NOLTE, referring to a letter from the Chairperson of the Human Rights Committee which concerned a recommendation from the working group on reservations of the human rights treaty bodies regarding the effects of invalid reservations, said that the letter contained the sentence: “It follows that a State will not be able to rely on such a reservation and, unless contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.” The letter continued: “The Human Rights Committee welcomed the fact that the Special Rapporteur had proposed draft guideline 4.5.3 along these lines in May 2010.” He asked the Special Rapporteur whether he agreed with the statement that his proposal was along those lines in view of the word “incontrovertibly”.

37. Mr. HMOUD said that he objected to the circulation of the letter that morning since it amounted to direct interference by the Human Rights Committee in the Commission's work.

38. Mr. PELLET (Special Rapporteur), replying to Mr. Hmoud, said that he had nothing to do with the circulation of the letter and that if he had been asked, he would not have agreed to it. In response to Mr. Nolte, he said that he had expressed his firm opposition to the adverb when he had discussed the position of the Human Rights Committee the previous year.

³¹⁶ See footnote 311 above.

39. He thanked the Commission for its decision to refer the draft guidelines in question to the Drafting Committee, which, he hoped, would be able to work quickly enough for a complete preliminary version of the Guide to Practice to be presented to the General Assembly that year. He regretted that, for medical reasons, he would not be present at the meeting when, as he hoped, the Commission would adopt the Drafting Committee's report, as that would represent the culmination of 16 years of effort on his part.

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

[Agenda item 8]

REPORT OF THE DRAFTING COMMITTEE

40. Mr. VÁZQUEZ-BERMÚDEZ, speaking on behalf of the Chairperson of the Drafting Committee, introduced the texts and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on the topic "Protection of persons in the event of disasters", as contained in document A/CN.4/L.776.

41. The Committee had held six meetings between 5 and 8 July 2010, at which it had considered draft articles 6 to 8, as proposed by the Special Rapporteur in this third report (A/CN.4/629). The three draft articles had been referred to the Drafting Committee at the Commission's 3057th meeting. As the Drafting Committee had run out of time, it had been unable to consider paragraph 2 of draft article 8, as proposed by the Special Rapporteur, which stipulated that external assistance might be provided only with the consent of the affected State. That issue would therefore be examined by the Drafting Committee in 2011. The draft articles provisionally adopted read:

Article 6. Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7. Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8. Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9. Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

42. Draft article 6 (Humanitarian principles in disaster response) set out the key humanitarian principles relevant to disaster response. The provision, which was based on the draft proposed by the Special Rapporteur, comprised three elements: first, an affirmation of the three core humanitarian principles applicable to the topic; second, a reference to non-discrimination; and, third, a reference to the needs of the particularly vulnerable.

43. He wished to clarify some general points before discussing those three components. First, with regard to the placement of draft article 6, it had been suggested in the plenary debate that the content of the draft article be moved to the preamble. However, the Drafting Committee had thought it more appropriate to reflect the above-mentioned principles in the body of the draft articles, given their significance in the context of disaster relief and assistance. During the plenary debate, it had further been suggested that the three principles should be split and that each should be made the subject of and defined in a separate article. That suggestion had not been followed, since it had not been considered necessary to redefine what were generally accepted humanitarian principles recognized by international law. Instead, a mere reference to the principles had been deemed sufficient. It had also been decided that the best way to reflect the principle of sovereignty was to deal with it in the provision on the primary role of the affected State.

44. As for the principles themselves, while there was general agreement on the inclusion of a reference to those of humanity and impartiality, some doubts had been expressed as to the pertinence of including the principle of neutrality, since it connoted a context of armed conflict and was commonly considered to be a principle of international humanitarian law. Nonetheless, the fact that the principle of neutrality had originated in a specific branch of international law did not make it inapplicable to other fields of the law. The principle of neutrality was commonly referred to in instruments pertaining to disaster relief and assistance and, even though it shared the same origin as the general concept of neutrality, it had acquired a more specific meaning in the context of such assistance. It was in the latter sense that the principle was referred to in draft article 6. The Drafting Committee had considered a proposal to make that clearer in the text by qualifying the principles as "humanitarian" principles. However, on balance it had been considered infelicitous to refer to the "humanitarian principle of humanity". The Committee had also preferred to avoid the inference that those principles alone would be applicable to disaster response, to the exclusion of others such as sovereignty. While in the end the qualifier had not been included, the reference to "humanitarian" in the title of draft article 6 served to circumscribe the nature of the principles listed therein. The commentary would, in defining their content, make it clear that the principles in question were not general principles of international law, but humanitarian principles underpinning disaster relief and assistance.

45. The Drafting Committee had recalled the proposal put forward during the plenary debate that an express reference be made to the principle of non-discrimination because it could not simply be inferred from the principle of impartiality. The Committee had noted that such

* Resumed from the 3057th meeting.

a provision had been included in the resolution entitled “Humanitarian Assistance” which the Institute of International Law had adopted at the 2003 Bruges session³¹⁷ and that the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the IFRC referred in paragraph 4 (2) (b) to disaster relief and initial recovery assistance being provided without “adverse distinction”.³¹⁸ There had been general agreement in the Committee as to the importance of including such a reference in the draft articles. It had proceeded accordingly on the basis of a proposal from the Special Rapporteur that incorporated a reference to the principle of non-discrimination.

46. At first, the Committee had considered the possibility of placing the reference to non-discrimination in a second paragraph of draft article 6, but had then decided to retain it in the same paragraph in order to avoid the implication that non-discrimination was secondary to the other three principles. The Special Rapporteur’s proposal had further drawn on the Bruges resolution by including a reference to the qualification that in applying the principle of non-discrimination “the needs of the most vulnerable groups” ought to be taken into account. In principle, the Drafting Committee had accepted the inclusion of such a qualification in the context of the current topic on the understanding that “positive discrimination” in favour of vulnerable groups did not violate the principle of non-discrimination. It had also taken note of the fact that the qualification appeared in the 2007 IFRC Guidelines. The word “while” had been introduced in order to balance the principle and the qualification thereto and avoid the perception that the principle was contradicted by the qualifier.

47. The Drafting Committee had been concerned about the reference to “groups”, which might be interpreted as excluding individuals. It had considered a reference to “persons”, but in the end it had settled for a more neutral reference to “the vulnerable”. The Committee had also discussed whether to qualify “vulnerable” with “most”, as did the Bruges resolution. There had been a feeling that some qualifier was necessary since victims of disasters were, by definition, “vulnerable”. The Committee had accordingly agreed on the phrase “particularly vulnerable”, which was used in the 2007 IFRC Guidelines. The title of draft article 6 was unchanged.

48. Draft article 7 (Human dignity) recognized the importance of respecting and protecting the inherent human dignity of persons during the disaster response process. The Committee had initially considered beginning the draft article with the more neutral phrase “For the purposes of the present draft articles”, but had settled on the formulation “In responding to disasters”, because it provided a more substantive indication of the context in which the provision applied. The expression “responding to” had been chosen rather than the more generic “in their response” in order to convey a sense of the continuing nature of the obligation to respect and protect the human dignity of affected persons throughout the response period.

49. The reference to “States, competent intergovernmental organizations and relevant non-governmental organizations” indicated the actors to which the provision was addressed. It recognized the reality that a vast amount of disaster relief assistance was provided by assisting States and non-State actors such as international organizations and NGOs. The Drafting Committee had initially considered, in addition to the mention of States, a more general reference to “other relevant actors”, but it had settled for the current formulation for the sake of consistency with the wording adopted in draft article 5 (Obligation to cooperate).³¹⁹ Views had differed in the Committee as to whether the reference to NGOs would also cover multinational corporations. The feeling in the Committee was that any decision on that issue would have to apply to the entire set of draft articles and that, if such entities were to be included, it would be only in respect of their actions to provide disaster relief and assistance. That would be reflected in the commentary.

50. The formula “shall respect and protect” indicated the action required. The Drafting Committee had initially considered restricting the reference to “respect”, but it had subsequently recognized that the combination “respect and protect” was a relatively common formulation which accorded with contemporary doctrine and jurisprudence in international human rights law. The term “respect” indicated a negative obligation to refrain from doing something and the term “protect” a positive obligation to take action. The dual duty to “respect and protect” human dignity was particularly important in the context of disaster relief and assistance. Furthermore, the duty to protect required States to adopt legislation proscribing the activities of third parties involved in situations which raised concerns about the violation of the principle of respect for human dignity. It was implicit in the reference to the duty to “protect” that the duty would be commensurate with the legal obligations borne by the different actors mentioned in the provision and that, by definition (and as would be confirmed in draft article 9), it would be the affected State that would bear the primary obligation to protect. Nonetheless, concern had been expressed in the Committee that the reference to a positive obligation to “protect” would impose too great a burden on States during a crisis brought about by a disaster.

51. In adopting the concluding phrase “the inherent dignity of the human person”, the Drafting Committee had been inspired by its work on a similar provision currently before the Committee under the topic “Expulsion of aliens”, which, in turn, was based on the formulation of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

52. The Drafting Committee had initially considered a proposal by the Special Rapporteur, following a suggestion made in the plenary debate, to include a reference to respect for the human rights of the persons concerned as set out in relevant international instruments. In the Committee’s view, human dignity and human rights existed at different levels of generality: human dignity was not a human right, but a principle underlying all human rights. After considering the possibility of dealing with compliance with human

³¹⁷ See footnote 187 above.

³¹⁸ See footnote 198 above.

³¹⁹ A/CN.4/L.758 (see footnote 179 above). See also *Yearbook ... 2009*, vol. I, 3029th meeting, paras. 1–33.

rights obligations in a second paragraph of draft article 7, the Committee had eventually preferred to include the issue in a separate draft article, draft article 8.

53. Draft article 8 (Human rights) dealt with the obligation to respect the human rights of persons affected by disasters. As he had just said, the provision had its origins in the work on draft article 7 on human dignity. Initially, the Drafting Committee had contemplated the inclusion of a reference to the respect of human rights in the original provision on the primary responsibility of the affected State (which had become draft article 9), but it had been felt that doing so would render the draft article unnecessarily complex. The Committee had instead opted for a separate provision on human rights to be located immediately after draft article 7 in order to indicate the linkage between the two provisions.

54. The key issue considered by the Drafting Committee had been how properly to disaggregate the differing human rights obligations of the various actors falling within the scope *ratione personae* of the draft articles. It had appreciated that the extent of the affected State's obligation to respect the human rights of persons affected by disasters would not be the same as that of the obligations of assisting States, which might be involved in the assistance effort to varying degrees. Their obligations would, in turn, be different from the obligations under international law, if any, of other assisting actors, including international organizations and NGOs. The Committee had initially considered several proposals attempting to reflect such differing obligations. However, none of the formulations had met with general approval, partly because of a difference of opinion within the Committee regarding the extent of NGOs' human rights obligations. That difficulty had been compounded by the existence of multiple views as to whether the category "non-governmental organizations" would include the activities of other non-State actors, such as multinational corporations, an issue to which he had already alluded.

55. An early proposal had included the qualification that the human rights obligations in question were those "as set out in the relevant international agreements". However, the Drafting Committee had decided not to include such a reference in case it might prove too restrictive, since it excluded States' human rights obligations under customary international law and could not easily be made to cover the best practices for the protection of human rights set forth in non-binding texts, a relatively large number of which were relevant to disaster relief and assistance. The Committee had also considered other formulas, such as "as applicable", "in accordance with applicable rules of national and international law" and "as recognized in national and international law", but none had obtained sufficient support in the Committee.

56. In the end, the Committee had opted for a simpler formulation affirming the entitlement of persons affected by disasters to have their rights respected. It was implicit that there was a corresponding obligation to respect such rights. In choosing that formulation, the Committee had been inspired by its work on a similar provision under the topic "Expulsion of aliens". Draft article 8 had therefore been included as a general indication of the existence of

human rights obligations, without any attempt to specify what those obligations were, or to add to or qualify them. The reference at the beginning of the draft article to "persons affected by disasters" reaffirmed the context in which the draft articles applied and did not signify that persons unaffected by a disaster did not similarly enjoy such rights. It was also understood that the reference to "human rights" encompassed both substantive rights and limitations thereto (such as the possibility of derogation) as recognized by existing international human rights law.

57. Draft article 9 (Role of the affected State) corresponded to the Special Rapporteur's proposed draft article 8, paragraph 1. The Drafting Committee had decided, for the sake of clarity, to deal with the obligation of the affected State to protect persons and provide disaster relief assistance in one paragraph and to affirm the primary role of the affected State in directing, controlling, coordinating and supervising disaster relief and assistance activities on its territory in another paragraph.

58. There was a third element in the Special Rapporteur's proposed draft article 8, namely the requirement of the affected State's consent to the provision of external assistance and the extent to which that requirement of consent might be qualified. The Drafting Committee had not had sufficient time to consider that aspect and would return to it in 2011 in a separate draft article 10.

59. One of the issues that had arisen during the discussion was the meaning of the term "affected State". Since the issue was pertinent to the entire set of draft articles, it had been agreed that there would eventually be a provision on "use of terms" which would include a definition of "affected State". It was therefore unnecessary to include such a specification in draft article 9.

60. Draft article 9, paragraph 1, dealt with the duty to ensure the protection of persons as well as to provide disaster relief and assistance. A key issue debated had been whether it was necessary to include a description of the origin of the duty. During the plenary debate, several members had spoken in favour of a reference to the principle of sovereignty. Although the Special Rapporteur's intention had been to deal with sovereignty in the context of consent, and some members of the Drafting Committee had felt that a reference to sovereignty in paragraph 1 was not strictly necessary, the Committee had decided to include such a reference as a reminder that sovereignty not only established rights but also implied the existence of obligations; such a reference was common to texts concerning disaster relief and assistance and would not be out of place. The Committee had considered several options on how best to reflect the concept, including the phrases "in the exercise of its sovereignty" and "in the exercise of its sovereign rights and duties", but had settled on the current formulation.

61. The Special Rapporteur's version of the paragraph had referred to the "primary responsibility" of the affected State. The Committee recognized that this was a common expression in many of the texts applicable to disaster relief and assistance. Nonetheless, it had decided to refer to the "duty" of the affected State out of concern for the confusion that might arise owing to the use of the term "responsibility", both because it was a term of art

that typically had a different connotation and because of the need to avoid any connection with the concept of “responsibility to protect”. The paragraph had been aligned with the language used in draft articles already adopted through the use of the formula “provision of disaster relief and assistance”.

62. Paragraph 2 expressed the idea that the affected State not only had the duty to protect and provide assistance but also had the primary role in overseeing the provision of such assistance. Further to the decision to replace the reference to “responsibility” in paragraph 1 with a reference to an obligation (“duty”), the placement of paragraph 2 implied that the “primary role” of the affected State was a consequence of the duty identified in the first paragraph. The use of the word “role” in paragraph 2 had been inspired by General Assembly resolution 46/182 and was intended to allow the affected State a margin of appreciation, since it might prefer (or might only be able) to take on a more limited role of overall coordination. Any language suggesting an obligation to direct, control, coordinate and supervise would have been too restrictive and would not necessarily accord with the options available to the affected State in the context of a disaster.

63. The original reference to “primary responsibility” had given rise to a difference of views in the Committee, some members being concerned that it implied a “secondary” or even “tertiary” responsibility. The issue had been resolved once the Committee had replaced the word “responsibility” with “role”, as there was no disagreement that the affected State had the primary role. That had, in fact, been anticipated in draft article 5 on the duty to cooperate, which had been adopted by the Committee in 2009 on the understanding that there would be a “balancing” provision laying out the primary role of the affected State. The Committee had also considered using the phrase “first and foremost”, as in resolution 46/182, but that proposal did not garner general support. The original version of the paragraph had made reference to the source of the primary role as being “under its national law”. That phrase had been deleted, however, since it was not always the case that internal law existed to regulate the matter nor that such law always covered all of the relevant aspects.

64. The Drafting Committee had also considered the formulation “direction, control, coordination and supervision”, based on the Special Rapporteur’s proposal. It was recognized that, while there existed other formulations for the actions taken by the affected State, the proposed formulation was used in the Tampere Convention and seemed to be gaining general currency in the field of disaster relief and assistance. The Committee had considered an alternative formulation of “initiation, organization, coordination and implementation”, as in resolution 46/182, but had decided to retain the Tampere version as being more contemporary.

65. In conclusion, he expressed the hope that the Commission would be in a position to take note of the draft articles presented.

The Commission took note of the report of the Drafting Committee on protection of persons in the event of disasters, contained in document A/CN.4/L.776.

Cooperation with other bodies (concluded)*

[Agenda item 14]

STATEMENT BY THE DIRECTOR OF LEGAL ADVICE AND
PUBLIC INTERNATIONAL LAW OF THE COUNCIL OF EUROPE

66. The CHAIRPERSON welcomed the representatives of the Council of Europe: Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult); Mr. Fife, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI); and Ms. Salina de Frias, Legal Adviser, Public International Law and Anti-Terrorism Division of the Council of Europe. He invited Mr. Lezertua to address the Commission.

67. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that a major event during the Swiss Chairpersonship of the Committee of Ministers, from November 2009 to May 2010, had been the election of the Council’s new Secretary-General, Mr. Jagland of Norway. In the run-up to the election, an intensive political dialogue had been instituted between the Committee, through its Chairperson, and the Parliamentary Assembly. On 14 September 2009, agreement had been reached on a set of measures aimed at strengthening cooperation between the Assembly and the Committee, the two decision-making bodies of the Council of Europe, including review of the procedures for future elections of the Secretary-General.

68. Switzerland had then focused on the future of the European Court of Human Rights, concerning which a High-level Conference had been held from 18 to 19 February 2010 in Interlaken, Switzerland. The Interlaken Declaration adopted unanimously at the conference had set a clearly defined timetable for short-, medium- and long-term reforms of the Court.³²⁰ Switzerland had also pointed to the abolition of the death penalty in Belarus, among other countries, as facilitating a rapprochement between that State and the Council.

69. The former Yugoslav Republic of Macedonia had assumed the chairpersonship of the Committee, which it would hold through November 2010, and intended to stress the need for a strategy on cooperation in the defence of various rights and for coordination of the numerous monitoring mechanisms in the institutions of the Council of Europe with a view to consolidating the handling of human rights issues.

70. In the past year, a number of high-level meetings had been held, including the 120th session of the Committee of Ministers in May 2010, at which the participants, Foreign Ministers of States members of the Council of Europe, had adopted a declaration on relations between the Council and the European Union. Other important conferences included the sixteenth session of the Council of Europe Conference of Ministers responsible for Local and Regional Government on the theme “Good local and regional governance in turbulent times: the challenge of

* Resumed from the 3064th meeting.

³²⁰ Available from the website of the Council of Europe (www.echr.coe.int), *Reform of the European Court of Human Rights*.

change”; the seventh Conference of Ministers responsible for Equality between women and men, on the theme “Gender equality: bridging the gap between *de jure* and *de facto* equality”; the twenty-third session of the Standing Conference of European Ministers of Education, one of the themes of which had been teacher competencies for diverse democratic societies; and the fifteenth session of the Conference of Ministers responsible for Spatial/Regional Planning (CEMAT), held in July 2010 in Moscow. In October 2009, as part of the sixty-fourth session of the General Assembly, Slovenia and Spain had co-sponsored the launching event of the joint Council of Europe/United Nations study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs.

71. The most important activity undertaken by the Council, however, involved the consolidation of its relations with the European Union. The twenty-ninth Quadripartite meeting between the Council of Europe and the European Union had been held in Luxembourg on 27 October 2009. The participants had recalled that ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) would make accession by the European Union to the European Convention on Human Rights possible. They had expressed their support for an early start of the accession process, since accession represented an important step towards better human rights protection for everyone in Europe. The Secretary-General of the Council had often emphasized the importance of such a step. Immediately upon the entry into force of the Treaty of Lisbon, informal contacts had led to the adoption by the Council of the European Union of a negotiation mandate. An informal group just set up by the Council of Europe’s Steering Committee for Human Rights had held its first meeting in July 2010. That had been preceded by a high-level meeting between the Council of Europe’s Secretary-General, Mr. Jagland, and the Vice-President of the European Commission, Ms. Reding, who had stressed the European Union’s desire to move the process forward swiftly. It had been pointed out that the European Union wished to join the system set up by the Convention as it stood, even though some of the European Union’s specific features would have to be taken into account. Negotiations were set to speed up after September 2010, with the possibly optimistic objective of producing an accession agreement by early 2011. The form of the instrument had already been agreed upon, although additional legal instruments might be needed to solve problems that could not be covered in an accession agreement, such as the financial contributions to be made by the European Union and some procedural details relating to the European Court of Human Rights. The formulation of reservations by the European Union had also been discussed, with the European Union being of the view that it should be possible, while some member States, such as the Netherlands, considered that negotiations should be held on that subject and that it should be covered in the accession agreement.

72. Turning to the current legal activities of the Council of Europe, he said that, in the past year, the Treaty Office’s work had revolved around the entry into force of two conventions and the opening for signature of three new ones.

On 1 June 2010, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, with a view to more efficient operation of the European Court of Human Rights, had entered into force. It made changes to the Convention in a number of areas. Inadmissibility decisions on clearly inadmissible cases, now taken by a committee of three judges, would be adopted by a single judge, assisted by non-judicial rapporteurs. The idea was to increase the Court’s capacity to filter out “hopeless” cases. Regarding repetitive cases where the case was one of a series deriving from the same structural defect at national level, the Protocol provided that it could be declared admissible and decided by a committee of three judges, instead of a seven-judge Chamber under the current system, with a simplified summary procedure. New admissibility criteria had been introduced with a view to allowing the Court a greater degree of flexibility. In addition to existing conditions such as exhaustion of domestic remedies and the six-month time limit, under the new admissibility criteria, the Court could declare inadmissible applications where the applicant had not suffered a significant disadvantage, provided that respect for human rights did not require it to go fully into the case and examine its merits. In addition, a case could not be rejected on grounds of inadmissibility if there was no remedy available in the country concerned. The Committee of Ministers would also be empowered, if it so decided by a two-thirds majority, to bring proceedings before the Court when a State refused to comply with a judgement. It would have the new power to ask the Court for an interpretation of a judgement so as to assist the Committee in its task of supervising the execution of judgements. Other measures in the Protocol included changing the judges’ term of office from the present six-year renewable term to a single nine-year term, with transitional measures for judges already serving, and a provision envisaging the European Union’s possible accession to the Convention.

73. On 1 July 2010, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse had entered into force. It was the first instrument to establish the various forms of sexual abuse of children as criminal offences, including such abuse committed in the home or family, with the use of force, coercion or threats. In addition to the usual offences in that field—sexual abuse, child prostitution, child pornography, forcible participation in pornographic shows—the text dealt with “grooming” and child sex tourism. Its adoption was part of the three-year programme run by the Council of Europe on building a Europe for and with children.

74. Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) had been opened for signature in Utrecht on 16 November 2009. It contained provisions on the legal status, establishment and operation of “Euroregional Cooperation Groupings”. Another instrument opened for signature on 16 November 2009 was the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.

75. On 27 May 2010, the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters had been opened for signature in Paris. It had been agreed upon by the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe as an update to an international treaty that aimed to help Governments enforce their tax laws as part of the worldwide drive to combat cross-border tax evasion. On 7 July 2010, the Committee of Ministers had adopted the Third Additional Protocol to the European Convention on Extradition, which aimed to accelerate the extradition procedure when the person sought consented to extradition. Negotiations were continuing, including with the participation of non-members of the Council, on the final text of a draft Council of Europe convention on the counterfeiting of medical products and similar crimes involving threats to public health.

76. He had received the Commission's request for comments on the draft articles on responsibility of international organizations, and work had already begun to ensure that the Council's experience in that area would be shared with the Commission. The two institutions had, in the past year, devoted their efforts to similar concerns and had worked to provide answers to legal problems that arose in the life of the international community. The values common to the members of the Council of Europe—human rights, democracy and the rule of law—were firmly anchored in the work of that institution.

STATEMENT BY THE CHAIRPERSON OF THE COMMITTEE OF
LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW OF THE
COUNCIL OF EUROPE

77. Mr. FIFE (Chairperson of the Committee of Legal Advisers on Public International Law) said that CAHDI was responsible for the coordination of activities and the provision of advice to the Committee of Ministers of the Council of Europe and regularly prepared comments and recommendations at the Committee's request. Since 1991, it had operated as an independent body, not subordinated to any other institution of the Council of Europe. It was currently the only pan-European forum bringing together numerous legal advisers, both from Ministries for Foreign Affairs of the member States of the Council of Europe and from a significant number of observer States and organizations. That high-level participation in its work made it a credible multidisciplinary forum. Its strength in coordination efforts was derived from the exchange of information on national practice in public international law: for example, on how States organized the legal activities of their ministries. Many of the issues discussed by CAHDI were highly contemporary in nature, and that enhanced its ability to provide guidance to the legal advisers of States. The need for a coordinated approach to issues of public international law was illustrated by the discussion by CAHDI on how legal advisers followed the handling by national courts of cases relating to the immunity of States and international organizations. CAHDI was also working on how United Nations sanctions were implemented and the impact on fundamental rights.

78. CAHDI functioned as European Observatory of Reservations to International Treaties, in which capacity it enabled member States to discuss whether to object to

a given reservation and to provide other States with clarifications on reservations they had formulated, thereby ensuring a healthy and constructive reservations dialogue. CAHDI followed with particular interest the work of the Council of Europe and other international organizations on measures to combat terrorism; it updated the list of potentially problematic reservations to anti-terrorism instruments.

79. With respect to the development of international justice, CAHDI was particularly attentive to issues relating to the peaceful settlement of disputes, including the jurisdiction of the International Criminal Court. It was continuing with its work on the follow-up to Recommendation CM/Rec(2008)9, stressing the importance of regular updates by member States of the Council of Europe of lists of arbitrators and conciliators. It kept abreast of the work of a number of international legal bodies such as the international tribunals for Cambodia, Lebanon, Rwanda, Sierra Leone and the former Yugoslavia, and exchanged information about the decisions handed down by the European Court of Human Rights in the field of public international law.

80. Every year, CAHDI held an exchange of views on the Commission's work. He thanked all the members of the Commission who had reported on that work, most recently Mr. Nolte, exchanges that had enriched discussions by CAHDI on a wide range of issues, from the fragmentation of international law to the expulsion of aliens, including the responsibility of international organizations and reservations to treaties.

81. Apart from its coordination function, which legal advisers of member States had found particularly useful, in the past year, CAHDI had also served as a think tank and advisory body. For example, it had assumed a particularly constructive role in discussions relating to the implementation of Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, which had been adopted in May 2009, and whose aim had been to allow for the immediate entry into force—for States ratifying it—of the new procedural provisions contained in Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, in particular those relating to the possibility of the Court to sit in single-judge formation and committees of three judges. CAHDI welcomed the entry into force of Protocol No. 14 on 1 June 2010.

82. In view of the fact that Protocol No. 14 provided for the European Union's accession to the European Convention on Human Rights, CAHDI had exchanged views with the President of the European Court of Human Rights in order to be ready to contribute to the *dénouement* of that complex but promising legal event.

83. The members of CAHDI would continue to reflect on the question of the European Union's accession to the European Convention on Human Rights at the forthcoming plenary meeting of CAHDI in September 2010. At that time, CAHDI would have the pleasure of welcoming for an exchange of information the Chairperson of the Council of Europe Steering Committee for Human

Rights Informal Working Group on the Accession of the European Union to the European Convention on Human Rights and the Deputy Director-General of the Council of the European Union. A representative of the European Court of Human Rights would also participate in discussions under that agenda item.

84. The Committee of Ministers of the Council of Europe regularly approached CAHDI to request its opinion. The Council's decision-making body had relied on the expertise of CAHDI regarding the issue of the so-called "disconnection clause" and, in particular, had given a favourable reception in 2008 to its report on the subject.

85. During the past year, CAHDI had regularly prepared commentaries to documents referred to it by the Committee of Ministers. So far in 2010, it had adopted its commentary to Recommendation 1888 (2009) of the Parliamentary Assembly of the Council of Europe entitled "Towards a new ocean governance", which emphasized the fundamental importance of the 1982 United Nations Convention on the Law of the Sea. It had also taken note of Recommendation 1870 (2009) entitled "Protecting financial aid granted by Council of Europe member States to poor countries against financial funds known as 'vulture funds'", Recommendation 1871 (2009) entitled "Ban on cluster munitions" and Recommendation 1865 (2009) entitled "The protection of human rights in emergency situations".

86. The number of requests made of CAHDI by the Committee of Ministers remained steady, and at its next meeting, CAHDI would consider two recommendations that had been referred to it by that body, namely Recommendation 1920 (2010) entitled "Reinforcing the effectiveness of Council of Europe treaty law" and Recommendation 1913 (2010) entitled "Necessity to take additional international legal steps to deal with sea piracy". CAHDI would also consider proposals formulated by the Venice Commission in its report on private military and security firms and erosion of the State monopoly on the use of force.

87. Furthermore, in an effort to engage in a constructive analysis of various issues of public international law, CAHDI continued to strengthen its relations with other actors in the international legal community. In addition to the exchange of views with Mr. Nolte, at its last two meetings CAHDI had also held an exchange of views with the President of the European Commission for Democracy through Law (Venice Commission) and the Director of the Legal Department of the International Monetary Fund. The fortieth meeting of CAHDI would be held in Tromsø, Norway, at the invitation of the Norwegian authorities on 16 and 17 September 2010.

88. As could be seen from the foregoing, the expertise of CAHDI had been called on regularly over the course of the past year, and the agenda for its forthcoming meeting was a full one. CAHDI was gratified at that demonstration of increased interest in issues of public international law. Accordingly, it hoped to continue its privileged cooperation with the International Law Commission in continuing to promote respect for international law and the peaceful settlement of international disputes.

89. The CHAIRPERSON thanked the Director of Legal Advice and Public International Law, Council of Europe (Jurisconsult), and the Chairperson of CAHDI for the valuable information provided in their statements and invited members of the Commission to put questions to them.

90. Sir Michael WOOD said that it was significant that CAHDI, which was a regional body, was making an important contribution to the development of universal public international law. He wondered whether it had made progress in developing cooperation with other regional bodies in the same field. The Secretary-General of AALCO, who had recently spoken to the Commission, had expressed great interest in developing working relationships with CAHDI and other bodies. He would be interested to know whether cooperation might also be developed with, for example, the newly established African Union Commission on International Law and the Organization of the Islamic Conference.

91. He expressed the hope that, when CAHDI considered the report of the International Law Commission, as it did each year in September, it would look favourably on the Commission's work on reservations to treaties, and, in particular, the important decision taken by the Commission that morning to refer a key provision to the Drafting Committee—one that was based to some degree on the work of CAHDI on reservations to treaties. It would be helpful to have the endorsement of bodies such as the Council of Europe regarding that provision.

92. He asked whether the European Court of Human Rights would be in a position to reduce its backlog of cases, even given the important changes that had been made to enhance its efficient operation.

93. Mr. FIFE (CAHDI) said that he was aware of the potential for strengthening relations with other regional legal consultative bodies and was very much interested in doing so. If CAHDI had not yet contacted representatives of regional bodies, such as the ones mentioned by Sir Michael, it was only because it had been required to attend to other important and time-consuming priorities, such as the question of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, and the need to consider and draft opinions in that respect. One possible scenario would be for CAHDI to strengthen its ties with other bodies on an informal basis initially and thereafter on a formal basis. CAHDI knew, from its experience as part of a pan-European forum that provided for the broad participation of observers, that there were genuine advantages to be had from cross-fertilization and from exchanges of information and views. Such input was highly important to the development of policies and practices aimed at strengthening compliance with international legal obligations and the role of international law in the formulation of foreign policy. The value of such cross-fertilization could only be heightened if it was sought from representatives of other regional forums. He would be sure to discuss that important point with the other members of CAHDI on his return to Strasbourg. CAHDI also believed that the kind of cross-regional dialogue that took place each autumn among the large number of legal advisers from around the world, in the context

of the Sixth Committee of the General Assembly and during international law week, was highly beneficial to the work of the United Nations.

94. The members of CAHDI would await with great anticipation and interest the outcome of the Commission's work on reservations to treaties. He assured the Commission that the draft guidelines and commentaries that it submitted to the Sixth Committee would be examined very carefully at the forthcoming session of CAHDI.

95. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that it would be difficult to eliminate completely the current backlog of 120,000 cases pending before the European Court of Human Rights, but that, according to the Court's estimates, some 30 per cent of the backlog could be reduced before the entry into force of the new procedures established as a result of the adoption in 2009 of Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms. Those procedures, which related, in particular, to the possibility of the Court to sit in single-judge formation and in three-judge committees to decide on the merits of certain cases, were already operational in respect of countries that had ratified the Protocol. However, the countries that had ratified Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms were not the ones in respect of which the highest number of cases had been brought: nearly 50 per cent of pending cases were from four countries that had not ratified that Protocol. The recent entry into force of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, would entail the application of the same system to all High Contracting Parties, thereby extending the experience of a few countries to all States members of the Council of Europe.

96. Prior to the entry into force of Protocol No. 14, the High-level Conference on the Future of the European Court of Human Rights had been held in Interlaken at the initiative of the Swiss Chairpersonship of the Committee of Ministers of the Council of Europe. The Conference, in its outcome document, the Interlaken Declaration, had unanimously adopted a number of proposals aimed at simplifying the procedure even further.³²¹ The Committee of Ministers was committed to pushing the Interlaken Declaration forward quickly and had created a special working group to track monthly progress in its implementation. Protocol No. 14 alone was therefore not considered sufficient, and new measures were being prepared. The Secretary-General of the Council of Europe had established a 2020 group whose task was to envision the Council of Europe of 2020 and one of whose main objectives was to ensure the efficient functioning of the Court by that year. The first effects of Protocol No. 14 would soon be felt, and, together with the additional measures being prepared, would, it was hoped, enable the Council of Europe to solve the dramatic problem of the backlog in the work of the European Court of Human Rights.

97. Mr. MURASE said that, during his visit to the Commission the previous week, the Secretary-General of AALCO had been enthusiastic about establishing cooperation with the International Law Commission and other bodies, notably with CAHDI. He had been impressed with the work of CAHDI as a think tank and advisory body, and was of the view that his organization had much to learn from the experience and practice of CAHDI. As he himself would be attending a meeting of AALCO the following month, he would appreciate knowing what type of ongoing cooperative relationship between the two bodies might be envisaged by CAHDI.

98. Mr. WAKO said that, in his view, the activities carried out by CAHDI should be emulated by other regional groups, since cross-regional dialogue was essential to the harmonious development of international law. He had a particular interest in the issue of piracy, having prosecuted more than 100 pirates, the majority of whom had been involved in cases concerning his home region of East Africa. He wished to know what progress CAHDI had made in examining the particular issue of piracy and wondered whether, in its future work on the topic, CAHDI might consider seeking the participation of experts with experience in the prosecution of modern-day pirates.

99. Mr. HASSOUNA said that the relationship between the Council of Europe and the International Law Commission should be characterized by mutual exchanges. Accordingly, it would be useful, not only to receive the reactions of the Council of Europe to the Commission's work but also to have suggestions from it concerning, for example, which topics it considered suitable for codification by the Commission.

100. He strongly supported the involvement of more regional actors, whether States or organizations, in the work of CAHDI. Noting that the meetings of CAHDI often included discussions of general issues of international law, he asked whether the outcome of such discussions was published or whether there were other means by which members of the Commission could be informed of their conclusions. He was concerned that, because there seemed to be few African or Asian representatives among the States and organizations taking part in those discussions, their outcome might be oriented too heavily towards the views of participating States. He suggested that consideration might be given to enlarging the scope of such discussions in order to ensure that the rules developed thereupon were of relevance and interest to the entire international community and not only to a small group of States.

101. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that the Council of Europe and the European Union had concluded a new memorandum of understanding in 2009, which provided the framework for their relationship. The European Union had designated an ambassador to the Council of Europe whose office would be staffed with an adequate number of officials to accommodate the deepening relationship between the two bodies. The general feeling was that the memorandum of understanding should not be modified for the time being, but that there were a number of issues, particularly in the area of treaty-making, in

³²¹ See footnote 320 above.

respect of which the application of the Treaty of Lisbon might alter their relations and which needed to be explored in greater detail by both bodies. Such exploration might result, for example, in a requirement for consultations between the two bodies to take place at an early stage, even before a decision was made to begin negotiations on the drafting of a treaty. Another issue that was being debated related to the participation of the European Union in the control bodies of existing treaties that provided for those bodies to address issues that fell under the exclusive competence of the European Union.

102. For the time being, however, priority was being placed on the accession of the European Union to the European Convention on Human Rights: a list of issues, resulting from the terms of the Treaty of Lisbon, had already been identified. One such issue concerned the establishment of a “co-defendant mechanism”, allowing for the joint participation of the European Union and the European Union member State concerned as defendants, in cases before the European Court of Human Rights or in those in which a defendant, being both a contracting party to the European Convention on Human Rights and a member State of the European Union, was thus legally required to apply European Union law. Another issue concerned how to handle cases referred to the European Court of Human Rights of a kind which, owing to the distribution of institutional and jurisdictional powers within the European Union, had never before been considered or encountered by the Court; the requirement to exhaust domestic remedies could be a particularly difficult issue. Another challenging issue was that relating to the establishment of a mechanism for the entry into force of the Treaty on European Union that would be less onerous than the one requiring signature and ratification by all 47 States members of the Council of Europe, which could create delays and deprive the whole process of momentum.

103. The European Commission took the view that, until the European Union became a party to the European Convention on Human Rights, any process leading to its accession to other treaties (given that most of the recent Council of Europe treaties contained clauses enabling the European Union’s accession) would be suspended. The opinion of the European Parliament on the issue of European Union accession was that the European Union should accede not only to the European Convention on Human Rights but also to the European Social Charter; however, its accession to the latter was not currently considered a top priority.

104. Concerning the cooperation of the Council of Europe with States outside the European continent, the law-making practice in the Council of Europe had evolved since the early days, when it tended to draft closed treaties to which only member States could become contracting parties: it now drafted open conventions, to which States not members of the Council of Europe could, at the Council’s invitation, accede. Currently, there were even clauses stipulating that non-member States participating in treaty negotiations could accede to a treaty under the same terms as member States. Moreover, proposals had been made to allow non-member States not participating in treaty negotiations also to sign and ratify a treaty under the same terms as member States.

105. Mr. FIFE (CAHDI) said that many of the comments made by members of the Commission had confirmed the importance of regional action in reinforcing the development of and international compliance with international law. He recalled that CAHDI was not a standing committee with an ongoing programme of work, but rather a body that held two-day meetings only twice a year and whose success depended on high-level but short bursts of activity. Members’ comments relating to the role of AALCO and other regional organizations confirmed the view taken by CAHDI that relations with such organizations should be pursued. The main purpose of such action would be to avoid the fragmentation of international law and to promote its concertation with a view to reinforcing global action, not to emphasize regional particularities or exceptions.

The meeting rose at 1.10 p.m.

3068th MEETING

Friday, 23 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, 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, Sir Michael Wood.

Organization of the work of the session (concluded)*

[Agenda item 1]

1. The CHAIRPERSON announced that the draft programme of work for the following two weeks had been distributed. If he heard no objections, he would take it that the members of the Commission approved it.

It was so decided.

Expulsion of aliens (concluded)** (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

2. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the Drafting Committee’s progress report on the expulsion of aliens.

* Resumed from the 3062nd meeting.

** Resumed from the 3066th meeting.

3. Mr. McRAE (Chairperson of the Drafting Committee) said that in 2007 the Commission had referred to the Drafting Committee draft articles 1 and 2, as proposed by the Special Rapporteur in his second report³²² and subsequently revised in the light of the debate,³²³ as well as draft articles 3 to 7, which had been contained in the Special Rapporteur's third report.³²⁴ In 2007 and 2008, the Drafting Committee had provisionally adopted draft articles 1 and 2, entitled "Scope" and "Use of terms", respectively, although it had recognized the need to revisit certain questions at a later stage. In 2008, it had also provisionally adopted draft article 3, entitled "Right to expulsion"³²⁵ and, in 2009, it had provisionally adopted draft articles 5, 6 and 7 on refugees, stateless persons and the issue of collective expulsion.³²⁶ On the other hand, it had been unable to agree on a text for the proposed draft article 4 concerning non-expulsion by a State of its nationals.

4. At the current session, the Drafting Committee had held eight meetings on 7, 12 and 14 May and on 8, 9, 12 and 13 July. During those meetings, it had considered a set of draft articles on the protection of the human rights of persons who had been or were being expelled, which had been referred to it during the first part of the session³²⁷ and which had been restructured in the light of comments made during the plenary debate at the previous session.³²⁸ The Drafting Committee's work on those draft articles had been very productive. In that connection, he wished to thank the Special Rapporteur for his cooperation and the efficient guidance which he had given to the Committee. He also thanked the members of the Drafting Committee for their active participation and contributions and the secretariat for its valuable assistance.

5. The Drafting Committee had provisionally adopted eight draft articles,³²⁹ namely: draft article 8, entitled "Obligation to respect the human dignity and human rights of persons subject to expulsion", which amalgamated the draft articles 8 and 9 which had been referred to the Committee; draft article 9, entitled "Obligation not to discriminate", in which ethnic origin and other grounds impermissible under international law had been added to the list of prohibited grounds; draft article 10, entitled "Obligation to protect the right to life of persons subject to expulsion"; draft article 11, entitled "Prohibition of torture or cruel, inhuman or degrading treatment or punishment"; draft article 12, entitled "Obligation to respect the right to family life"; draft article 13, entitled "Vulnerable persons", which covered children, older persons, persons with disabilities, pregnant women and other vulnerable persons subject to expulsion; draft article 14, entitled

"Obligation not to expel a person to a State where his or her life or freedom would be threatened", which covered not only threats based on the discriminatory grounds enumerated in draft article 9, but also the threat resulting from the imposition of the death penalty, or the execution of a death sentence which had already been passed in the State of destination, and, lastly, draft article 15, entitled "Obligation not to expel a person to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

6. In keeping with the practice followed in 2007, 2008 and 2009 in respect of the topic, the Drafting Committee had decided that the draft articles provisionally adopted in 2010 would remain with the Drafting Committee. In principle, they would be presented to the Commission for adoption at its following session, together with the draft articles adopted at previous sessions and any draft article that would be adopted in 2011. At that point, all the draft articles would be introduced in detail.

The meeting rose at 10.10 a.m.

3069th MEETING

Tuesday, 27 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

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

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)**

1. Mr. McRAE (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 3.3.3 and 3.3.4, and draft guidelines 4.5 to 4.7.3, provisionally adopted by the Drafting Committee in the course of three meetings held on 20, 21 and 22 July 2010, as contained in document A/CN.4/L.760/Add.3, which read:

3.3.3 Effect of individual acceptance of an impermissible reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation.

* Resumed from the 3067th meeting.

** Resumed from the 3061st meeting.

³²² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

³²³ *Yearbook ... 2007*, vol. II (Part Two), p. 61, para. 188, and p. 68, para. 258, footnotes 326–327.

³²⁴ See footnote 25 above.

³²⁵ *Yearbook ... 2008*, vol. I, 2989th meeting, p. 252, paras. 22–28.

³²⁶ *Yearbook ... 2009*, vol. I, 3027th meeting, p. 198, paras. 1–6.

³²⁷ Revised version of draft article B in paragraph 276 of the sixth report of the Special Rapporteur (ILC(LXII)/EA/CRP.1) (see footnote 305 above), session distribution limited to the members of the Commission.

³²⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617; see also footnote 16 above.

³²⁹ Session document ILC(LXII)/DC/EA/CRP.3, distribution limited to the members of the Commission.

3.3.4 *Effect of collective acceptance of an impermissible reservation*

A reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.

4.5 *Consequences of an invalid reservation*

4.5.1 [4.5.1 and 4.5.2] *Nullity of an invalid reservation*

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts II and III of the Guide to Practice is null and void, and therefore devoid of legal effect.

4.5.2 [4.5.3] *Status of the author of an invalid reservation in relation to the treaty*

1. When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.

2. The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- (a) the wording of the reservation;
- (b) statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty;
- (c) subsequent conduct of the author of the reservation;
- (d) reactions of other contracting States and contracting organizations;
- (e) the provision or provisions to which the reservation relates; and
- (f) the object and purpose of the treaty.

4.5.3 [4.5.4] *Reactions to an invalid reservation*

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

4.6 *Absence of effect of a reservation on the relations between the other parties to the treaty*

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 *Effect of an interpretative declaration*

4.7.1 [4.7 and 4.7.1] *Clarification of the terms of the treaty by an interpretative declaration*

1. An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties.

2. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

4.7.2 *Effect of the modification or the withdrawal of an interpretative declaration in respect of its author*

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

4.7.3 *Effect of an interpretative declaration approved by all the contracting States and contracting organizations*

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

2. Draft guidelines 3.3.3 and 3.3.4, which had initially been proposed by the Special Rapporteur in his tenth report³³⁰ (and reiterated in his fifteenth report in paragraph 198 [488] and 205 [495] (A/CN.4/624/Add.1), would be included in Part 3 of the Guide to Practice, dealing with the permissibility of reservations. The other seven draft guidelines proposed by the Special Rapporteur in the last sections of his fifteenth report would be included in Part 4 of the Guide to Practice, concerning the legal effects of reservations and interpretative declarations.

3. Draft guideline 3.3.3 was entitled “Effect of individual acceptance of an impermissible reservation”. The Drafting Committee had made only minor changes to the text proposed by the Special Rapporteur. In the title, the term “invalid” had been replaced by the term “impermissible” in the English version, and, in the text, for the sake of clarity, the word “impermissible” had been inserted before “reservation”. That change in terminology had to do with the placement of draft guidelines 3.3.3 and 3.3.4 in Part 3 of the Guide to Practice, which dealt with the substantive conditions for the validity of a reservation. In that connection, he recalled the approach laid out in the report of the Commission on the work of its fifty-eighth session³³¹—and followed ever since—which was to use the term “permissibility” in the English version of the draft guidelines to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the 1969 and 1986 Vienna Conventions.

4. Also in the title of the draft guideline, the Drafting Committee had decided to replace the expression “unilateral acceptance”, originally proposed by Special Rapporteur, with the expression “individual acceptance”. It was felt that the term “individual” more adequately reflected the relationship between draft guideline 3.3.3, which referred to acceptance by a contracting State or a contracting organization of an impermissible reservation, and draft guideline 3.3.4, which, as its title indicated, referred to the collective acceptance of an impermissible reservation. Moreover, the expression “individual acceptance” had already been used in the Guide to Practice in guideline 2.8.9, which concerned the modalities of the acceptance of a reservation to a constituent instrument of an international organization. In addition, in order to align the English text more closely with the French, the expression “cure the nullity” had been substituted for the expression “change the nullity”, which some members of the Drafting Committee had considered to be ambiguous. Lastly, in order to bring about consistency with the text of other draft guidelines and of the 1986 Vienna Convention, the expression “contracting international organization” had been replaced by “contracting organization”.

³³⁰ *Yearbook ... 2005*, vol. II (Part One), A/CN.4/558 and Add.1–2, p. 188, para. 202, and p. 189, para. 207.

³³¹ *Yearbook ... 2006*, vol. II (Part Two), p. 144, para. (7) of the general commentary to section 3 of the Guide to Practice.

5. Draft guideline 3.3.4 was entitled “Effect of collective acceptance of an impermissible reservation”. In addition to replacing the word “invalid” with “impermissible” in the title in the English version, as in draft guideline 3.3.3, the Drafting Committee had introduced a number of other changes to the text of draft guideline 3.3.4.

6. In the first paragraph of the Special Rapporteur’s proposed text, the Drafting Committee had decided, following a suggestion made during the plenary debate, to replace the expression “may be formulated by a State or an international organization” by the expression “shall be deemed permissible”. That formulation was considered to be more appropriate for describing the situation envisaged in the draft guideline, where, after a reservation prohibited by the treaty or incompatible with its object and purpose had been formulated and notification had been sent to the contracting States and contracting organizations by the depositary, a contracting State or a contracting organization that considered the reservation to be impermissible requested the depositary to communicate its position to the other contracting States and contracting organizations; and if, after having been expressly informed thereof by the depositary, no contracting State or contracting organization objected to the reservation on the basis of its alleged impermissibility, the reservation was “deemed permissible” in the light of its collective acceptance by all contracting States and contracting organizations. It should be noted that the expression “shall be deemed permissible” was understood as applying without prejudice to the possibility that the reservation might, at a later stage, be found to be impermissible—for example, on the grounds of its incompatibility with *jus cogens*—by a body competent to adopt binding decisions on the matter. That point would be addressed in the commentary.

7. The final phrase “at the request of a contracting State or a contracting organization” had been added by the Drafting Committee in order to clarify that, for the purposes of draft guideline 3.3.4, the depositary was not expected to take any initiative in matters concerning the permissibility of reservations. In the text originally proposed by the Special Rapporteur, reference had been made to the depositary’s role in conducting consultations regarding the permissibility of a reservation. In response to doubts raised in the Drafting Committee concerning the competence of the depositary to conduct consultations with contracting States or contracting organizations, the Committee had decided to replace the word “consulted” by the phrase “informed thereof”.

8. In that same spirit, the Drafting Committee had decided to delete the second paragraph of the text proposed by the Special Rapporteur. It had required the depositary to draw the attention of the signatory States and international organizations—and, where appropriate, the competent organ of the international organization concerned—to the nature of legal problems raised by an impermissible reservation. Some members of the Commission had expressed disagreement with such an approach during the debate on the draft guideline that had taken place during the Commission’s fifty-eighth session. Similar concerns had been raised by several members of the Drafting Committee, who considered the second paragraph of the original text to be excessive, in that it

purported to confer on the depositary a substantive role in matters of reservations exceeding the nature of its functions. The Drafting Committee had therefore decided to delete the paragraph.

9. The question of the time period within which a reaction should be expected from a contracting State or a contracting organization had been raised by some members in the Drafting Committee. It had been agreed to address that question in the commentary, which would specify that such a reaction should take place within a reasonable time period, to be determined in the light of relevant circumstances. While allowing for the necessary flexibility in that regard, the commentary would also draw attention to the 12-month deadline for objections to reservations prescribed by the Vienna Conventions. Lastly, in order to ensure consistency with the text of other draft guidelines, the phrase “explicitly or implicitly” before the word “prohibited” had been deleted, leaving it to the commentary to recall the fact that the prohibition of a reservation by the treaty could be either explicit or implicit.

10. Turning to the draft guidelines pertaining to section 4.5, he noted that the title of the section was “Consequences of an invalid reservation”, whereas the title proposed by the Special Rapporteur had been “Effects of an invalid reservation”. Following a suggestion made during the plenary debate, the Drafting Committee had decided to replace the word “effects” by “consequences”, as it was felt that the use of the word “effects” in the title of section 4.5 could be problematic, given that the main assumption underlying the guidelines in the section was that an invalid reservation was devoid of legal effect.

11. Unlike draft guidelines 3.3.3 and 3.3.4, the draft guidelines in section 4.5 referred, in general terms, to the validity or invalidity of a reservation, and not solely to its permissibility or impermissibility. An invalid reservation within the meaning of the draft guidelines in section 4.5 was either a reservation that did not meet the formal requirements enunciated in Part 2 of the Guide to Practice or a reservation that did not fulfil the substantive requirements for permissibility set out in Part 3. That broader meaning ascribed to the terms “validity” and “invalidity” was consistent with the approach laid out in the report of the Commission on the work of its fifty-eighth session,³³² according to which the expression “validity of reservations” was assigned a general meaning, encompassing both formal validity and permissibility, in order to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization, was capable of producing the effects attached in principle to the formulation of a reservation.

12. Draft guideline 4.5.1 was entitled “Nullity of an invalid reservation” and had resulted from the merger of the originally proposed draft guidelines 4.5.1 and 4.5.2. Although one Commission member had expressed the view during the plenary debate that draft guidelines 4.5.1 and 4.5.2 as formulated by the Special Rapporteur were

³³² *Ibid.*, p. 143, para. (2).

problematic in that they envisaged consequences that would apply only in respect of those contracting States or contracting organizations that regarded the reservation as invalid, a large majority of the members who had spoken during the debate had expressed support for the content and formulation of those guidelines. The Drafting Committee had subsequently retained and merged the original text of the two draft guidelines. The only change introduced by the Drafting Committee to the text of draft guideline 4.5.1 concerned the alignment of the English text with the French text by replacing the phrase “permissibility and validity” by the phrase “formal validity and permissibility”. That change was intended to make it clear that the draft guideline referred both to the formal (or procedural) conditions for the formulation of a reservation and to the conditions for its permissibility.

13. Draft guideline 4.5.2, which corresponded to original draft guideline 4.5.3, was entitled “Status of the author of an invalid reservation in relation to the treaty”. In the French version of the title, the word “non” was missing; the title should read: “*Statut de l’auteur d’une réserve non valide à l’égard du traité.*” During the plenary debate, some members had expressed opposition to the establishment of a presumption of severability of an invalid reservation and had emphasized the role of consent in treaty relations, stressing in particular that a reservation should be regarded as a condition of the consent of its author to be bound by the treaty. However, since the majority of members had favoured the presumption of severability enunciated in the original draft guideline 4.5.3, the Drafting Committee had decided to incorporate it.

14. While the substance of the first paragraph proposed by the Special Rapporteur had been retained, a number of changes in its wording had been introduced by the Drafting Committee. The first change concerned the deletion of the phrase “in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole”, which qualified the reservation in the original text but was considered by the Drafting Committee to be superfluous. A second change concerned the replacement of the phrase “the treaty applies to the reserving State or the reserving international organization, notwithstanding the reservation” by wording considered to be both more accurate and more precise: the new formulation stated that the reserving State or reserving international organization was considered “a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation”. It was felt, in particular, that the expression “the treaty applies” did not adequately reflect the fact that the first paragraph stated only a presumption. Moreover, the expression “notwithstanding the reservation” had been regarded as ambiguous by some members of the Drafting Committee.

15. At the end of the first paragraph, the word “established” had been replaced, in the English text, by the word “identified”. Some members were of the view that the term “established” would have made the presumption of severability of the invalid reservation too strong. It was also observed that the English word “established” seemed to presuppose a degree of clarity that was not necessarily implied by the elements listed in paragraph 2. The commentary would indicate that the “contrary intention”

referred to in the first paragraph should be understood as the intention of the reserving State or organization not to be bound by the treaty at all in the event that the reservation was deemed invalid; if such an intention could be identified, then the presumption embodied in paragraph 1 was overturned.

16. Changes had also been introduced by the Drafting Committee to the second paragraph, which provided a list of factors to be taken into consideration in order to identify the intention of the author of the reservation. In the *chapeau* of the second paragraph, the word “established” had again been replaced by “identified” in the English text. Moreover, in order to capture more completely the various elements listed in the second paragraph, in the *chapeau* the phrase “all the available information” had been replaced by “all factors that may be relevant to that end”—the “end” being understood as the identification of the intention of the author of the reservation. The purpose of that formulation was to indicate that the factors enumerated would be taken into consideration only to the extent that they were relevant to the identification of the intention of the reserving State or the reserving international organization—a point that would be clarified in the commentary. Although the Drafting Committee had deleted the term “*inter alia*” after the word “including,” in the *chapeau*, the commentary would emphasize that the list of factors was to be regarded as non-exhaustive.

17. The Drafting Committee had decided to modify the order in which the various factors were listed so as to mention, first, the wording of the reservation; second, statements by the author of the reservation; third, conduct of the author; followed by the reactions of other contracting States or organizations; and, lastly, two factors of a more general nature, the provision or provisions to which the reservation related and the object and purpose of the treaty, divided into two separate points. Although the reason for revising the order of the list was to suggest a logical sequence to be followed when taking into consideration the factors that identified the intention of the author of the reservation, the new ordering was not meant to suggest that certain factors should necessarily be given more weight than others in identifying the author’s intention. That point would also be clarified in the commentary.

18. In addition, a few changes had been made to the wording of the list. In the second point, reference was made to “statements” by the author of the reservation, instead of “declarations”, as had originally been proposed, and the phrase “or otherwise expressing its consent to be bound by the treaty” had been added in order to cover the various modalities of the expression of the consent to be bound by a treaty that were recognized in article 11 of the 1969 and 1986 Vienna Conventions. In the third point, the term “attitude” had been replaced by “conduct” so as to cover both actions and omissions, in keeping with the approach taken in article 2 of the draft articles on responsibility of States for internationally wrongful acts,³³³ annexed to General Assembly resolution 56/83 of 12 December 2001.

³³³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 and 34.

19. During the plenary debate, and again in the Drafting Committee, a suggestion had been made to include in the draft guideline a reference to the nature or character of the treaty, on the reasoning that it could be relevant in identifying the intention of the author of an invalid reservation concerning the severability of the reservation and also in determining the way in which the presumption of severability set out in the first paragraph should operate. The Drafting Committee had decided not to follow that suggestion, as the majority of its members were opposed to the idea of singling out certain categories of treaties, in particular, human rights treaties, in contradistinction to other types of treaties. However, the minority view, according to which the nature of a treaty was relevant in determining the severability of an invalid reservation to it, would be reflected in the commentary.

20. Lastly, the Drafting Committee had considered a suggestion made during the plenary debate and reiterated in the Drafting Committee that the draft guideline should include a reference to the right of the author of the reservation to withdraw from the treaty in the event that its reservation was deemed invalid. It was argued that the recognition of such a possibility in the Guide to Practice would not contradict the Vienna Conventions, which were silent on that issue. However, some members were of the view that implementing that suggestion would contradict article 56 of the Vienna Conventions, which regulated the conditions for the withdrawal from a treaty, as well as article 42, paragraph 2, according to which the withdrawal from a treaty could take place only as a result of the application of the provisions of the treaty or of the Convention. The Drafting Committee had ultimately decided not to include in the draft guideline a reference to a right of withdrawal from the treaty by the author of an invalid reservation; however, the commentary would mention the fact that such a proposal had been made and was supported by some members of the Commission.

21. Draft guideline 4.5.3, which corresponded to the original draft guideline 4.5.4, was entitled "Reactions to an invalid reservation". While the substance of the draft guideline proposed by the Special Rapporteur had been retained, the Drafting Committee had introduced a number of changes to the wording. Since section 4.5 referred to both the permissibility and the formal validity of a reservation, the Drafting Committee had replaced, in the title and in the text of the original guideline 4.5.4, the term "impermissible" by the term "invalid", which also appeared in the other draft guidelines in section 4.5.

22. In the first paragraph, reference was made to the "nullity" of an invalid reservation, and not to the "effects of the nullity" as in the original draft guideline, since an invalid reservation was devoid of legal effect. Moreover, for the sake of clarity, the general reference to "the reaction" to a reservation in original draft guideline 4.5.4 had been replaced by a more explicit reference to "the objection or the acceptance" by a contracting State or a contracting organization, it being understood that the contracting State or contracting organization in question did not include the author of the reservation. The commentary would explain the close relationship that existed between that provision and draft guideline 3.3.3, which stated that the acceptance of an impermissible reservation did not cure the nullity of

the reservation. The commentary would also indicate that the 12-month deadline for the formulation of an objection was not applicable in the case of invalid reservations. In addition, it would explain the difference between the situation envisaged in the current draft guideline 4.5.3 and the case of the collective acceptance of an impermissible reservation, which was addressed in draft guideline 3.3.4.

23. The second paragraph of draft guideline 4.5.3, which began with the word "Nevertheless" in the current revision, stated that a contracting State or a contracting organization which considered a reservation to be invalid should, if it deemed it appropriate, formulate a reasoned objection to the reservation as soon as possible. The commentary would emphasize the recommendatory nature of that paragraph. The qualifier "if it deems it appropriate" had been included in response to concerns raised by members who felt that the original formulation of the recommendation was too strong. The point had also been made that various considerations might, in a given case, discourage a State from formulating an objection to a reservation which it considered to be invalid. Moreover, although the phrase "as soon as possible" had been retained at the end of paragraph 2, the commentary would emphasize that this phrase was merely recommendatory, as there was no deadline for the formulation of an objection to an invalid reservation.

24. During the plenary debate, a suggestion had been made to include a reference in the second paragraph to the reservations dialogue. However, the Drafting Committee had considered it inappropriate to include a reference to a concept that did not appear anywhere else in the text of the Guide to Practice. In that connection, the Special Rapporteur had indicated that he intended to cover the issue of the reservations dialogue in his final report, which would be presented to the Commission at its sixty-third session, and that he was likely to propose that the question be addressed in an annex to the Guide to Practice. That said, the commentary to draft guideline 4.5.3 would explain that the purpose of the recommendation contained in the second paragraph was to encourage the reservations dialogue.

25. Draft guideline 4.6 was entitled "Absence of effect of a reservation on the relations between the other parties to the treaty". The Special Rapporteur had presented two options for the text of the draft guideline. According to the first option, the guideline would have simply reproduced the text of article 21, paragraph 2, of the Vienna Conventions, while, according to the second option, the provision would have included the opening phrase "Without prejudice to any agreement between the parties as to its application". Given that a slight preference had been expressed for the first option during the plenary debate, the Drafting Committee had decided to retain that option. Thus, draft guideline 4.6 as provisionally adopted by the Drafting Committee reproduced the exact wording of article 21, paragraph 2, of the Vienna Conventions.

26. Turning to the draft guidelines under section 4.7, he said that the title of the section "Effect of an interpretative declaration" corresponded to the original title of draft guideline 4.7 proposed by the Special Rapporteur, except that the word "effects" had been used in the singular.

27. Draft guideline 4.7.1 was entitled "Clarification of the terms of the treaty by an interpretative declaration",

as originally proposed by the Special Rapporteur. However, draft guideline 4.7.1 as provisionally adopted by the Drafting Committee was the result of a partial merging of original draft guidelines 4.7 and 4.7.1.

28. The text of the first paragraph was based on the text of draft guideline 4.7 as proposed by the Special Rapporteur, with a number of amendments. In order to align the English version with the French text, the words “may not modify” had been replaced by the words “does not modify”. Also in the English version, the expression “some of its provisions” had been replaced by the words “certain provisions thereof” for the sake of consistency with the definition of an interpretative declaration in draft guideline 1.2. The word “accordingly” in the second sentence had been replaced by the expression “as appropriate”, which purported to indicate that whether, or the extent to which, an interpretative declaration might constitute an element to be taken into account in interpreting the treaty would depend on a variety of factors, including the nature of the declaration and the circumstances in which it had been formulated.

29. The last phrase of the first paragraph in the current version, “in accordance with the general rule of interpretation of treaties”, was taken from the first sentence of original draft guideline 4.7.1, which had also contained further details on treaty interpretation. The rest of the sentence had been deleted by the Drafting Committee at the suggestion of several members, who had been of the view that the Guide to Practice should not deal with the modalities of treaty interpretation. Thus, a reference to the general rule of treaty interpretation had been deemed sufficient in the context.

30. The second paragraph of draft guideline 4.7.1 was a simplified version of the second sentence of the original draft guideline 4.7.1 proposed by the Special Rapporteur. It stated that, in interpreting the treaty, account should also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations. The words “as appropriate” had been added by the Drafting Committee in order to convey the idea that the relevance and the weight to be accorded, in interpreting a treaty, to approval of or opposition to an interpretative declaration needed to be assessed in the light of the relevant circumstances.

31. Draft guideline 4.7.2 was entitled “Effect of the modification or the withdrawal of an interpretative declaration in respect of its author”. The draft guideline originally proposed by the Special Rapporteur had stated that “the author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration”. During the plenary debate, several members had expressed the view that the formulation proposed for the guideline was too strict. In particular, it had been suggested that the guideline include a reference to the right of the author of an interpretative declaration to modify or withdraw it in conformity with draft guidelines 2.4.9 or 2.5.12. The Special Rapporteur had agreed on the need to seek a more nuanced formulation.

32. The general feeling in the Drafting Committee had been that, while the right of a State or an international organization to modify or withdraw an interpretative

declaration ought to be acknowledged, there was also a need to protect the interests of other contracting States or contracting organizations that might have relied upon the initial declaration. In that spirit, the Drafting Committee had agreed on the following formulation: “The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.” To the extent that it referred to the idea of reliance, that text was based on the wording of principle No. 10 of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations,³³⁴ adopted by the Commission in 2006.

33. The assumption was that the effects envisaged in draft guideline 4.7.1 might also be attached to the modification or the withdrawal of an interpretative declaration; in other words, the modification or the withdrawal of an interpretative declaration were elements that might be taken into account, as appropriate, in interpreting a treaty in accordance with the general rule of interpretation of treaties. However, such interpretative effects might not be attached to the withdrawal or the modification of an interpretative declaration to the extent that other contracting States or contracting organizations had relied on that declaration. The commentary would emphasize the role of the principle of good faith and the potential relevance of estoppel in this context. It would also elaborate on the notion of reliance as well as other criteria that were mentioned in Guiding Principle No. 10 and the commentary thereto.

34. After careful consideration, the Drafting Committee had decided not to include a reference to draft guidelines 2.4.9 and 2.5.12 in the text of the draft guideline. The majority of the members had considered that such a reference was not necessary in a provision that addressed the effects of the modification or withdrawal of an interpretative declaration, as opposed to the procedure to be followed in modifying or withdrawing an interpretative declaration. However, the commentary would include a reference to draft guidelines 2.4.9 and 2.5.12.

35. Furthermore, contrary to the text proposed by the Special Rapporteur, the draft guideline provisionally adopted by the Drafting Committee did not refer to the case of a State or an international organization which, having approved an interpretative declaration, intended to put forward a different interpretation of the treaty. Some doubts had been raised in the Drafting Committee as to whether such a State or international organization should be treated in the same way as the author of the interpretative declaration. The case of a State or an international organization that had approved an interpretative declaration would be addressed in the commentary; as a relevant factor, reference would be made to the extent to which other contracting States or contracting organizations had relied on the initial declaration and/or on the approval thereof.

36. Draft guideline 4.7.3 was entitled “Effect of an interpretative declaration approved by all the contracting States and contracting organizations”. The term “effect” in the title had been used in the singular for the sake of consistency with other draft guidelines.

³³⁴ See footnote 311 above.

37. The Drafting Committee had retained the text of the draft guideline originally proposed by the Special Rapporteur, except that it had replaced the words “constitutes an agreement” with the words “may constitute an agreement”. It had been felt that the original wording was too affirmative and that the word “may” would adequately express the need that the relevant circumstances should be taken into consideration when assessing the existence of an agreement regarding the interpretation of the treaty. It had been suggested in the Drafting Committee that the words “between the parties”, which appeared in article 31, paragraph 3 (a), of the Vienna Conventions, should be included in order to qualify the agreement regarding the interpretation of the treaty referred to in the draft guideline. However, the Drafting Committee had not followed that suggestion. It had considered that the text of the draft guideline was sufficiently clear; moreover, such an addition could have conveyed the wrong impression that the scope of the draft guideline should be limited to the situation envisaged in article 31, paragraph 3 (a), of the Vienna Conventions.

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

39. Mr. MELESCANU recalled that the title and text of draft guideline 4.7.2 originally proposed by the Special Rapporteur had been quite different from the title and text approved by the Drafting Committee. While he had no objection to the current version, he suggested that it should be clearly explained in the commentary that until an interpretative declaration was modified or withdrawn, its author could not invoke an interpretation contrary to that put forward in the original declaration.

40. The CHAIRPERSON said he took it that the Commission wished to adopt the titles and texts of draft guidelines 3.3.3, 3.3.4 and 4.5 to 4.7.3 contained in document A/CN.4/L.760/Add.3 on the understanding that Mr. Melescanu's suggestion would be taken into account in the commentary to draft guideline 4.7.2.

It was so decided.

Shared natural resources³³⁵ (A/CN.4/620 and Add.1, sect. E, A/CN.4/621,³³⁶ A/CN.4/633³³⁷)

[Agenda item 4]

REPORT OF THE WORKING GROUP

41. Mr. CANDIOTI (Chairperson of the Working Group) said that, since the Commission's decision at

its 3053rd meeting on 28 May 2010 to reconstitute the Working Group on shared natural resources, the Working Group had held two meetings. The Working Group's main task was to continue its assessment of the feasibility of any future work by the Commission on the issue of transboundary oil and gas resources.

42. Among the documents considered³³⁸ was a working paper prepared by Mr. Murase (A/CN.4/621), as requested by the Working Group during the sixty-second session. The topic “Shared natural resources” had been included in the Commission's programme of work on the basis of a syllabus drawn up by Mr. Rosenstock during the fifty-second session,³³⁹ outlining the general orientation of the topic; however, there was no specific syllabus concerning oil and gas resources. Thus, in accordance with the step-by-step approach proposed by the former Special Rapporteur,³⁴⁰ Mr. Yamada, following completion of the work on transboundary aquifers, it had been deemed necessary to consider the feasibility of work on oil and gas issues.

43. The basic recommendation made in the paper prepared by Mr. Murase was that the transboundary oil and gas aspects of the topic should not be pursued further by the Commission. An analysis of comments received from Governments and statements made by member States in the Sixth Committee showed that they fell into three main groups: those in favour of the Commission addressing the subject; those advocating a more cautious approach based on broad agreement; and those (the preponderant view) suggesting that the Commission not proceed any further.

44. The majority of States held the view that transboundary oil and gas issues were essentially bilateral in nature, as well as highly political or technical, involving diverse regional situations. Doubts had also been expressed about the need for the Commission to proceed with a codification exercise, including the development of universal rules. It was feared that an attempt at generalization might make matters more complex and confused when they had been adequately addressed through bilateral efforts. Moreover, since transboundary oil and gas reserves were often located on the continental shelf, concerns had also been voiced that the politically delicate issue of maritime delimitation would need to be taken into consideration, unless the parties reached agreement beforehand not to deal with it, as had happened in a limited number of cases.

45. Furthermore, it had been considered that the option of collecting and analysing information about State practice concerning transboundary oil and gas or elaborating a model agreement on the subject would not be productive because of the specific problems relating to each case involving oil and gas. Moreover, the sensitive nature of

³³⁵ At its fifty-fourth session (2002), the Commission decided to include the topic “Shared natural resources” in its programme of work and named Mr. Chusei Yamada, Special Rapporteur for the topic (*Yearbook ... 2002*, vol. II (Part Two), p. 100, paras. 518–519). At its sixtieth session (2008), the Commission adopted on second reading a preamble and 19 draft articles on transboundary aquifers (*Yearbook ... 2008*, vol. II (Part Two), p. 19, and General Assembly resolution 63/124 of 11 December 2008). Between 2003 and 2009, the Commission also created five working groups on shared natural resources, the first of which was chaired by the Special Rapporteur; the four other working groups were chaired by Mr. Enrique Candiotti.

³³⁶ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

³³⁷ *Idem.*

³³⁸ The Study Group had before it: (a) comments and observations received from Governments on oil and gas (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/607 and Add.1) and document A/CN.4/633; (b) the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session (A/CN.4/620 and Add.1, sect. E); and (c) a compilation of extracts of analytical summaries for the discussion held in the Sixth Committee in 2007, 2008 and 2009 on oil and gas. For the 2007 questionnaire, see *Yearbook ... 2007*, vol. II (Part Two), p. 56, para. 159, and p. 59, para. 182.

³³⁹ *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141.

³⁴⁰ *Yearbook ... 2002*, vol. II (Part Two), pp. 100–102, para. 520.

certain relevant cases might well hamper any attempt at a sufficiently comprehensive and useful analysis of the issues involved.

46. He recalled that, when selecting a topic, the Commission was generally guided by established criteria, namely that the topic should reflect the needs of States in respect of the progressive development and codification of international law; it should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and it should be concrete and feasible for the purposes of progressive development and codification.

47. Having considered all aspects of the matter in the light of its previous discussions, and taking into account the views of Governments including those reflected in the working paper, the Working Group recommended that the Commission not consider the transboundary oil and gas aspects of the topic “Shared natural resources”.

48. In conclusion, he expressed the hope that the Commission would take note of the report of the Working Group and endorse its recommendation. He expressed his appreciation to Mr. Murase and all the members of the Working Group for their useful contributions, and to the Secretariat for its valuable assistance.

49. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Working Group on shared natural resources and endorse its recommendation.

It was so decided.

The meeting rose at 1 p.m.

3070th MEETING

Thursday, 29 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrić, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Other business

[Agenda item 15]

SETTLEMENT OF DISPUTES CLAUSES (A/CN.4/623³⁴¹)

1. The CHAIRPERSON recalled that at its sixty-first session, the Commission had decided to devote at least

one meeting to a discussion on settlement of disputes clauses.³⁴² In that connection, the Secretariat, taking into account the recent practice of the General Assembly, had been requested to prepare a note on the history and practice of the Commission with respect to such clauses, which was contained in document A/CN.4/623.

2. Sir Michael WOOD said that the examination of the topic could be viewed as the Commission's contribution to the consideration by the General Assembly of the agenda item entitled “The rule of law at the national and international levels”.³⁴³ In its 2009 report, the Commission had reiterated its commitment to the rule of law in all its activities and had stressed that the rule of law constituted its essence, since its basic mission was to guide the development and formulation of the law.³⁴⁴ He would welcome the Commission to provide a fuller response to the General Assembly at the current session and perhaps to mention the current debate in that regard.

3. He welcomed the fact that the debate was taking place. It was good that the Commission took the opportunity from time to time to discuss such cross-cutting issues as the peaceful settlement of disputes, which was of growing importance. Together with the prohibition on the use of force enunciated in Article 2, paragraph 4, of the Charter of the United Nations, the principle of the peaceful settlement of disputes in Article 2, paragraph 3, and Article 33 lay at the heart of the system for the maintenance of international peace and security defined in the Charter of the United Nations. It was one of the principles of international law set forth 40 years previously in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970, and further elaborated in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, approved by the General Assembly in its resolution 37/10 of 15 November 1983, in which it appears as an annex.

4. Reference should also be made to the statement by the President of the Security Council of 29 June 2010, which contained the following passage:

The Security Council is committed to and actively supports the peaceful settlement of disputes and reiterates its call upon Member States to settle their disputes by peaceful means as set forth in Chapter VI of the Charter of the United Nations. The Council emphasizes the key role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work and calls upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute.

The Security Council calls upon States to resort also to other dispute settlement mechanisms, including international and regional courts and tribunals which offer States the possibility of settling their disputes peacefully, contributing thus to the prevention or settlement of conflict.³⁴⁵

³⁴² *Yearbook ... 2009*, vol. II (Part Two), p. 151, para. 238.

³⁴³ Item 83 of the agenda of the sixty-fourth session of the General Assembly (A/64/251). See also General Assembly resolution 63/128 of 11 December 2008.

³⁴⁴ *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 231.

³⁴⁵ S/PRST/2010/11, paras. 2–3.

³⁴¹ Reproduced in *Yearbook ... 2010*, vol. II (Part One).

5. It was only natural that the Commission continue to make a contribution in the field of the peaceful settlement of disputes. The 2009 decision had referred specifically to settlement of disputes clauses. That was an important part of a wider topic, where the Commission had played a role in the past. In his view, the Commission should have a role in promoting the practical implementation of one of the basic principles of the Charter of the United Nations in the field of international law. The question was how best it could make a contribution.

6. On the specific issue of the inclusion of dispute settlement clauses in international instruments, it could be said that this was essentially a political matter, one to be left to the appreciation of States. In the past, that might have been an accurate perception, to some degree at least. Things were different today, however, and encouragement to States to accept dispute settlement procedures would be broadly welcomed as a contribution to the rule of law at international level. The above-mentioned statement by the President of the Security Council was witness to that.

7. The specific terms of the dispute settlement provision in an instrument might need to be tailored to the substantive content, and it might often make sense for those who drafted the substantive provisions also to indicate what they considered to be the best modalities for dispute settlement. While the ICJ might often be appropriate, in specialized fields it might sometimes be necessary to think of other methods.

8. He thanked the Secretariat for its note on settlement of disputes clauses (A/CN.4/623), which contained three substantive chapters. The first (paras. 3–13) provided an overview of the history of the study by the Commission of topics related to the settlement of disputes. In a sense, that was the most interesting sections of the report. It first described the Commission's work in the 1950s leading to the Model Rules on Arbitral Procedure.³⁴⁶ That could not perhaps be described as a total success, but the process itself of consideration by the Commission had undoubtedly shed light on important aspects of inter-State arbitral procedure. As indicated in the Secretariat's note, the Commission had considered taking up aspects of dispute settlement on the occasion of its three great reviews of international law, in 1949,³⁴⁷ 1971³⁴⁸ and 1996,³⁴⁹ but each time it had ultimately decided not to do so. The description of the Commission's approach set out in its 1971 report, cited in paragraph 11 of the Secretariat's note, was interesting and worth quoting, the issue being whether the reasons that had led to that approach were still valid in the very different world of today:

[T]he Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles,

³⁴⁶ *Yearbook ... 1958*, vol. II, document A/3859, Report of the Commission on the work of its tenth session, p. 83, para. 22.

³⁴⁷ "Survey of international law in relation to the work of codification of the International Law Commission: preparatory work within the purview of article 18, paragraph 1, of the International Law Commission", memorandum submitted by the Secretary-General (A/CN.4/1/Rev.1), para. 105.

³⁴⁸ *Yearbook ... 1971*, vol. II (Part Two), document A/CN.4/245, pp. 29–34, paras. 120–149.

³⁴⁹ *Yearbook ... 1996*, vol. II (Part Two), annex II, sect. XIII, p. 136.

or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.³⁵⁰

9. There had been at least one other more recent occasion when the Commission had consciously decided not to take up a dispute settlement issue. That was in connection with the topic on fragmentation of international law,³⁵¹ when it had been decided that the Commission would focus on the fragmentation of substantive law. The question of the competing and overlapping jurisdiction of the many international courts and tribunals had been deliberately not addressed, yet it was still a live issue, and the great expansion in the number and role of international courts and tribunals was well known.

10. The reasons which had led the Commission to hesitate to consider dispute settlement clauses might not apply today. In recent years, the political organs of the United Nations had stressed the importance of dispute settlement, including through courts and tribunals.

11. The following chapter of the Secretariat's note detailed the practice followed by the Commission in relation to dispute settlement clauses (paras. 14–66). It was divided into two sections. First, in paragraphs 15 to 44, it examined the relevant clauses as they had been included in draft articles adopted by the Commission and covered such varied matters as the law of the sea, diplomatic law, the law of treaties, the security of persons entitled to international protection and the non-navigational uses of international watercourses.

12. The second section of this chapter (paras. 45–66) considered draft articles in which the inclusion of such clauses, although discussed, had not been retained. For each set of draft articles, the Secretariat had provided a brief description of the factors considered by the Commission in deciding whether to include settlement of disputes clauses.

13. Finally, the Secretariat's note had a short chapter with information on the recent practice of the General Assembly in relation to settlement of disputes clauses inserted in conventions which had not been concluded on the basis of draft articles adopted by the Commission. The note was not limited to the inclusion of settlement of disputes clauses in international instruments, but also covered the Commission's contribution to the peaceful settlement of disputes. In his view, the current discussion could usefully range more widely.

³⁵⁰ *Yearbook ... 1971*, vol. II (Part Two), document A/CN.4/245, p. 33–34, para. 144.

³⁵¹ *Yearbook ... 2003*, vol. II (Part Two), pp. 96–97, paras. 416–419, and "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi (A/CN.4/L.682 and Add.1 and Corr.1) (see footnote 291 above).

14. The Secretariat's note prompted several reflections. It was apparent that the Commission had a rich practice in considering and sometimes including dispute settlement clauses in its drafts, but it seemed, superficially at least, to have approached dispute settlement in a rather haphazard manner. The Secretariat stated in its note that the Commission had not discussed the issue in general terms before. It also emerged clearly from the Secretariat's note that when they adopted an instrument on the basis of the Commission's draft, States frequently departed from the Commission's recommendations with regard to dispute settlement. That did not mean that the Commission's decision on the matter—to include or not to include a particular provision—was without purpose. One would think that its recommendation had been influential in prompting States to consider the question and pointing towards the eventual solution. Ultimately, the inclusion or not, and the form, of dispute settlement clauses was a policy matter for States. In that respect, dispute settlement clauses were no different from any other provisions of an international instrument.

15. While consideration of the matter was primarily of importance for current and future topics, it was also relevant in relation to existing instruments. It was, unfortunately, the case that many States still did not accept optional dispute settlement clauses, such as the optional protocols to the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations, and they maintained reservations to other clauses, which were often expressly permitted. However, there was a trend in recent years not to make such reservations or to withdraw them. That was to be encouraged.

16. As a general matter, it might be thought that a presumption in favour of including effective dispute settlement clauses in international instruments should follow from the current emphasis on the rule of law in international affairs. One could see a trend in that direction with the General Assembly's inclusion of article 27 in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. Only where there was some special reason not to include a clause should it be omitted.

17. In specific cases, inclusion of a dispute settlement clause might be an essential part of a package deal on some particularly delicate issue. Classic examples were the provisions of the Vienna Conventions on the Law of Treaties concerning *jus cogens* and Part XV of the United Nations Convention on the Law of the Sea.

18. What, in concrete terms, might come out of the Commission's discussion of the issue? The Commission had initially planned to devote one or more meetings to the question, but owing to its workload, it had only been able to allocate the current meeting. Given the preliminary nature of the current debate, the Commission should perhaps agree to continue with it in 2011 with a view to possibly including the following suggestions in the 2011 report.

19. First, the Secretariat's note already constituted a useful contribution, and it could serve as a point of reference for consideration by the Commission, and indeed by States, of whether to include dispute settlement clauses in future drafts and instruments.

20. Second, the very fact that the debate was taking place was recognition of the importance of the question of whether to include dispute settlement clauses in drafts prepared by the Commission and in instruments, multilateral and also bilateral, adopted by States.

21. Third, the Commission could recall that in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, the General Assembly had encouraged States to include "in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof" (General Assembly resolution 37/10, annex, para. 9).

22. Fourth, in recognition of the practical importance of dispute settlement, the Commission could decide, in principle at least, to discuss the question at an appropriate stage of the consideration of each topic on its agenda.

23. Fifth, the Commission could acknowledge and encourage the important work done by other United Nations bodies in the field of the peaceful settlement of disputes. For example, the *Handbook on the Peaceful Settlement of Disputes between States*³⁵² prepared in the early 1990s by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization remained a valuable introduction to the subject, although it would be good if the Secretariat could find a way of bringing it up to date.

24. Sixth, the Commission might invite regional bodies with which it interacted to inform it of any work they had done in the field of dispute settlement. They could do so when their representatives visited the Commission. The Council of Europe had already drawn attention to two interesting recommendations adopted a few years previously by the Committee of Ministers on the basis of the work of CAHDI. The first had been to suggest model clauses for possible inclusion in declarations under the optional clause accepting the compulsory jurisdiction of the ICJ,³⁵³ and the second dealt with the important practical matter of nominating qualified persons for the lists of arbitrators and conciliators provided for under a range of treaties.³⁵⁴ The Commission had heard the previous week that this was an ongoing exercise within CAHDI. It would be interesting to hear from other regional bodies. Dispute settlement could be a good subject for cooperation between those bodies and the Commission.

25. Ms. JACOBSSON said that in 2009, in the first annual report on strengthening and coordinating the United Nations rule of law activities, the Secretary-General had stated that "[f]or any conception of the rule of law at the international level, peaceful means to address alleged violations of international law are essential" and

³⁵² Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (OLA/COD/2612) (United Nations publication, Sales No. E.92.V.7), New York, 1992.

³⁵³ Recommendation CM/Rec(2008)8 of the Committee of Ministers of the Council of Europe to member States on the acceptance of the jurisdiction of the International Court of Justice of 2 July 2008.

³⁵⁴ Recommendation CM/Rec(2008)9 of the Committee of Ministers of the Council of Europe to member States on the nomination of international arbitrators and conciliators of 2 July 2008.

that “Member States have repeatedly recognized the need to strengthen international dispute settlement mechanisms (see General Assembly resolution 55/2 [of 8 September 2000])”.³⁵⁵ The report referred to Article 33 of the Charter of the United Nations, and the importance of settling disputes by peaceful means was also stressed in the statement by the President of the Security Council of 29 June 2010 cited by Sir Michael.

26. Given the time constraints, she would limit her comments. She agreed with most of the views expressed by Sir Michael. International law allowed for disputes to be settled in numerous ways, but although States resorted more frequently to dispute settlement mechanisms, they had always been reluctant to include compulsory mechanisms in the treaties which they concluded. Today, there was an interesting trend towards a more frequent use of dispute settlement procedures at both multilateral and regional levels. That was a welcome development, although in some instances the procedures were not used at all when they ought to be, or the reservations which States made to treaties were such that the dispute settlement clauses therein became meaningless. States were perfectly entitled to make such reservations, but that clearly weakened dispute settlement mechanisms. Some mechanisms, such as the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe, had never even been used.

27. The question, as Sir Michael had said, was how the Commission could make a contribution in that area. In her view, it was important to broaden the discussion and to include not only dispute settlement clauses as such but also other instruments and mechanisms, for example fact-finding mechanisms. Fact-finding could be of a legal nature; it was not necessarily political.

28. She supported the idea of continuing the discussion at the 2011 session. Sir Michael had made six suggestions, which all deserved further examination, although the one concerning cooperation with other bodies should be given special attention, because it was within the regional context that there had been the greatest developments in terms of dispute settlement.

29. Mr. GAJA welcomed the initiative which had led the Commission to have a debate on peaceful dispute settlement clauses and expressed appreciation to the Secretariat for its comprehensive note on the subject and to Sir Michael for his very useful introduction, including his six suggestions.

30. As a possible result of its consideration of dispute settlement clauses, the Commission could first stress the importance for States and international organizations of strengthening the accepted methods of settling disputes in many areas; the position of international organizations was particularly problematic in that regard and needed to be addressed. The Commission could then add that, because of the greater certainty of the applicable rules that an international convention offered, its adoption provided a clear incentive for accepting a method capable of eventually leading to a settlement of the dispute. That

applied, regardless of whether the convention was based on draft articles prepared by the Commission. Those two general recommendations should be in a preliminary part and should not necessarily be tied to the Commission's contribution as such.

31. As the recent practice of the General Assembly showed, the choice of the method of settlement did not necessarily depend on the subject of the convention. With regard to disputes between States, the clauses to which the Secretariat's note referred in paragraphs 67 to 69 and article 27 of the United Nations Convention on Jurisdictional Immunities of States and their Property provided an adequate model for future conventions. The model would need to be enlarged in order to cover disputes between States and international organizations or between international organizations; in this regard, it was important to make arbitration effective, access to the Court being barred for the time being.

32. It did not seem necessary for the Commission to elaborate a specific clause each time it adopted draft articles. When adopting a text which was designed to eventually become binding, it could simply remind States and international organizations of the need to envisage an appropriate method for settling disputes and call attention to the pattern prevailing in the recent practice of the General Assembly, which on the whole was satisfactory. He did accept, however, as Sir Michael had said, that there might be cases in which a tailor-made clause would be more appropriate; in that case, the Commission would recommend a special clause.

33. Mr. CAFLISCH warmly commended the author or authors of the Secretariat's note, an excellent piece of work that presented a real overview of the question and was a useful text, not only for the Commission, but for anyone interested in the peaceful settlement of disputes as well as the codification and progressive development of international law. The note showed first of all that, as indicated in paragraph 20, there had always been members of the Commission who thought that the task of the Commission was to codify or develop the law but not to safeguard its application. However, it also made clear that, in general, that view had not prevailed either in the Commission or in the recent practice of the General Assembly, as set out in paragraphs 67 to 69 of the note, a practice which supported the possibility of a unilateral referral to the ICJ.

34. From the Commission's point of view, the subject under consideration had at least two aspects: firstly, the rules relating to the peaceful settlement of disputes as a subject of progressive development and codification, of which the 1958 Model Rules on Arbitral Procedure³⁵⁶ was a classic example; and secondly, the elaboration of settlement clauses to build on the drafts prepared by the Commission, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations being examples in that regard. The point was not to codify a specific area (the peaceful settlement of disputes), but to add settlement clauses to the draft conventions which the Commission elaborated.

³⁵⁵ A/64/298, para. 13.

³⁵⁶ See footnote 346 above.

35. The subject addressed in the Secretariat's note raised a number of difficulties when considered in the perspective of the work of the Commission. The first difficulty was the reluctance of some States to accept settlement mechanisms, especially if they had to do so in advance. Such reluctance could result in a refusal to accept a particular text, the draft codification and the progressive development of international law. However, as recent practice suggested, that disapproving attitude was less pronounced *vis-à-vis* treaties of a specific, limited and precise nature, as was the case with the Commission's drafts.

36. The second difficulty was that the Commission practised a sectoral approach to international law. Its work covered a given question on a particular dimension of substantive law. The rules relating to the peaceful settlement of disputes were applicable, as the phrase indicated, to disputes. In reality, disputes did not, or did not exclusively, concern the interpretation or application of an instrument emanating from the Commission, but rather a variety of problems of relevance to the law of nations. As a consequence, settlement clauses in an instrument of progressive development or codification might not be effective, because they only covered a particular dimension of a given dispute. With regard to the development or codification of procedural rules, for example in the areas of arbitration, conciliation or fact-finding, the content of the rules could depend on the institutional environment within which the rules were to be applied.

37. Another difficulty was that the activities of the Commission produced different categories of texts, which might later become draft conventions, model rules, guides to practice or something else. Only if the results of the Commission's work were meant to take the form of conventions in the short or longer term should it be asked whether the substantive rules in question should also have dispute settlement clauses concerning what was usually called the interpretation or application of those rules.

38. A final difficulty was that draft treaties emanating from the Commission covered very varied subjects. That meant that, for the peaceful settlement of disputes, every body of substantive rules could give rise to different requirements for the methods used to settle the disputes to which they might give rise. The idea of elaborating model clauses for every draft convention produced by the Commission would thus have to be addressed with caution.

39. The document under consideration showed that, notwithstanding the standpoint of those in favour of work being confined to a study of the substantive rules of international law, the Commission had in fact addressed the application of rules which it had formulated by making provision for a great variety of solutions: compulsory or optional referral to the courts, such as the ICJ or a special tribunal; arbitration or conciliation with optional or compulsory participation (which could be combined with a fact-finding procedure); or a simple reference to Article 33 of the Charter of the United Nations. Sometimes, however, nothing had been contemplated.

40. He drew a number of conclusions on the basis of those considerations. First, the Commission should give greater attention to the question of the peaceful settlement

of disputes. Secondly, following the precedent established in 1958, the Commission could also envisage formulating draft rules of procedure with regard to conciliation and, perhaps, fact-finding, where essentially the idea would be to review the rules in the Hague Conventions I of 1899 and 1907 for the Pacific Settlement of International Disputes. Any results could take the shape of model rules, from which States could derogate, however. To that could be added, as suggested by Sir Michael, the question of the fragmentation of international law from the point of view of the peaceful settlement of disputes. Thirdly, all Special Rapporteurs, and with them the Commission, should consider, during the elaboration of draft conventions or drafts which might lead to negotiations, whether dispute settlement clauses were needed and, if so, what kind. The clauses should be tailored to the content of the draft. It was to be hoped that the debate under way was the first of many and that it would lead either to the elaboration of procedural rules for certain types of dispute settlement or to greater attention being given to that aspect of the preparation of treaties or, even better, to both of the above. The consideration of the subject should be continued, and he endorsed the idea of greater cooperation with regional organizations.

41. Ms. ESCARAMEIA congratulated the newly elected Chairperson and members of the Bureau; thanked all those who, in her absence, had shown her support; and expressed appreciation to the Secretariat for its excellent note on the question of settlement of disputes clauses. She fully agreed with the statement by Sir Michael and had just a few comments. The Commission must give close attention to the implementation of the basic principles on the peaceful settlement of disputes enunciated in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations. Those Articles recognized the primacy of law and were the very essence of international law.

42. The Commission could make a contribution to the subject at three levels, which she would take up by order of difficulty of accomplishment. First, it could simply co-operate with AALCO and CAHDI, with which it already interacted, as well as any other relevant regional legal body to exchange information on the issue of dispute settlement. It would also be useful to bring up the question during the meeting of the legal advisers in the framework of informal exchanges between the members of the Commission and the representatives of the Sixth Committee and, more generally, on any suitable occasion.

43. Secondly, the Commission should always try to insert dispute settlement clauses in all its drafts. Some members were opposed to that; they usually argued that an insertion of such clauses would prejudice the final form of the draft articles, which would then have to be a convention. That was why a number of recently adopted drafts, such as the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities or the draft articles on the law of transboundary aquifers, did not include such clauses. It would be useful for the Sixth Committee to know how the Commission envisaged the settlement of disputes even if the draft articles concerned did not become a convention. The Secretariat's note on settlement of disputes clauses showed that the conventions recently adopted by the General Assembly contained such provisions. That was the case

in any rate for the three conventions on terrorism and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which contained very sophisticated dispute settlement mechanisms ranging from negotiation to arbitration and referral to the ICJ. It would thus be surprising for a body such as the Commission, which was firmly committed to the rule of law, not to insert dispute settlement clauses in its draft articles.

44. Thirdly, the Commission could be more ambitious, as Mr. Caflisch had suggested, and make a more substantial contribution by working to propose possible forms of dispute settlement, as had been done in 1958 in its Model Rules on Arbitral Procedure. For its part, CAHDI had formulated a recommendation on acceptance of the compulsory jurisdiction of the ICJ. Thus, the Commission should always consider the possibility of drafting model rules on international fact-finding, mediation and conciliation. She hoped that the current debate would continue at the 2011 session, and she agreed with the suggestions made by the previous speakers.

45. Mr. McRAE thanked the Secretariat for its excellent note on the subject of dispute settlement. It was appropriate for the Commission to consider the question, given its contemporary importance and increasing use of third party mechanisms by States to settle their disputes. It might be asked why, in certain areas, some States were prepared to accept third party dispute settlement—for example, the compulsory third party dispute settlement under the WTO—but refused it in others, or why there had been increased resort to the ICJ and arbitral bodies.

46. As pointed out by Mr. Caflisch, the Commission should not limit itself to the area of judicial settlement of disputes, and there was a greater need for considering issues of conciliation, mediation and fact-finding mechanisms. It was surprising that, just as the international community seemed to be engaging more and more in litigation-types of dispute settlement, domestically many systems were looking at alternatives to litigation. Thus, the development in international law with regard to dispute settlement seemed to be somewhat behind in relation to practice. As noted by Sir Michael, the Commission's approach to the question of dispute settlement in individual topics had been somewhat haphazard, and that was a good argument for considering it in greater depth in the context of the Working Group on the long-term programme of work. It would not be useful to update the rules on arbitral procedures; instead, the Commission should examine the feasibility of devising a model article for all draft articles that it adopted. Although Mr. Caflisch had opposed that idea, arguing that each situation was different, he personally thought that the Commission should discuss the question to see whether there was some value in elaborating a model article on conciliation and mediation, indicating, for example, in which circumstances it was preferable to go before an arbitral tribunal rather than the ICJ and in which circumstances one mechanism should be favoured over another.

47. The question of whether each dispute was unique deserved further discussion in the Commission. Did different subject areas necessarily mean that there had to be a different type of dispute settlement, or could the Commission identify core principles that could then be adapted

to specific needs? In any event, the Commission should consider whether different areas required different dispute settlement models. Mr. Gaja had suggested that the solution adopted by the General Assembly was the best way of proceeding. He was personally of the view that the Commission should continue its discussion on the topic, focusing on particular questions. To that end, perhaps Sir Michael could produce a working paper for consideration at the 2011 session.

48. Mr. VARGAS CARREÑO thanked the Secretariat for its excellent study and endorsed the proposals made by Sir Michael, which were timely, realistic and useful. Settlement of disputes clauses should be a priority topic in the future work of the Commission, given their importance and the effective and fruitful contribution which the Commission could make in that area. As indicated in the Secretariat's note, the question was not new. It had been the subject of debate during the United Nations Conference on the Law of Treaties, at which States initially had taken two seemingly irreconcilable positions. For some, the wish of the parties should take precedence with regard to dispute settlement, and it was up to them to choose how to proceed; others had stressed the compulsory nature of the jurisdiction of the ICJ and were reluctant to ratify a treaty that did not provide for compulsory dispute settlement. After nearly ending in failure, the Conference had agreed on a compromise: conciliation had been retained as the compulsory dispute settlement mechanism, and in the event of a dispute concerning treaty provisions, notably those relating to *jus cogens*, the ICJ would have jurisdiction. It would be interesting to see how that system, which had prevented the emergence of other dispute settlement mechanisms, had functioned in practice.

49. The conciliation mechanism was probably the most widespread, judging by the number of treaties that made provision for it, but it was the means of dispute settlement least used in international practice. Although it emerged from international practice that referral to the ICJ was the best way of settling disputes, it should be recalled that when the Court rendered a decision unfavourable for a State, it seemed very dangerous that this State should be able to revoke its acceptance of the obligatory jurisdiction of the Court in the framework of the dispute or the interpretation or application of the relevant treaty. Precedents existed and gave cause for concern.

50. He agreed with the proposals by Sir Michael and Mr. Caflisch; the question of settlement of disputes clauses should be given priority attention. He also endorsed Ms. Escameia's proposal that the subject be addressed during the meeting of the legal advisers. The question, which was linked to the fragmentation of international law, would probably come up again in the work of the Commission. He was not at all certain, given the complexity of the subject, that there could be a sole model clause for the settlement of disputes. Whereas some types of disputes called for a pre-established type of settlement, others did not: all the more reason to give priority attention to the issue at the 2011 session.

51. Mr. PETRIČ supported the proposal by Sir Michael to consider the question of dispute settlement clauses in the Commission and thanked the Secretariat for its excellent

report on the subject. The peaceful settlement of disputes was the cornerstone of the rule of law; the two were closely linked, and promoting the rule of law presupposed the peaceful settlement of disputes. Thus, there was no question of the crucial importance of the question, which should be placed on the agenda of the Commission, although with the end of the quinquennium approaching, it was perhaps not the right time to appoint a special rapporteur.

52. The various suggestions made by the previous speakers were interesting, and he agreed that the issue should perhaps be addressed during the meeting of the legal advisers or with regional legal bodies, but the main question was how the Commission was to pursue its work on the subject. It would be useful for the Secretariat and Sir Michael to prepare a document clearly indicating how to continue with the topic, which in his view was suitable for codification and progressive development. After the fall of the Berlin Wall in 1989 and the end of the bipolar world, it had been expected that the peaceful settlement of disputes would become the general rule. Yet despite some progress, that had not been the case. The ICJ was increasingly busy, as was the International Tribunal for the Law of the Sea in Hamburg, whereas the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe had never been used, as noted by Ms. Jacobsson. The peaceful settlement of disputes was a crucial topic that was closely linked to the rule of law, and for that reason, the Commission should not merely discuss whether to start work on the question, but should make a decision, appoint a special rapporteur in due course and take steps to codify or develop international law in the area.

53. Mr. PERERA stressed the need to widen the scope of the discussion beyond draft articles already elaborated by the Commission. Sir Michael had referred to the 1982 United Nations Convention on the Law of the Sea, which had been a watershed in the area of dispute settlement. Taking into account the great sensitivity of States with regard to jurisdiction over natural resources, the drafters of the Convention had placed emphasis on a combination of formal and informal settlement methods, such as conciliation, compulsory conciliation, mediation and so on. As indicated by Mr. Caffisch, that example should be followed, and the Commission should go beyond formal, judicial methods of dispute settlement and explore informal alternatives. He also agreed with the elements of the road map outlined by Sir Michael in his statement.

54. Mr. NOLTE said that the study of the topic fit well in the Commission's work, in particular at a time when the General Assembly was addressing the question of the rule of law at national and international levels. Sir Michael had evoked the current trend towards a wider acceptance of dispute settlement procedures and had come to the conclusion that a presumption should be considered to exist in favour of including dispute settlement clauses in international instruments. He personally would generalize that suggestion by recommending that the Commission include the question of dispute settlement in all its work, not as a separate matter, but in all topics in which it was relevant. He agreed with Mr. McRae that the Commission should examine more closely why States were at times reluctant to use dispute settlement procedures and what incentives might encourage them to resort more readily to them.

55. Mr. DUGARD said that Sir Michael had drawn attention to the fact that CAHDI had embarked on the task of preparing model clauses for possible inclusion in declarations by States under the optional clause on recognition of the compulsory jurisdiction of the ICJ. It would be very helpful for the Commission to examine those declarations; that was a very sensitive area, and such declarations were often inconsistent or unacceptable.

56. Mr. VASCIANNIE said that the subject required further discussion and cooperation, especially with regional bodies. He agreed with the point made by Ms. Escameia that supporting dispute settlement was tantamount to reaffirming the primacy of law over power. However, it was important first to assess the magnitude of the problem, namely the number of unresolved disputes, if that was possible, so as to avoid an exchange of platitudes. The question of the settlement of disputes was often a political matter, as other members had noted. Some States were opposed to dispute settlement through legal procedures because they were confused about the material rules to be considered or were sceptical about the dispute settlement body. In the field of international law relating to investments, for example, for many years the countries of Latin America had maintained the Calvo doctrine,³⁵⁷ arguing that disputes pertaining to investment matters should be settled in their national courts. Over time, those same countries had gradually become more accepting of international dispute settlement, not because they had been given a set of draft articles on the subject, but because they had come to believe that they might get a more just hearing. Sometimes States were reluctant to accept international dispute settlement mechanisms because they believed that disputes which might arise were their personal matters.

57. International dispute settlement should not be limited to judicial or arbitral forms, but should also cover negotiations and conciliation procedures. Several years previously, two Caribbean States, Barbados and Trinidad and Tobago, had had a dispute over their maritime boundary. One of those States had sought international arbitration under the United Nations Convention on the Law of the Sea, but the other State had publicly announced that it would be preferable, for reasons of cost, to arrive at a friendly settlement of the dispute through negotiations. In the area of human rights, States were frequently encouraged to accede to optional protocols to a given instrument. That was a good idea on the face of it, but sometimes a State might find that the settlement mechanism concerned interpreted the rules enunciated in the instrument very differently from the way it did. It was interesting to note in that regard that the WTO dispute settlement mechanism, which had sought to confine itself to the most literal interpretation possible of the rules, benefited from the confidence of WTO member States. The Commission should also address questions concerning separation of powers: in some countries, the executive power could not hand over the jurisdiction of the courts from a national to an international body. Finally, the Commission should also choose the form it wanted to give the draft articles: it could provide for compulsory dispute

³⁵⁷ C. Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, 6 vols., 4th rev. ed., Paris, Guillaumin, 1887–1888, available from <http://gallica.bnf.fr>.

settlement mechanisms or for optional mechanisms, or it could remain silent. In his view, the Commission should deal with the question case by case.

58. Mr. CANDIOTI said that it was important to focus on the prevention of disputes. The Commission's special rapporteurs on topics relating to natural resources, the environment or human rights, for example, should take that into account when they elaborate draft articles and should make provision from the outset for adequate consultation and cooperation mechanisms, which could play an essential prevention role.

59. Mr. MELESCANU, referring to the two approaches identified by Ms. Escameia, namely the immediate approach and the long-term approach, said the Commission could decide for the time being that all draft articles elaborated by it would contain dispute settlement clauses. As suggested by Mr. Caflisch, the Commission should even review the international conventions which it had drafted and which did not contain such clauses, and propose the necessary amendments to them. The longer-term approach could be limited to the elaboration of model clauses relating to the peaceful settlement of disputes, but even so, it must be borne in mind that this work would keep the Commission busy for many years. If the Commission adopted a general approach, it should not confine itself to judicial or arbitral procedures but should also include negotiations, good offices, mediation and so on. If it decided to embark on work of that magnitude, it should also address the question of the application of decisions emerging from the implementation of dispute settlement mechanisms.

60. Mr. HMOUD pointed out that the purpose of dispute settlement mechanisms was not only to defend the rule of law, but also to preserve and restore peace, and thus the international community as a whole had an interest in having more such mechanisms. Apart from the universal problem of expenses, some States were reluctant to accept dispute settlement mechanisms, and formulated reservations to dispute settlement clauses because of the political context, the specific instrument concerned or for other reasons. The Commission should take that into account, as well as the problem of the fragmentation of international law, to which a number of speakers had referred and which resulted in overlap between the procedures and mechanisms provided for under different instruments. He supported Ms. Escameia's suggestion to propose model dispute settlement clauses. If that suggestion were adopted, the commentaries would be more useful than the clauses themselves, because they would clarify the various situations likely to arise. As Mr. Melescanu had noted, given the magnitude of the task, perhaps the Commission should limit the number of areas which it considered, whether it be investment, trade or law enforcement.

61. Mr. FOMBA said that in view of the importance of the legal nature of the obligation of the peaceful settlement of disputes, which was an obligation of results and not of means, it was clear that the subject was of particular interest to the Commission, given its mandate. The question was whether and to what extent the Commission could or should make a contribution in that area. An assessment of its role was necessary, and the Secretariat's note had provided a good overview of the subject. The

Commission's approach should essentially be guided by the criterion of the final legal form of its work and the resulting logic from the point of view of the method to be adopted, including the question of whether to draw up model dispute settlement clauses.

62. Sir Michael WOOD thanked all those who had spoken on the subject and had made many interesting proposals. It had been suggested that he might prepare a short working paper for the 2011 session, and he was prepared to do so with, he hoped, the assistance of the Secretariat. On the basis of the paper, the Commission might consider whether to include some of the points raised during the current debate in the report and, more specifically, whether there were any particular aspects of the very broad field of dispute settlement on which the Commission might decide to focus its attention.

63. The CHAIRPERSON said that, if he heard no objection, he would take it that at its next session, the Commission wished to give further consideration, under the agenda item "Other business", to the question of settlement of disputes clauses and that Sir Michael would be entrusted with preparing a document for that purpose, taking into account the proposals made at the current meeting.

It was so decided.

The meeting rose at 11.40 a.m.

3071st MEETING

Friday, 30 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Treaties over time³⁵⁸ (A/CN.4/620 and Add.1, sect. I)

[Agenda item 10]

REPORT OF THE STUDY GROUP

1. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that the Study Group had held

³⁵⁸ The Commission decided to include the topic in its programme of work and to establish a study group at its sixtieth session (*Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353; see *ibid.*, annex I, p. 156, for the framework proposed for the study of the topic). At its sixty-first session, the Commission created a Study Group on treaties over time, chaired by Mr. Nolte, which identified the issues to be covered and the working methods of the Study Group (*Yearbook ... 2009*, vol. II (Part Two), chap. XII, p. 148, paras. 220–226).

four meetings, on 5 and 26 May and 28 July 2010. It had begun its work on the aspects of the topic relating to subsequent agreement and practice, on the basis of an introductory report prepared by its Chairperson on the pertinent jurisprudence of the ICJ and of arbitral tribunals of *ad hoc* jurisdiction.³⁵⁹ The report addressed a number of questions, including certain terminological issues; the general significance of subsequent agreement and practice in treaty interpretation; the question of inter-temporal law; the relationship between evolutionary interpretation and subsequent agreement and practice; the beginning and the end of the period within which subsequent agreement and practice could take place; common understanding or agreement by the parties, including the potential role of silence and omissions; attribution of conduct to the State; and subsequent agreement and practice as a possible means of treaty modification. Except for the last item, deferred for lack of time until the next session, all those questions had been the subject of preliminary discussions within the Study Group.

2. Aspects touched upon included whether, in the interpretation of treaties, different judicial or quasi-judicial bodies had a different understanding of, or had a tendency to give different weight to, subsequent agreement and practice; and whether the relevance and significance of subsequent agreement and practice could vary, depending on factors relating to the treaty such as its age, its subject matter or its past- or future-oriented nature. It had generally been felt that no definitive conclusions could be drawn on those issues at that stage.

3. During the second meeting, some members of the Study Group had asked for additional information to be provided on relevant aspects of the preparatory work for the 1969 Vienna Convention. At the third meeting, the Chairperson had accordingly submitted an addendum to his introductory report, dealing with the preparatory work relating to the rules on interpretation and modification of treaties and on inter-temporal law.³⁶⁰ The addendum described the Commission's drafting work during the first and second readings of those draft articles relating to the interpretation and modification of treaties and the changes made to those texts in the 1969 Vienna Convention. It concluded that the Convention's article 31, paragraphs 3 (a) and (b), on "subsequent agreements" and "subsequent practice", were the remnants of a more ambitious plan to deal with inter-temporal law and the modification of treaties. The plan could not be realized for a number of reasons, in particular the difficulties of formulating in an appropriate way a general rule on inter-temporal law and the reluctance by States at the United Nations Conference on the Law of Treaties to accept an explicit rule on the informal modification of treaties by way of subsequent practice. However, no differences in substance appeared to have caused the initial, more ambitious plan to have been abandoned.

4. The Study Group had also discussed its future work. During the Commission's next session, it intended first

to complete its discussion of the introductory report prepared by its Chairperson and then move to the analysis of pronouncements of courts and other independent bodies under special regimes. That would be done on the basis of a report to be prepared by the Chairperson. In parallel, contributions were to be made by some members on specific issues, such as subsequent agreement and practice in the field of environmental law and treaties pertaining to specific regions.

5. At its final meeting, the Study Group had examined the idea that a request for information from Governments might be included in chapter III of the Commission's report on its current session and be brought to the attention of Governments by the Secretariat. It was generally felt that any information provided by Governments would be extremely useful, in particular with respect to the consideration of instances of subsequent practice and agreement that had not been the subject of a judicial or quasi-judicial pronouncement by an international body. The Study Group therefore recommended that chapter III of the Commission's report on its current session should include a request for information on the topic "Treaties over time". The Study Group had been able to agree on a provisional text for the request, subject to any modifications the Commission might introduce when adopting chapter III of its report. The text of the request had been circulated to all members of the Commission.³⁶¹

6. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Study Group on treaties over time, and to approve the recommendation regarding the request to Governments for information.

It was so decided.

The most-favoured-nation clause³⁶² (A/CN.4/620 and Add.1, sect. I)

[Agenda item 11]

REPORT OF THE STUDY GROUP

7. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that the Study Group had been reconstituted at the current session and had held three meetings, on 6 May and 23 and 29 July 2010. It had reviewed various papers prepared on the basis of the road map for future work decided on in 2009³⁶³ and had agreed on a programme of work for 2011. It had had before it several papers prepared by its members, including: (a) a catalogue of

³⁶¹ See the text adopted by the Commission in *Yearbook ... 2010*, vol. II (Part Two), chap. III, paras. 26–28.

³⁶² At its sixtieth session (2008), the Commission decided to include the topic in its programme of work and to establish a study group at its sixty-first session (*Yearbook ... 2008*, vol. II (Part Two), p. 138, para. 354; see *ibid.*, annex II, p. 168, for the framework proposed for the study of the topic). In 2009, the Commission established a Study Group on the topic, co-chaired by Mr. McRae and Mr. Perera, and took note of the oral report of the Study Group (*Yearbook ... 2009*, vol. II (Part Two), p. 146–147, paras. 211–216).

³⁶³ *Ibid.*, paras. 215–216.

³⁵⁹ ILC(LXII)SG/TOT/INFORMAL.1 (session document, distribution limited to the members of the Commission); see *Yearbook ... 2010*, vol. II (Part Two), chap. X, para. 349.

³⁶⁰ ILC(LXII)SG/TOT/INFORMAL.1/Add.1 (*idem.*); *Yearbook ... 2010*, vol. II (Part Two), chap. X, para. 352.

most-favoured-nation provisions³⁶⁴—Mr. McRae and Mr. Perera; (b) the 1978 draft articles of the International Law Commission³⁶⁵—Mr. Murase;³⁶⁶ (c) Most-favoured nation in the General Agreement on Tariffs and Trade (GATT) and the WTO³⁶⁷—Mr. McRae; (d) the work of the OECD on most-favoured nation³⁶⁸—Mr. Hmoud; (e) the work of the United Nations Conference on Trade and Development (UNCTAD) on most-favoured nation³⁶⁹—Mr. Vasciannie; and (f) the *Maffezini* problem under investment treaties³⁷⁰—Mr. Perera. The papers shed light on the challenges of the most-favoured-nation clause in contemporary times by looking at the typology of existing most-favoured-nation provisions; the relevance of the 1978 draft articles; how most-favoured nation had developed and was developing in the context of GATT and the WTO; what other activities had been carried out, particularly in the context of OECD and UNCTAD; where substantial work had been accomplished on the subject; and contemporary issues concerning the clause's scope of application, such as those arising in *Maffezini*.

8. The central focus remained on how most-favoured-nation clauses were being interpreted, particularly in the context of investment, and whether some common underlying guidelines could be formulated to serve as interpretative tools or assure some certainty and stability in the field of investment law.

9. The Study Group had held wide-ranging discussions on the basis of the papers before it as well as developments elsewhere, including within the context of the Southern Common Market (MERCOSUR), on which Mr. Saboia had submitted a paper. The Group had also had before it other material on recent work done on the subject.

10. The general sense of the Study Group had been that it was premature to consider preparing draft articles or revising the 1978 draft articles. It had also been felt that the Group could study further the relationship between trade and investment in services and in intellectual property in the context of GATT and the WTO. There was a need to better identify the normative content of most-favoured-nation clauses in investment, to undertake a further analysis of case law, including the role of arbitrators and to consider other factors that explained the divergences, assumptions and interpretative approaches taken in case law and the steps taken by States in response to case law. A systematic attempt should be made to determine whether general patterns could be distilled from the way case law had proceeded in making determinations on questions of jurisdiction based on the most-favoured nation principle. It was necessary to consider the types of most-favoured-nation clauses that had been implicated when making such determinations and to examine the outcomes of arbitral awards in the light of the interpretative tools under the 1969 Vienna Convention.

³⁶⁴ *Yearbook ... 2010*, vol. II (Part Two), chap. XI, para. 360.

³⁶⁵ *Yearbook ... 1978*, vol. II (Part Two), p. 16, para. 74.

³⁶⁶ *Yearbook ... 2010*, vol. II (Part Two), chap. XI, para. 361.

³⁶⁷ *Ibid.*, paras. 362–363.

³⁶⁸ *Ibid.*, para. 364.

³⁶⁹ *Ibid.*, para. 365.

³⁷⁰ *Ibid.*, paras. 366–368.

11. The Co-Chairpersons would endeavour to address the issues just highlighted and to put together an overall report, including a framework of questions, for the Study Group's consideration in 2011.

12. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Study Group on the most-favoured-nation clause.

It was so decided.

The obligation to extradite or prosecute (*aut dedere aut judicare*)³⁷¹ (A/CN.4/620 and Add.1, sect. F, A/CN.4/630,³⁷² A/CN.4/L.774³⁷³)

[Agenda item 7]

REPORT OF THE WORKING GROUP

13. Mr. CANDIOTI (Interim Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that the Working Group had been reconstituted at the current session and had held two meetings, on 27 and 28 July 2010. It had continued its discussions with the aim of identifying the issues to be addressed to further facilitate the work of the Special Rapporteur on the topic. He himself had acted as interim Chairperson in the absence of Mr. Pellet.

14. The Working Group had had before it a survey of multilateral conventions that might be of relevance, prepared by the Secretariat (A/CN.4/630), together with the general framework prepared by the Working Group in 2009.³⁷⁴ The survey identified 61 multilateral instruments that contained provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. It proposed a description and a typology of such instruments and examined the preparatory work for certain key conventions that had served as models in the field, as well as the reservations made to the relevant provisions. It pointed out the differences and similarities between the provisions reviewed. Lastly, the Secretariat's survey offered conclusions on: (a) the relationship between extradition and prosecution in the relevant provisions; (b) the conditions applicable to extradition under the various conventions; and (c) the conditions applicable to prosecution under the various conventions.

³⁷¹ At its sixtieth session, the Commission established, under the chairpersonship of Mr. Pellet, a working group on the topic (*Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315). At its sixty-first session, the Working Group proposed a general framework for the Commission's consideration of the topic, to facilitate the work of the Special Rapporteur (*Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204). From 2006 to 2008, the Commission received and discussed three reports from the Special Rapporteur, Mr. Galicki: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571; *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585; and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603. The Commission also received comments and information from Governments at its fifty-ninth, sixtieth and sixty-first sessions, respectively: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4; *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/599; and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/612.

³⁷² Reproduced in *Yearbook ... 2010*, vol. II (Part One).

³⁷³ *Idem.*

³⁷⁴ *Yearbook ... 2009*, vol. II (Part Two), para. 204.

15. The Working Group had also had before it a paper prepared by the Special Rapporteur, entitled “Bases for discussion in the Working Group on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’” (A/CN.4/L.774), containing observations and suggestions based on the general framework proposed in 2009 and further drawing upon the survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning: (a) the legal bases of the obligation to extradite or prosecute (paras. 5–8); (b) the material scope of the obligation (paras. 9–10); (c) the content of the obligation to extradite or prosecute (paras. 11–13); and (d) the conditions for triggering the obligation to extradite or prosecute (paras. 18–19).

16. In its discussions, the Working Group had affirmed the continuing relevance of the general framework agreed upon in 2009. It had recognized that the Secretariat survey had helped to elucidate aspects of the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in those provisions and their evolution. However, the treaty practice on which the Secretariat study focused needed to be complemented by a detailed consideration of State practice, including but not limited to national legislation, case law and official statements of government representatives. In particular, since the duty to cooperate in combating impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment needed to be made of the extent to which that duty could, as a general rule or in relation to specific crimes, help to elucidate work on the topic, including on the material scope, the content and the conditions for triggering the obligation to extradite or prosecute.

17. Taking into account the Commission’s practice in the progressive development of international law and its codification, the Working Group considered that the general orientation of future reports should be towards presenting draft articles for consideration by the Commission.

18. The CHAIRPERSON said he took it that the Commission wished to take note of the report.

It was so decided.

The meeting rose at 10.30 a.m.

3072nd MEETING

Monday, 2 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

Draft report of the International Law Commission on the work of its sixty-second session

CHAPTER VI. *Effects of armed conflicts on treaties* (A/CN.4/L.766 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to adopt chapter VI of its report (A/CN.4/L.766 and Add.1), paragraph by paragraph.

A. *Introduction* (A/CN.4/L.766)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted with a minor editorial amendment to the English version.

Paragraph 4

2. Mr. GAJA said that the paragraph suggested that Sir Ian Brownlie had resigned from his position as Special Rapporteur, which was not the case. In order to avoid confusion, he proposed that the words “from the Commission” should be inserted after “Sir Ian Brownlie”.

Paragraph 4, as amended, was adopted.

Section A as a whole, as amended, was adopted.

B. *Consideration of the topic at the present session* (A/CN.4/L.766 and Add.1)

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Paragraph 10

3. Mr. NOLTE proposed the deletion of the last sentence, because its wording suggested that the topic raised essentially formal questions which, however, formed the subject of only a few draft articles, whereas, generally speaking, it concerned substantive issues.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 24

Paragraphs 11 to 24 were adopted.

Paragraph 25

4. Mr. NOLTE said that, contrary to the statement made at the beginning of the last sentence, the definition of “armed conflict” in the *Tadić* case did not contain “a certain degree of circularity”. He therefore proposed the deletion of the phrase “While admitting a certain degree of circularity in that definition.”

5. Mr. CAFLISCH (Special Rapporteur) approved of that proposal. When he had spoken of circularity, he had been referring to the Geneva Conventions for the protection of war victims and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and

relating to the protection of victims of non-international armed conflicts (Protocol II), and not to the *Tadić* case.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 28

Paragraphs 26 to 28 were adopted.

Paragraph 29

6. Mr. CAFLISCH (Special Rapporteur) proposed the addition, at the end of that paragraph, of a sentence which would reproduce the wording used in paragraph 70 of the *Tadić* decision and which would read, "Moreover, in order to be consistent with the definition in the *Tadić* case, the words 'a situation in which there has been resort to armed force' should be replaced by 'a situation in which there is resort to armed force'."

The proposal was adopted.

7. Mr. NOLTE proposed the replacement of the words "element of longevity" with "element of duration and intensity" which was closer to what he had wanted to say when the report on effects of armed conflicts on treaties had been considered.

8. Mr. CAFLISCH (Special Rapporteur) approved of that proposal because the debate had concerned "intensity".

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 40

Paragraphs 30 to 40 were adopted.

Paragraph 41

9. Mr. McRAE said that he was uncertain that, as it stood, the third sentence really reflected the debate. He proposed that it should be recast or deleted.

10. The CHAIRPERSON said that he took it that the members of the Commission did not object to the deletion of the third sentence.

It was so decided.

Paragraph 41, as amended, was adopted.

Paragraphs 42 to 44

Paragraphs 42 to 44 were adopted.

Paragraph 45

11. Mr. NOLTE proposed, in order to provide a more accurate record of what the Special Rapporteur had said during the debate, that the word "primarily" should be inserted between "not" and "aimed" in the second sentence, so that it would read: "He recalled that some who had opposed it had pointed out that the application of articles 31 and 32 was not primarily aimed at determining the intention of the parties, but determining the content of the treaty."

12. Mr. CAFLISCH (Special Rapporteur) approved of that proposal.

Paragraph 45, as amended, was adopted.

Paragraphs 46 to 49

Paragraphs 46 to 49 were adopted.

Paragraph 50

13. After an exchange of views in which Mr. McRAE, Sir Michael WOOD and Mr. GAJA took part, the CHAIRPERSON proposed that, in the English version, the word "compromise" should be replaced with "encompass" and in the Spanish version, the words "*afectaría a*", by "*incluiría*".

It was so decided.

Paragraph 50, as amended in the English and Spanish versions, was adopted.

Paragraph 51

Paragraph 51 was adopted.

Paragraph 52

14. Mr. NOLTE said that he was surprised to see that the third sentence stated that doubts had been expressed regarding the inclusion of treaties relating to the protection of the environment. Since other categories of treaties had also been mentioned during the debate, they should likewise be mentioned, or any reference to the treaties in question should be removed.

15. Mr. CAFLISCH (Special Rapporteur) proposed that the words "treaties relating to the protection of the environment, not all" should be replaced with "categories of treaties, not all".

Paragraph 52, as amended, was adopted.

Paragraphs 53 to 62

Paragraphs 53 to 62 were adopted.

Paragraph 63

16. After an exchange of views between Mr. NOLTE and Mr. CAFLISCH (Special Rapporteur), the CHAIRPERSON proposed that the end of the last sentence should be amended to read, "since considering the fate of treaties may not be a priority for a State involved in an armed conflict".

The proposal was adopted.

Paragraph 63, as amended, was adopted.

Paragraphs 64 to 85

Paragraphs 64 to 85 were adopted.

The portion of section B contained in document A/CN.4/L.766, as a whole, as amended, was adopted.

17. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, the remainder of section B of chapter VI, contained in document A/CN.4/L.766/Add.1.

Paragraph 83 (A/CN.4/766/Add.1)

18. Mr. VASCIANNIE proposed that, in the third sentence, the phrase “alleged addressee” should be replaced with “possible victim State”.

Paragraph 83, as amended, was adopted.

Paragraphs 84 to 91

Paragraphs 84 to 91 were adopted.

Paragraph 92

19. Mr. NOLTE proposed the addition, at the end of the paragraph, of the sentence, “Some members noted that the interpretation of Article 2, paragraph 4, of the Charter of the United Nations was also controversial and that this provision was not an exact counterpart to Article 51 of the Charter of the United Nations regarding the right to self-defence”.

Paragraph 92, as amended, was adopted.

Paragraphs 93 to 104

Paragraphs 93 to 104 were adopted.

Paragraph 105

20. Mr. NOLTE proposed that the meaning of the last sentence should be made clearer by amending it to read: “Instead, for non-international armed conflicts to have an effect on treaties, an additional outside involvement would be required.”

Paragraph 105, as amended, was adopted.

Paragraphs 106 and 107

Paragraphs 106 and 107 were adopted.

The remainder of section B of chapter VI contained in document A/CN.4/L.766/Add.1, as amended, was adopted.

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

CHAPTER VII. Protection of persons in the event of disasters (A/CN.4/L.767 and Add.1)

21. The CHAIRPERSON invited the members of the Commission to adopt chapter VII of the report, contained in documents A/CN.4/L.767 and Add.1, paragraph by paragraph.

A. Introduction (A/CN.4/L.767)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.767)

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

22. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, acting on a proposal from Mr. Gaja, the Planning Group had decided to insert a footnote to paragraph 8, which reproduced the text of the draft articles adopted by the Drafting Committee at the current session. As the Planning Group had not yet presented its report to the Commission, he was inclined to approve the adoption of paragraph 8 on the understanding that the footnote would be inserted in due course.

Paragraph 8 was adopted subject to the amendment proposed by the Special Rapporteur.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE THIRD REPORT

Paragraphs 11 to 19

Paragraphs 11 to 19 were adopted.

2. SUMMARY OF THE DEBATE

(a) Draft article 6 (Humanitarian principles in disaster response)

Paragraphs 20 to 23

Paragraphs 20 to 23 were adopted.

Paragraph 24

23. Mr. GAJA proposed that this paragraph should be placed before paragraph 28, in the part concerning draft article 8, for the matters with which it dealt (the principles of sovereignty and non-intervention in the domestic affairs of a State) were directly connected with the issue of the primary responsibility of the affected State.

Paragraph 24 was adopted subject to the repositioning proposed by Mr. Gaja.

Paragraph 25

Paragraph 25 was adopted.

(b) Draft article 7 (Human dignity)

Paragraphs 26 and 27

Paragraphs 26 and 27 were adopted.

(c) Draft article 8 (Primary responsibility of the affected State)

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

24. Mr. GAJA proposed that the last three sentences of that paragraph, which concerned a “secondary” responsibility for the protection of victims of disasters, be placed at the end of paragraph 29.

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 35

Paragraphs 31 to 35 were adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 36 to 40

Paragraphs 36 to 40 were adopted.

Section B as a whole, as amended, was adopted.

25. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, document A/CN.4/L.767/Add.1, which contained the remainder of chapter VII.

C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted so far by the Commission (A/CN.4/L.767/Add.1)

1. TEXT OF THE DRAFT ARTICLES

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION

Article 1 (Scope) Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

26. Mr. GAJA proposed the deletion of the last two sentences of that paragraph, because they were unconnected with the text of draft article 1.

Paragraph (5), as amended, was adopted.

The commentary to draft article 1 as a whole, as amended, was adopted.

Article 2 (Purpose)

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

27. Mr. NOLTE proposed that the word “broadly” in the first sentence should be replaced with the phrase “where relevant”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

28. Mr. NOLTE said that paragraph (7), which referred only to needs related to survival, was too narrow and proposed that the phrase “or similarly essential needs” should be inserted after the word “survival”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

29. Mr. McRAE said that he feared that the phrase “an implied margin of appreciation” in the penultimate sentence, which was widely used in Europe but less so in other regions of the world, might be seen as being associated with the case law of the European Court of Human Rights and proposed that it should be replaced with the phrase “an implied degree of latitude”.

30. Mr. GAJA said that he approved of Mr. McRae’s proposal. The words “such conditionality” in the last sentence seemed somewhat incongruous and should be replaced with the words “such latitude”. In the fifth sentence, he proposed that the word “including” should be replaced with “adding”. In the first sentence, which lacked clarity, he proposed, after consulting with the Special Rapporteur, that it should be replaced with the following sentence: “As regards the reference to rights, it was understood that some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively.”

Paragraph (9), as amended by Messrs. Gaja and McRae and in consultation with Mr. Valencia-Ospina, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to draft article 2 as a whole, as amended, was adopted.

Article 3 (Definition of disaster)

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

31. Mr. NOLTE proposed that, in order to avoid any suggestion that widespread loss of human life was a criterion for defining a disaster, the words “not only” and “but also” should be deleted from the first sentence which should simply read, “many major disasters are accompanied by widespread loss of life or by great human suffering and distress”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

32. Mr. NOLTE said that the adjective “extreme” in the first sentence was superfluous. He therefore proposed that it should be deleted and that the end of the sentence should read, “such as serious political or economic crises”.

33. Mr. McRAE said that it was not the requirement of severe disruption that excluded serious political and economic crises from the draft articles' scope of application, but rather the criterion of a widespread loss of life and great human suffering. He therefore proposed that the last section of the first sentence after the words "a high threshold" should be deleted. He was not sure why the second sentence began with the word "likewise", because it was unconnected with the first. In the fourth sentence, he proposed that the phrase "a margin of appreciation" should be replaced with the words "some discretion".

34. Mr. GAJA said that, while the ideas formulated in the last two sentences were quite correct, they were out of place at that point in the commentary and he proposed that they be deleted.

35. Mr. VALENCIA-OSPINA (Special Rapporteur) acknowledged that the reference to international co-operation in the penultimate sentence was premature at that point and belonged more to the commentary to draft article 5 (Duty to cooperate). The last sentence of the paragraph, which harkened back to the debate on various possible ways of defining the term "disaster", was also misplaced. The last two sentences could therefore be deleted. In response to one of Mr. McRae's comments, he conceded that the word "likewise" at the beginning of the second sentence was inappropriate and he proposed that the whole sentence should be deleted. He was also prepared to accept the deletion of the adjective "extreme" from the first sentence.

36. Mr. PETRIČ said that since the last two sentences contained important ideas, they must not be deleted.

37. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the last two sentences should not be deleted altogether, but moved to the commentary of another article.

Paragraph (8), as amended, was adopted.

The commentary to draft article 3, as amended, was adopted.

Article 4 (*Relationship with international humanitarian law*)

Commentary

Paragraph (1)

38. Mr. NOLTE proposed that the word "predominance" should be replaced with "precedence", a more technical legal term that more closely reflected the Commission's intention. On second reading, it would also be necessary to examine in greater detail the relationship between the text of the article and that of the commentary, since the first gave the impression that the draft articles did not apply at all in areas covered by international humanitarian law, whereas the commentary clarified the relationship between them and corrected that impression.

39. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed with Mr. Nolte's comments and said that he would subsequently propose a reworked version of article 4 that would take account of them.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The commentary to draft article 4, as amended, was adopted.

Article 5 (*Duty to cooperate*)

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

40. Sir Michael WOOD said that he doubted that the first part of paragraph (4) was necessary, or even appropriate, as commentary to draft article 5. If the Special Rapporteur wished to retain it, the text would have to be recast. If he did not, the first three sentences could be deleted and the paragraph could begin with the fourth sentence without the adverb "furthermore".

41. Mr. VALENCIA-OSPINA (Special Rapporteur) drew attention to the fact that draft article 5 had triggered a lively debate and said that some issues, especially that of the affected State's consent, had not been considered owing to a lack of time. He wondered if the Commission might wish to deal with it in the commentary to one of the articles adopted by the Drafting Committee at the current session. He was therefore open to any proposals which would improve the text of the commentary.

42. Sir Michael WOOD said that this reply merely strengthened his conviction and that he failed to see the relationship between the duty to cooperate and the issues dealt with in the first part of paragraph (4).

43. Mr. VASCIANNIE (Rapporteur) said that the question of what would happen if a State refused to cooperate was essential and that the first part of the commentary, which he would like to retain, specifically concerned that eventuality.

44. Mr. NOLTE proposed that only the second and third sentences be deleted.

45. Mr. PERERA, Mr. PETRIČ and Sir Michael WOOD supported that proposal.

46. The CHAIRPERSON, speaking as a member of the Commission, said that he would also prefer to retain the second sentence, but to delete the adverbial phrase "on the contrary".

47. Sir Michael WOOD said that the meaning of that sentence was unclear and he did not see how the duty to cooperate underlined respect for non-intervention. He would therefore prefer it if the text were simplified and those important matters were dealt with in the commentary to an article.

48. Mr. GAJA proposed that the second sentence should be replaced with wording such as "This point will be addressed in the commentary to article 8" and that the third sentence should be deleted.

49. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in the sentence suggested by Mr. Gaja, the words “article 8” should be replaced with “a subsequent article”, because article 8 had not yet been adopted.

50. The CHAIRPERSON said that he took it that the Commission wished to adopt a paragraph (4) worded:

“Cooperation should, however, not be interpreted as diminishing the prerogatives of a sovereign State within the limits of international law; this point will be addressed in a subsequent article. Furthermore, the principle of cooperation is to be understood also as being complementary to the primary duty of the authorities of the affected State to take care of the victims of natural disasters and similar emergencies occurring in its territory. The provision has to be read in light of the other provisions in the draft articles, particularly those on the primary duty of the affected State.”

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

51. Mr. McRAE proposed that in the penultimate line of paragraph (6), the phrase “a margin of appreciation” should be replaced with “a degree of latitude”.

52. Mr. GAJA said that it was unnecessary to define what was meant by the “exact nature” of the obligation to cooperate and therefore proposed that the phrase “(whether ‘shall’ or ‘should’)” should be deleted from the sixth sentence of that paragraph.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

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

Section C, contained in document A/CN.4/L.767/Add.1, as amended, was adopted.

Chapter VII of the draft report as a whole, as amended, was adopted.

CHAPTER IX. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.769)

Paragraph 1

Paragraph 1 was adopted.

Paragraphs 2 and 3

53. Mr. CANDIOTI proposed that, at the end of the paragraph, “2009” should be added in brackets after “sixty-first session”, in order to give a better idea of progress with consideration of the topic over the years.

54. Mr. DUGARD said that this last sentence of the paragraph suggested that the Special Rapporteur had submitted a report, but that the Commission had not examined it. He therefore proposed that “did not” should be replaced by “was unable to”.

55. Mr. NOLTE said that the Commission had been unable to consider the topic because the Special Rapporteur’s report had been unavailable. If paragraph 2 and paragraph 3 were read together, they gave the impression that there had been a report, but that the Commission had not considered it.

56. After a discussion in which Mr. CAFLISCH, Mr. HMOUD, Mr. VALENCIA-OSPINA and Mr. NOLTE took part, Mr. McRAE proposed that the last sentence of paragraph 2 and paragraph 3 be amended to read as follows:

“In the absence of a further report, the Commission was unable to consider the topic at its sixty-first session (2009).”

“3. At the present session, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.”

Paragraphs 2 and 3, as amended, were adopted.

Chapter IX of the draft report as a whole, as amended, was adopted.

CHAPTER XII. Shared natural resources (A/CN.4/L.772)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

57. Mr. GAJA said that the phrase in square brackets could be deleted.

It was so decided.

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

Paragraph 6 was adopted subject to a minor editorial amendment to the English version.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

58. Mr. McRAE proposed that, in the last sentence of paragraph 8, the term “boundary delimitation” should be replaced with “maritime delimitation”, the expression used in the rest of the document.

Paragraph 8, as amended, was adopted.

Paragraph 9

59. Mr. GAJA said that, having consulted the Special Rapporteur on the subject, he thought that, in the third sentence, it would be wise not to give the impression that the Commission was passing judgment over bilateral agreements which might or might not have been concluded. He therefore proposed that the words “had been adequately addressed” with “may have been adequately addressed”.

60. Mr. CANDIOTI proposed that, in the same sentence, the words “and confusion” should be deleted.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

61. Mr. NOLTE said that, in the last sentence of the paragraph, it would be advisable to indicate why the Working Group had taken the decision in question, if only by referring back to the previous paragraphs. He therefore proposed that the words “On the whole” should be replaced with “In light of the foregoing”.

Paragraph 11, as amended, was adopted.

Chapter XII of the draft report, as a whole, as amended, was adopted.

The meeting rose at 6.10 p.m.

3073rd MEETING

Tuesday, 3 August 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-second session (*continued*)

CHAPTER IV. *Reservations to treaties* (A/CN.4/L.764 and Add.1–10)

1. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report beginning with the portion of the chapter contained in document A/CN.4/L.764.

A. *Introduction* (A/CN.4/L.764)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. *Consideration of the topic at the present session* (A/CN.4/L.764 and Add.1)

Paragraphs 5 to 12

Paragraphs 5 to 12 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE SECOND ADDENDUM TO HIS FOURTEENTH REPORT AND HIS FIFTEENTH REPORT

Paragraphs 13 to 30

Paragraphs 13 to 30 were adopted.

2. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SIXTEENTH REPORT

Paragraphs 31 to 55

Paragraphs 31 to 55 were adopted.

3. CONTENT OF THE FINAL REPORT ON THE TOPIC

Paragraph 56

Paragraph 56 was adopted.

- C. **Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.764/Add.2–10)**

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (A/CN.4/L.764/Add.3–10)

2. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter IV contained in document A/CN.4/L.764/Add.3.

Commentary to guideline 2.6.3 (Freedom to formulate objections)

Paragraph (1)

3. Mr. NOLTE questioned the wording of the second sentence of paragraph (1) which read: “Nevertheless, although that freedom is quite extensive, it is not unlimited, and it therefore seems preferable to speak of a ‘freedom’ rather than a ‘right’.” As he recalled, the Drafting Committee and the Commission had been prompted to use the term “freedom” and not “right”, because it had been held that the word “freedom” would allow States greater latitude, whereas rights might tend to be limited. He therefore proposed that the sentence be recast to read: “As this entitlement flows from the general freedom of States to conclude treaties, it seems preferable to speak of a freedom rather than a right.” He clearly remembered that the discussion had turned on terminology drawn from English or American legal theory. The philosopher Wesley Newcomb Hohfeld had been mentioned as someone who had distinguished between rights and freedoms and who had contended that freedoms were less specific than rights and that they flowed from general entitlements.³⁷⁵ That was why the term “freedom” had been chosen rather than “right”. The debate had reached the conclusion that the possibility of formulating an objection should not be limited but enhanced.

4. Mr. PELLET (Special Rapporteur) said, in response to Mr. Nolte, that he was unsure whether the philosophy

³⁷⁵ W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, W. Cook (ed.), New Haven, Yale University Press, 1919.

of rights and freedoms had really inspired the Commission when it had discussed paragraph (1). The Drafting Committee, after careful consideration, had decided to retain the term “freedom” [in French “*faculté*”], which had appeared in the text originally proposed by the Special Rapporteur and referred to the Drafting Committee, because, as its report had noted, the term “right” might not be appropriate in that context, since a right could be regarded as implying the existence of a correlative obligation and, possibly, of a remedy in the event of its violation. Although the reason for choosing the term “freedom” was not therefore that suggested by Mr. Nolte, he did not have any objection to the wording that Mr. Nolte had proposed.

5. Mr. NOLTE said that the Special Rapporteur’s answer had confirmed his own argument that it was precisely the correlation between rights and duties which had prompted the Commission to use the expression “freedom”. Paragraph (1) did not reflect that thinking.

6. Sir Michael WOOD said that Mr. Nolte was right to hold that the current language was not entirely accurate. He suggested that the Commission try to echo some of the language from the Drafting Committee’s report. He therefore proposed that the sentence should read, “That freedom is quite extensive but it is not unlimited. It seems preferable to speak of a freedom rather than a right”, and then continue with the language of the Drafting Committee.

7. Mr. NOLTE said that the choice of the word “freedom” or “right” had nothing to do with any limitation of the entitlement to formulate objections. It rested on different considerations.

8. Mr. GAJA said that the English text of the last footnote to paragraph (1) sounded rather strange, because it said that an objection could not be made before the treaty had come into force. What the footnote should say was “To be specific, there are two cases in which an objection may be formulated, but does not produce its effects, the first being...”.

The footnote would be amended in that vein.

9. Mr. NOLTE said that, he proposed deleting the word “nevertheless” at the beginning of the second sentence of paragraph (1). The sentence would then be amended to read: “Although that freedom is quite extensive, it is not unlimited. It seems preferable to speak of a ‘freedom’ rather than a ‘right’ because this entitlement flows from the general freedom of States to conclude treaties.” The third sentence would remain unchanged.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were adopted.

Paragraph (9)

10. Mr. GAJA, supported by Mr. NOLTE and Mr. McRAE, said that, in the English text, the last sentence should read: “In practice, this would render the mechanism of acceptances and objections meaningless.”

11. Mr. McRAE said that to say in the first sentence that a State was never bound by treaty obligations that were not in its interests sounded strange. It was quite possible that a State might discover that a treaty was no longer in its interests. What the sentence should say was that a State could never be bound by treaty obligations against its will.

12. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. McRae, because “in its interests” did not accurately translate the French expression “*qui ne lui conviennent pas*”.

13. Mr. VASCIANNIE said that “against its will” captured what was intended.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

14. Mr. NOLTE said that the second sentence, which referred to an objection that might be incompatible with the object and purpose of the treaty, was too narrowly worded. It should state that it was scarcely possible to envisage a situation in which an objection might be incompatible with the treaty.

15. Mr. PELLET (Special Rapporteur) suggested that the sentence should read “... incompatible with the treaty, in particular with its object and purpose”.

16. Sir Michael WOOD said that the wording proposed by the Special Rapporteur did not reflect the conclusions of the Commission’s debate, which had specifically concentrated on objections incompatible with the object and purpose of a treaty. If the wording was broadened to encompass the treaty as a whole, it would be difficult to see what was meant by saying that an objection was contrary to a treaty, unless it meant objections prohibited by the treaty, which would be most unusual.

17. Mr. PELLET (Special Rapporteur) said that it was precisely that unusual situation which he had had in mind. Although he had never encountered a situation where a treaty expressly permitted reservations but not objections to reservations, the possible existence of such a situation could not be ruled out.

18. Sir Michael WOOD said that such a situation might not be impossible, but it would be ridiculous and the Commission should not anticipate the ridiculous.

19. Mr. PELLET (Special Rapporteur) said that the situation was less ridiculous than suggested by Sir Michael. If a treaty expressly authorized negotiated reservations, in other words a reservation whose text was provided for in the treaty itself, an objection would be implicitly prohibited.

20. Mr. NOLTE said that he could accept the wording suggested by the Special Rapporteur. There were other means of interpretation besides the text of the treaty and its object and purpose that might make the situation envisaged seem more likely.

21. Mr. PELLET (Special Rapporteur) said that the passage would read “Although it is scarcely possible to envisage a situation in which an objection might be incompatible with the treaty, in particular with its object and purpose, it goes without saying...” [*Alors qu’il n’est guère envisageable qu’une objection soit incompatible avec le traité, en particulier avec son but et son objet, il va de soi...*].

22. Sir Michael WOOD said that if the situation was indeed quite common, it was inconsistent to say that it could scarcely be envisaged.

23. Mr. PELLET (Special Rapporteur) suggested that the clause “Although it is scarcely possible to envisage a situation in which an objection might be incompatible with the object and purpose of the treaty” be deleted. In that way no position would be taken on whether it was possible to envisage such a situation. The reference to the Guide to Practice amply covered all aspects connected with the permissibility of objections.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

The commentary to guideline 2.6.3, as amended, was adopted.

Commentary to guideline 2.6.4 (Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

24. Mr. GAJA said that States often indicated that their objection should not prevent the entry into force of the treaty. There was nothing strange about such action on the part of States if the reservation in question was not deemed to be valid. At the end of the first sentence, it would therefore be advisable to add “with regard to an objection to a permissible reservation” after the phrase “that would automatically be the case”. The addition of the words that he had proposed would not alter the substance of the commentary, but might clarify matters with regard to State practice.

25. Mr. PELLET (Special Rapporteur) agreed with the wording proposed by Mr. Gaja. It would be advisable to add a footnote worded, “With regard to invalid reservations, see guideline...”.

Paragraph (7), as amended and supplemented by the additional footnote, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to guideline 2.6.4, as amended and supplemented with a footnote, was adopted.

26. The CHAIRPERSON invited the members of the Commission to continue the adoption of section C.2 of chapter IV by considering document A/CN.4/L.764/Add.4.

General commentary to section 3.4 (Permissibility of reactions to reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary to section 3.4, was adopted.

Commentary to guideline 3.4.1 (Permissibility of the acceptance of a reservation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

27. Mr. GAJA said that the wording of the second sentence seemed to imply that the time period provided in article 20, paragraph 5, of the Vienna Convention on the Law of Treaties was applicable in the case of impermissible reservations. He therefore proposed ending the sentence with the words “tacit acceptances”, deleting the article “the” before “tacit”.

Paragraph (5), as amended, was adopted.

The commentary to guideline 3.4.1, as amended, was adopted.

Commentary to guideline 3.4.2 (Permissibility of an objection to a reservation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

28. Mr. GAJA proposed amending the opening phrase of the English version of the penultimate footnote to read: “The United Kingdom objected with maximum effect, in due and proper form, to the reservations...”.

Paragraph (2), with the amendment to the penultimate footnote in the English version, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

29. Mr. NOLTE, referring to the phrase “it makes little sense to apply a treaty with no object or purpose”, asked whether it was the treaty itself or its application that was deemed to have no object or purpose.

30. Mr. PELLET (Special Rapporteur) proposed amending the phrase to read: “it makes little sense to apply a treaty that has been deprived of its object and purpose”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

31. Mr. GAJA proposed replacing “other provisions of Part 5” in the second sentence with “certain provisions of Part 5”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (15)

Paragraphs (10) to (15) were adopted.

Paragraph (16)

32. Mr. NOLTE, referring to the last sentence of the paragraph, said that at least one member of the Commission did in fact think that it was conceivable that an “objection” might violate a peremptory norm. He therefore proposed adding the following sentence: “According to one point of view, it was conceivable that a minus could produce an *aliud*.”

33. Mr. PELLET (Special Rapporteur) said that he was unfamiliar with the Latin term used in the proposed amendment. Perhaps Mr. Nolte could rephrase it so that the language was more accessible.

34. Mr. NOLTE proposed the following alternative wording: “According to another view, however, it was conceivable that a ‘deregulation’ of one obligation could lead to a modification of related obligations.”

35. Mr. PELLET (Special Rapporteur) said that the new wording was acceptable. However, he wondered whether the “related obligations” referred to customary or treaty-based rules.

36. Mr. GAJA proposed adding the words “under the treaty” at the end the sentence.

37. Mr. NOLTE agreed to the proposed addition.

38. Mr. McRAE said that the meaning of the term “deregulatory” in the sentence “The effect is simply ‘deregulatory’” should be clarified. He suggested either inserting a footnote indicating the source, which he assumed was Frank Horn,³⁷⁶ or clarifying that “deregulation” entailed the applicability of rules of customary international law rather than treaty obligations.

39. Mr. PELLET (Special Rapporteur) confirmed that the term had been used by Frank Horn. He suggested the following amendment: “The effect is ‘deregulatory’ and the customary norm applies.”

40. Mr. McRAE said that the proposed amendment was acceptable.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (19)

Paragraphs (17) to (19) were adopted.

The commentary to guideline 3.4.2, as amended, was adopted.

Commentary to guideline 3.5 (Permissibility of an interpretative declaration)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

41. Mr. GAJA pointed out that the words “other grounds” in the English version of the paragraph should be amended to read “another ground”, since only one other ground was mentioned.

Paragraph (9), as amended in the English version, was adopted.

Paragraphs (10) to (18)

Paragraphs (10) to (18) were adopted.

Paragraph (19)

42. Mr. NOLTE said that the German quotation was perhaps somewhat misleading, particularly the clauses “International law knows no limits to the formulation of a simply interpretative declaration” and “restrictions on the admissibility of simply interpretative declarations may only derive from the treaty itself”. Paragraphs (9) and (10) mentioned possible exceptions, for instance where an interpretative declaration was contrary to a peremptory norm of general international law. He therefore considered that the paragraph should be deleted.

43. Mr. PELLET (Special Rapporteur) said that he agreed to the proposed deletion.

Paragraph (19) was deleted.

Paragraph (20)

Paragraph (20) was adopted and renumbered.

The commentary to guideline 3.5, as amended, was adopted.

Commentary to guideline 3.5.1 (Permissibility of an interpretative declaration which is in fact a reservation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

44. Mr. CAFLISCH pointed out that “the *Mer d’Iroise* case” was a term used in the popular press to designate the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* [English Channel case].

³⁷⁶ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, 1988, p. 121.

45. Sir Michael WOOD expressed strong support for the use of the correct title of the case.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to guideline 3.5.1, as amended, was adopted.

Commentary to guideline [3.5.2 (Conditions for the permissibility of a conditional interpretative declaration)]

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

46. Mr. VARGAS CARREÑO said that, although guideline 3.5.2 and the commentary thereto was in brackets, he wished to make a statement for the record. Paragraph (5) cited as “a particularly clear example of a conditional interpretative declaration” the declaration that France attached to its expression of consent to be bound Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”). According to the declaration,³⁷⁷ if France was attacked, it would not apply the rules laid down in Additional Protocol II and hence would be free to use nuclear weapons. Even if the attack was not made with nuclear weapons, if, for instance, it took the form of an invasion of Martinique by sea, France would be entitled to respond with nuclear weapons. All the Latin American States had objected to the interpretative declaration on the ground that it was incompatible with the principle of proportionality, as recognized by the ICJ in a number of advisory opinions and by the Commission in its draft articles on State responsibility for internationally wrongful acts.³⁷⁸ The change in nuclear weapons policy of France since 1974 was clearly demonstrated by the fact that France considered itself bound by Additional Protocol II despite the objections. He merely wished to place that fact on record.

Paragraph (5) was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

47. Mr. NOLTE proposed amending the words “remains in a legal vacuum” in the third sentence to read “remains in a twilight realm”.

48. Mr. PELLET (Special Rapporteur) said he agreed that the reference to a legal vacuum was indeed misleading. However, he would prefer the alternative wording “remains undetermined”.

Paragraph (9), as amended, was adopted.

³⁷⁷ United Nations, *Treaty Series*, vol. 936, Annex A, No. 9068, p. 419.

³⁷⁸ See footnote 217 above.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

The commentary to guideline 3.5.2, as amended, was adopted.

Commentary to guideline [3.5.3 (Competence to assess the permissibility of a conditional interpretative declaration)]

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

49. Mr. HMOUD asked whether the time had come to remove the square brackets around the text of the guideline and then to delete paragraph (2) explaining the brackets.

50. Mr. PELLET (Special Rapporteur) said that it had been agreed to keep the guideline in square brackets until the Commission assessed whether conditional interpretative declarations came under the reservations regime. As it had now been established that they did, all the guidelines concerning such declarations would eventually be removed from the Guide to Practice and replaced by a single guideline to the effect that conditional interpretative declarations were subject to the legal regime applicable to reservations. If the Commission so wished, guideline 3.5.3 could already be deleted. However, he would prefer to keep it in square brackets for the time being and explain the situation in a footnote.

51. Mr. HMOUD said that Mr. Pellet’s proposal was acceptable.

Paragraph (2) was adopted.

The commentary to guideline 3.5.3 was adopted.

Commentary to guideline 3.6 (Permissibility of reactions to interpretative declarations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

52. Mr. GAJA, referring to the last sentence of the first footnote to the paragraph, proposed amending the phrase “that the author State or organization must accordingly treat the recharacterized reservation as a reservation” to read: “that this State should accordingly treat the recharacterized reservation as a reservation”. He had replaced “must” with “should” to reflect the wording of draft guideline 2.9.3.

53. Sir Michael WOOD proposed replacing “recharacterized reservation” with “recharacterized declaration”.

Paragraph (3), with the amendment to the first footnote in the second sentence, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

The commentary to guideline 3.6, as amended, was adopted.

Commentary to guideline 3.6.1 (Permissibility of approvals of interpretative declarations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 3.6.1, was adopted.

Commentary to guideline 3.6.2 (Permissibility of oppositions to interpretative declarations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 3.6.2, as a whole, was adopted.

54. The CHAIRPERSON drew attention to the portion of section C.2 of chapter IV of the draft report contained in document A/CN.4/L.764/Add.5.

General commentary to Part 4 (Legal effects of reservations and interpretative declarations)

Paragraphs (1) to (16)

Paragraphs (1) to (16) were adopted.

Paragraph (17)

55. Mr. GAJA asked whether, in the second sentence, the phrase “objections with maximum effect” should be replaced by “objections with minimum effect”, as that was what was most likely intended by the reference contained in that sentence to article 21, paragraph 3, of the Vienna Convention.

56. Mr. PELLET (Special Rapporteur) said that the use of the term “maximum” was indeed an error and should be corrected.

Paragraph (17), as amended, was adopted.

Paragraphs (18) to (21)

Paragraphs (18) to (21) were adopted.

The general commentary to Part 4, as amended, was adopted.

Commentary to guideline 4.1 (Establishment of a reservation with regard to another State or organization)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

57. Mr. NOLTE pointed out that, in the English version of the first sentence, the word “established” was used twice in close succession with two different meanings, which made for awkward reading. He proposed that the second occurrence of the term should be replaced by “pre-supposed” or “spelled out”.

58. Mr. PELLET (Special Rapporteur) said that the second use of the word “established” in the English version was the translation of the word “*consacré*” in the French version.

59. Mr. HASSOUNA proposed, alternatively, that “established” could be replaced by “contained” or “included”.

60. The CHAIRPERSON further suggested as options the terms “stipulated” or “embodied”.

61. Mr. PELLET (Special Rapporteur) said that the term “*consacré*” had a more complex meaning than any of the terms just proposed: it implied that the concept in question was not only included in the article but was based on a pre-existing rule. Of the suggested alternatives, the term “embodied” came the closest to translating the French adequately.

62. Mr. McRAE said that the first sentence seemed to imply that the term “established reservation” was to be found in the Convention but was simply not defined in it. His recollection of the Commission’s debate was that there had been disagreement over whether the concept of an “established reservation” was contained in the Convention; however, it had ultimately been agreed that the concept could be found in article 21, paragraph 1, of the Vienna Conventions. He therefore proposed that, in the first sentence, the phrase “had failed to define clearly what was meant by” should be replaced by “had not defined” and that the term “established” should be replaced by “nevertheless found”.

63. Mr. CANDIOTI said that the discovery of the concept of an “established reservation” in article 21, paragraph 1, of the Vienna Conventions posed problems in Spanish. That was because that article in the official Spanish version of the 1969 and 1986 Vienna Conventions did not employ the Spanish cognate “*establecida*” where the English version used “established” and the French version used “*établie*”, but rather the word “*efectiva*”, which corresponded to “effective” in English. If, in keeping with its usage in article 21, paragraph 1, of the Vienna Conventions, the word “*efectiva*” was retained in the guidelines as a translation of “established” in English, many of the guidelines would be confusing in that they would refer to the equivalent in Spanish of such constructions as “the effectiveness of an effective reservation” and “the effects of an effective reservation”.

64. After discussing the problem, the Spanish-speaking members of the Commission had concluded that the concept of an “established reservation” could best be incorporated in the Spanish version of the Guide to Practice if the translation of the term “established” departed from the official language of the Vienna Conventions and used the term “*establecido*” instead of “*efectivo*” where the English used the term “established”. That would require modifying the Spanish version of the guidelines provisionally adopted by the Drafting Committee, replacing the term “*efectivo(a)*” by “*establecido(a)*” and “*efectividad*” by “*establecimiento*”. He proposed that a footnote to paragraph (3) in the Spanish version of the draft report should be included to clarify that situation.

65. Mr. PELLET (Special Rapporteur) said that the proposal conveyed by Mr. Candiotti was important and should be implemented. He suggested that the footnote should state that the Commission, in making those changes, was

aware of the fact that, regrettably, it was departing from the official text of the Vienna Conventions.

66. Mr. HASSOUNA said that, if it was the only change to the sentence, the term “found” proposed by Mr. McRae did not adequately convey the meaning of “*consacrer*”, which implied some form of confirmation. For that reason, he could accept the term “found” only if other changes were also made to the first sentence.

67. Sir Michael WOOD agreed with Mr. McRae’s proposal but added that the sentence was too complicated and could benefit from being split in two. The word “because” seemed odd, given that, in his view, it was not “because” the Vienna Conventions had not defined an established reservation that the Commission had considered that the concept was found in article 21, paragraph 1; rather it was in spite of it, which could be conveyed by replacing the word “because” with “although”.

68. Mr. McRAE said that he could agree to split the first sentence in two, provided that the comma after “reservations” was deleted and that his proposed clause “because the Vienna Conventions had not defined an ‘established reservation’” was linked to the first part of the sentence and not to the second.

69. Sir Michael WOOD said that the first sentence could easily be reformulated along the lines proposed by Mr. McRae to read: “Some of the members of the Commission expressed hesitation regarding the chosen terminology, which in their view could introduce an element of confusion by unnecessarily and artificially creating a new category of reservations because the Vienna Conventions had not defined ‘an established reservation’. Nevertheless, the Commission considered that the concept was found in article 21, paragraph 1, of the Vienna Conventions...”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

Paragraph (11)

70. Mr. GAJA said that the paragraph referred only to the criterion of compatibility with the object and purpose of the American Convention on Human Rights: “Pact of San José, Costa Rica”, but, as was mentioned later in the commentary, the Inter-American Court of Human Rights had also found that the Convention implied acceptance of all reservations that were not incompatible with its object and purpose. That meant that the element of consent was considered to be implied in the Convention. He proposed adding the following sentence to the end of paragraph (11): “The Court also found that the Convention implied the acceptance of all reservations that were not incompatible with its object and purpose.” That sentence would explain the position taken by the Inter-American Court of Human Rights and would link paragraph (11) to paragraph (12).

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (17)

Paragraphs (12) to (17) were adopted.

The commentary to guideline 4.1, as amended, was adopted.

Commentary to guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty)

Paragraphs (1) to (15)

Paragraphs (1) to (15) were adopted.

The commentary to guideline 4.1.1 was adopted.

Commentary to guideline 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to guideline 4.1.2 was adopted.

Commentary to guideline 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 4.1.3 was adopted.

71. The CHAIRPERSON drew attention to the portion of section C.2 of chapter IV of the draft report contained in document A/CN.4/L.764/Add.6.

General commentary to section 4.2 (Effects of an established reservation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary to section 4.2 was adopted.

Commentary to guideline 4.2.1 (Status of the author of an established reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

72. Mr. GAJA proposed that, in the first sentence, the phrase “it is, in fact, impossible to determine”—in reference to whether the author of the reservation became a party to the treaty in the sense of article 2, paragraph 1 (g), of the 1969 Vienna Convention—should be amended to read: “it may, in fact, be impossible to determine”. While he agreed that, in most cases, it was impossible to make such a determination, there were cases in which it might be possible.

73. Mr. PELLET (Special Rapporteur) said that, in that same spirit, he would prefer the expression “it is frequently impossible” because it most closely described the reality of the situation.

74. Mr. GAJA suggested that the word “often” might be preferable to “frequently”. The proposed expression would then read: “it is often impossible”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (10)

Paragraphs (5) to (10) were adopted.

Paragraph (11)

75. Mr. NOLTE said that, as currently worded, the paragraph implied that the Commission's position (regarding article 20, paragraph 4 (c), of the Vienna Conventions) was contrary to the predominant practice of depositaries, which was not consistent with the softer position expressed in draft guideline 4.2.2, paragraph 2. He proposed that new text should be inserted in paragraph (11) after the second sentence. It should read: "By reaffirming article 20, paragraph 4 (c), of the Vienna Conventions, the Commission does not wish to imply, however, that the practice by depositaries in a particular case is necessarily incompatible with that provision. This issue is dealt with more specifically in draft guideline 4.2.2, paragraph 2."

76. Mr. PELLET (Special Rapporteur) agreed that some reference should be made in paragraph (11) to paragraph (3) of the commentary to draft guideline 4.2.2, where the Commission's position was clarified. However, he would prefer more neutral wording than that proposed by Mr. Nolte, since he would not wish to imply that the Commission regarded such practice of depositaries as good practice.

77. Mr. GAJA agreed that, if a reference was made in paragraph (11) to draft guideline 4.2.2, the Commission should be careful not to imply that it endorsed the practice of the Secretary-General and certain other depositaries, which not only disregarded the rule contained in article 20, paragraph 4 (c), and the time limit laid down in article 20, paragraph 5, of the Vienna Conventions, but, more importantly, ignored the distinction between permissible and impermissible reservations.

78. Mr. NOLTE said that draft guidelines 4.2.1 and 4.2.2 were closely interrelated and persons reading the commentaries should be aware of that fact. While he had no wish to alter what the Commission had already decided, he did not consider that a simple cross reference to draft guideline 4.2.2 would suffice.

79. Mr. PELLET (Special Rapporteur) said that the simplest way to meet Mr. Nolte's concern would be to start paragraph (11) with the phrase "without intending to give its opinion on the correctness of this practice", adding at that point a footnote that would say, "See guideline 4.2.2 and its commentary, in particular paragraph (3) below." Mr. Gaja's concern would be better dealt with in paragraph (3) of the commentary to draft guideline 4.2.2.

80. Mr. NOLTE said that the Special Rapporteur's proposal adequately addressed his concern.

81. Sir Michael WOOD suggested the deletion of the words "in particular paragraph (3)," from the new footnote, since paragraphs (4) and (5) of the commentary to draft guideline 4.2.2 were also relevant.

Paragraph (11), as amended and supplemented by an additional footnote, was adopted.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

The commentary to guideline 4.2.1 as amended, was adopted.

Commentary to guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

82. Mr. PELLET (Special Rapporteur), in order to meet the concerns expressed by Mr. Gaja earlier regarding the practice of certain depositaries, proposed that the last part of the paragraph should be reworded to read "which is to consider the author of the reservation to be a contracting State or contracting organization, on the one hand, as soon as the instrument expressing its consent to be bound has been deposited, and, on the other hand, without considering the permissibility or impermissibility of the reservation".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to guideline 4.2.2, as amended, was adopted.

Commentary to guideline 4.2.3 (Effect of the establishment of a reservation on the status of the author as a party to the treaty)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 4.2.3 was adopted.

Commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations)

Paragraphs (1) to (19)

Paragraphs (1) to (19) were adopted.

Paragraph (20)

83. Mr. GAJA proposed, for the sake of clarity, that the phrase "without affecting the rights and obligations" should read "without affecting the content of the rights and obligations".

Paragraph (20), as amended, was adopted.

Paragraphs (21) to (23)

Paragraphs (21) to (23) were adopted.

Paragraph (24)

84. Mr. GAJA proposed, for the sake of consistency with paragraph (20), that the phrase "the rights and obligations" should read "the content of the rights and obligations".

He also had some concerns about the last sentence, in particular the reference to the exceptions cited in guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), which he would address in connection with that guideline.

Paragraph (24), as amended, was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

85. Mr. NOLTE wondered whether the principle of reciprocity was correctly described in the paragraph, which spoke of the right to require the fulfilment of an obligation. A similar statement about the loss of the right to invoke an obligation appeared in the third sentence of paragraph (7) of the commentary to draft guideline 4.2.5. There, in a context of human rights treaties, which dealt with obligations for the benefit of the individual, the concept of invocation of an obligation was appropriate, but in the context of guideline 4.2.4, where inter-State relations were concerned, the parties were released from the obligation itself. He therefore proposed that paragraph (26) be redrafted as follows:

“It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation, but also that the State or international organization with regard to which the reservation is established is released from the obligation to which the reservation relates with regard to the author of the reservation.”

86. Mr. GAJA said that, although he shared Mr. Nolte’s concerns, he was not entirely satisfied with the wording of his proposal. The Commission needed more time to consider how to explain in the commentaries the distinction between guidelines 4.2.4 and 4.2.5, in other words, the fact that, in certain cases, the content of the obligation changed and the State or international organization was released from the obligation, whereas, in other cases (guideline 4.2.5), the obligation still existed, but only towards States other than the author of the reservation. That distinction seemed fairly clear in the guidelines, less so in the commentary.

87. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (26) at the next plenary meeting.

The meeting rose at 1 p.m.

3074th MEETING

Tuesday, 3 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki,

Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

CHAPTER IV. *Reservations to treaties (continued)* (A/CN.4/L.764 and Add.1–10)

C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)* (A/CN.4/L.764/Add.2–10)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (*continued*) (A/CN.4/L.764/Add.3–10)

1. The CHAIRPERSON invited the members of the Commission to continue with the adoption of section C.2 of chapter IV by considering document A/CN.4/L.764/Add.6 paragraph by paragraph.

Commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations) (*concluded*)

Paragraph (26)

2. Mr. NOLTE said that paragraph (26) defined in general terms the principle of reciprocal application, which meant that one party was released from compliance with a treaty obligation and another party could not invoke that obligation. Paragraph (7) of the commentary to 4.2.5 specified that a State or international organization that had made a reservation could not invoke the obligation excluded or modified by that reservation. He proposed to simplify paragraph (26) by not raising the issue of invocation and merely to refer to the reciprocal application of the obligation. The text would then read:

“It follows that not only the author of the reservation is released from compliance with the treaty obligations which are the subject of the reservation, but that the same is true for the State or international organization with regard to which the reservation is established.”

3. Mr. PELLET (Special Rapporteur) said that the point made by Mr. Nolte was correct, but insofar as a non-reciprocal obligation was concerned, the reserving State also lost the right to require other States to apply it. He did not see how paragraph (7) of the commentary to draft guideline 4.2.5 supported Mr. Nolte’s position.

4. Mr. GAJA said that he had no objection to the initial text of paragraph (26), but had a problem with Mr. Nolte’s proposal: the State or international organization with regard to which the reservation was established was released from its treaty obligations towards the reserving State, but there might be a parallel obligation towards other States or international organizations. That aspect should be included.

5. Sir Michael WOOD proposed to retain the current text of paragraph (26) and to add the following sentence to take Mr. Nolte’s concern into account:

“In addition, the State or international organization with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State.”

Paragraph (26), as amended, was adopted.

Paragraph (27)

6. Mr. VÁZQUEZ-BERMÚDEZ said that the words “principle of reciprocity” in the first sentence should be replaced by the words which the Drafting Committee had used elsewhere in that part of the commentary, namely “principle of reciprocal application”.

Paragraph (27), as amended, was adopted.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were adopted.

The commentary to draft guideline 4.2.4, as amended, was adopted.

Commentary to guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates)

Paragraph (1)

7. Mr. VÁZQUEZ-BERMÚDEZ said that the words “principle of reciprocity” should be replaced by “principle of reciprocal application” for the same reasons as in paragraph (27) of the commentary to draft guideline 4.2.4.

Paragraph (1), as amended, was adopted.

Paragraph (2)

8. Mr. GAJA said that the first sentence of the paragraph was confusing, because the general rule enunciated in the Vienna Conventions, which was at issue, did not provide for any exceptions: the situation which prevailed between the reserving State and the State which had accepted the reservation did not presuppose any change in the content of the obligations that the latter might have towards other entities. His suggestion was to delete the first sentence.

9. Mr. PELLET (Special Rapporteur) said that he was opposed to that suggestion, but agreed not to speak of exceptions and proposed the following wording: “... guideline 4.2.5 emphasizes that the principle of reciprocity is not absolute” [... *la directive 4.2.5 souligne que le principe de réciprocité n'est pas absolu*].

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

10. Mr. GAJA proposed the insertion of the word “only” after “apply not” in the fourth line. That did not seem to be controversial.

11. Mr. PELLET (Special Rapporteur) said that, on the contrary, that was the heart of the problem, because paragraph (4) concerned non-reciprocal obligations. The text could specify that the measure of reciprocity accompanying those obligations was not affected by draft guideline 4.2.5, but it certainly could not mix up reciprocal and non-reciprocal obligations. If the word “only” was inserted, it would mean that draft guideline 4.2.5 might be applicable to non-reciprocal obligations, which was simply impossible.

12. Mr. GAJA said that human rights treaties imposed obligations on States with regard not only to individuals but also to other States parties. The non-reciprocal element of some obligations did not mean that treaties did not impose obligations on a State party towards another State party.

13. Mr. PELLET (Special Rapporteur) said that the problem was that Mr. Gaja was talking about treaties, whereas he himself was speaking of an obligation towards others. That obligation was always either reciprocal or non-reciprocal. In the current case, obligations were at issue which were not reciprocal *vis-à-vis* certain entities. Consequently, *insofar* as they were not reciprocal (as indicated by the first words of draft guideline 4.2.5), they could not be considered to be reciprocal in part, which Mr. Gaja was saying with his proposal.

14. Mr. GAJA said that although those obligations did not apply between the reserving State and the State which had accepted the reservation, they did apply in relation to other States parties and thus they still existed.

15. Mr. PELLET (Special Rapporteur) proposed to move paragraph (7), which dealt with that point, and to insert it as a new paragraph (4) *bis* after paragraph (4), which could be amended to read:

“(4) A typical example is afforded by the human rights treaties. The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, insofar as the obligation concerned is non-reciprocal. Also insofar as it is non-reciprocal, that obligation applies not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but simply in a State-human being relationship. The Human Rights Committee ... within their jurisdiction.

“(4) *bis* Qualifying that absolute formulation, the phrase ‘insofar as’, with which guideline 4.2.5 begins, aims to show that even if the nature of the obligation or the object and purpose of the treaty as a whole exclude the reciprocity of reservations, elements of reciprocity may nevertheless remain in the relations between the author of the reservation and the other parties to the treaty. Thus, for example, ... at the end of the first sentence of guideline 4.2.5.”

[(4) *Un exemple typique est constitué par les conventions relatives à la protection des droits de l'homme*...]. Le fait qu'un État formule une réserve

excluant l'application d'une des obligations contenues dans une telle convention ne libère pas l'État l'acceptant de respecter cette obligation, dans la mesure où il s'agit d'une obligation non réciproque. Toujours dans cette mesure, une telle obligation n'est en effet pas appliquée dans la relation interétatique entre l'État réservataire et l'État qui a accepté la réserve, mais simplement dans une relation État-être humain, où il s'agit d'obligations non réciproques. Le Comité des droits de l'homme [...] de la juridiction des États^[...].

(4) bis *Nuançant cette formulation absolue, l'expression '[d]ans la mesure où' qui introduit la directive 4.2.5 tend à montrer que même si la nature de l'obligation ou l'objet et le but du traité dans son ensemble excluent le jeu réciproque des réserves, des éléments de réciprocité peuvent néanmoins subsister dans les relations entre l'auteur de la réserve et les autres parties au traité. Ainsi par exemple, [...] à la fin de la première phrase de la directive 4.2.5.]*

16. Mr. GAJA said that the new paragraph (4) *bis* addressed non-reciprocal elements of a treaty. In the area of non-reciprocal elements, obligations existed between States that had not made a reservation but had accepted the reservation and other States parties to the treaty. The third sentence of paragraph (4) seemed to be saying that when the obligation was not reciprocal, it only existed in a State–human being relationship; that posed a problem.

17. Sir Michael WOOD said that it would suffice to delete the word “simply” in the third sentence of paragraph (4).

18. The CHAIRPERSON said he took it that the Commission wished to approve the proposals by Mr. Pellet (Special Rapporteur) and Sir Michael.

It was so decided.

Paragraph (4), as amended, and paragraph (4) bis were adopted.

Paragraph (5)

19. Mr. PELLET (Special Rapporteur), referring to the French version, proposed the insertion of the words “*Au demeurant*” at the beginning of paragraph (5) in order to have a smoother transition from paragraph (4) *bis*.

Paragraph (5), as amended, was adopted.

Paragraph (6)

20. Mr. GAJA proposed that the wording of the second sentence should be amended to read: “A party owes an obligation towards all the other parties to the treaty.”

Paragraph (6), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

21. Mr. McRAE said that the word “magical” should be replaced by “cultural”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

The commentary to guideline 4.2.5 as a whole, as amended, was adopted.

Programme, procedures and working methods of the Commission and its documentation (concluded)* (A/CN.4/620 and Add.1, sect. I, A/CN.4/L.775)

[Agenda item 11]

REPORT OF THE PLANNING GROUP

22. The CHAIRPERSON drew attention to the information distributed on the publications and websites of the Codification Division (document without a symbol, distributed at the meeting).

23. Mr. MIKULKA (Secretary to the Commission) said that during the meeting of the Planning Group, information had been requested on the status of the trust fund on the backlog relating to the publication of the *Yearbook of the International Law Commission*. The balance of the fund currently stood at \$23,720. Over the past year, Panama had contributed \$500, Ireland \$1,984 and Chile \$5,000 to the fund.

24. Mr. DUGARD (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.775), said that the Group had held five meetings and had had before it section J of the topical summary of the discussions held in the Sixth Committee of the General Assembly at its sixty-fourth session entitled “Other decisions and conclusions of the Commission” (A/CN.4/620 and Add.1); the proposed strategic framework for the period 2012–2013,³⁷⁹ covering “Programme 6: Legal affairs”; General Assembly resolution 64/114 of 16 December 2009 on the report of the International Law Commission on the work of its sixty-first session, in particular paragraphs 7, 8 and 13 to 21; General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels; and chapter XIII, section A.3, of the report of the Commission at its sixty-first session concerning the consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels.³⁸⁰

25. The report was organized to reflect the outcome of discussions on the items that had been before the Planning Group. The Group had decided to prepare a detailed section on the rule of law in response to General Assembly resolution 64/116. It had also had a discussion on the

* Resumed from the 3053rd meeting.

³⁷⁹ A/65/6 (Prog. 6).

³⁸⁰ *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 231.

methods of work of the Commission, notably the work of the special rapporteurs, on the basis of a memorandum which he had prepared. Following discussion, the text had been revised. The revised text of the memorandum concerning the work of the special rapporteurs would be transmitted to the Working Group in 2011. The minutes of the debate had been circulated and sent to all members of the Commission.

26. The Planning Group had also addressed issues relating to its working methods and had agreed that, in order to better organize plenary debates and make full use of available resources, the members of the Commission should speak on the topic as early as possible after the introduction by the Special Rapporteur of the relevant report. The Planning Group had noted that it would be only in exceptional circumstances and for valid reasons that the plenary should only take note of draft articles adopted by the Drafting Committee during a given session and that every effort should be made to ensure that such draft articles were adopted and included in the report of the Commission, together with the commentaries prepared by the Special Rapporteurs. The Planning Group also recommended that when the Commission took note of draft articles, they should appear in a footnote in the Commission's report.

27. It was his understanding that the other recommendations of the Planning Group, if approved by the Commission, as was customary, would be incorporated into the report of the Commission under the chapter entitled "Other decisions and conclusions of the Commission", with the necessary adjustments.

28. Mr. PELLET said that, with regard to taking note of the draft articles adopted by the Drafting Committee, he was not radically opposed to the Commission's reproducing them in its report, but expressed a word of caution in that regard: there had been only one precedent, that of the draft articles on responsibility of States, which the Drafting Committee had adopted in 2000 and which the Commission had been so imprudent as to reproduce in its report. The result had been disastrous, because States had thought that they were expected to comment on the draft articles without really knowing, in the absence of commentary, what had motivated them.

29. Concerning the draft guidelines on reservations to treaties, he would like the Commission to discuss the future of the draft Guide to Practice, a first version of which had a good chance of being adopted by the end of the current session. Regardless of its fate, the Guide would need to be reviewed in its entirety by the Commission at the 2011 session. To that end, the Commission might envisage setting up a working group to meet for a week to put the final touches on all the commentaries to the draft guidelines, an enormous and rather technical task, since the Guide to Practice would be approximately 800 pages long.

30. Finally, he recalled that the Chairperson of the Human Rights Committee had written a letter to the Chairperson of the Commission. It would be useful for the Commission to have a brief exchange of views on how to reply.

31. The CHAIRPERSON said that the Enlarged Bureau would meet to discuss the three questions raised by Mr. Pellet. He took it that the Commission wished to adopt the report of the Planning Group (A/CN.4/L.775).

The report of the Planning Group was adopted.

The meeting rose at 4.30 p.m.

3075th MEETING

Wednesday, 4 August 2010, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

CHAPTER XIII. Other decisions and conclusions of the Commission (A/CN.4/L.773 and Add.1)

1. The CHAIRPERSON invited the Commission to begin its consideration of chapter XIII of the report with sections C, D and E of that chapter contained in document A/CN.4/L.773/Add.1 and to adopt them paragraph by paragraph.

C. Cooperation with other bodies

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section C was adopted.

D. Representation at the sixty-fifth session of the General Assembly

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

2. Mr. GAJA proposed that the Commission should decide at the current plenary meeting which special rapporteur it would request to attend the sixty-fifth session of the General Assembly, under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989.

3. The CHAIRPERSON said that the Bureau had discussed the matter and had agreed to recommend that Mr. Pellet, Special Rapporteur for the topic "Reservations to treaties", should be requested to attend the forthcoming session of the General Assembly.

4. Mr. VASCIANNIE said that he wished to nominate Mr. Pellet for that purpose.

5. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the Bureau's recommendation and to fill in the blanks in paragraph 7 accordingly.

It was so decided.

Paragraph 7, as completed, was adopted.

Section D, as completed, was adopted.

E. International Law Seminar

Paragraphs 8 to 21

Paragraphs 8 to 21 were adopted.

Section E was adopted.

Other business (concluded)

[Agenda item 15]

6. Mr. CANDIOTI announced that, on 2 August 2010, in San Juan, Argentina, a framework agreement had been signed between Argentina, Brazil, Paraguay and Uruguay on the management and use of the Guaraní aquifer, which was one of the world's largest transboundary underground water sources. In its preamble, the agreement included an express reference to General Assembly resolution 63/124 of 11 December 2008, which reproduced the Commission's draft articles on the law of transboundary aquifers and urged the States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of those draft articles. It was rewarding to note that the four countries sharing the aquifer had complied with that request in their agreement, and a hopeful sign that States were beginning to take into account the Commission's valuable efforts in that area, in particular the excellent work carried out by Mr. Yamada, former member of the Commission and former Special Rapporteur on the topic of shared natural resources. As soon as the agreement became available, he would provide copies of it to the members of the Commission.

7. The CHAIRPERSON said that, on behalf of the Commission, he wished to express congratulations to the States parties to that auspicious agreement. It was gratifying that the Commission's work had been considered useful; that, in turn, provided encouragement for its future work on shared natural resources.

8. He announced that immediately following the public part of the meeting the Commission would meet in closed session to discuss plans for its sixty-third session.

The meeting rose at 10.25 a.m.

* Resumed from the 3070th meeting.

3076th MEETING

Wednesday, 4 August 2010, at 3.05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

CHAPTER IV. Reservations to treaties (continued)* (A/CN.4/L.764 and Add.1–10)

B. Consideration of the topic at the present session (continued) (A/CN.4/L.764 and Add.1)**

Paragraph 12 *bis*

1. The CHAIRPERSON said that a proposal had been made for the insertion of the following new paragraph 12 *bis* (document without a symbol distributed at the meeting):

“Having provisionally adopted the entire set of draft guidelines in the Guide to Practice, the Commission intends to adopt the final version of the Guide to Practice during its sixty-third session, taking into consideration the observations of States and international organizations as well as the bodies with which the Commission cooperates, made since the beginning of the examination of the topic, and also those that could be received by the Secretariat before 31 January 2011.”

He invited the members of the Commission to comment on the proposal.

2. Mr. NOLTE proposed, in the interests of clarity, to split the paragraph into three sentences. The first would end with the words “sixty-third session”. The second would read: “It will take into consideration the observations of States and international organizations as well as the bodies with which the Commission cooperates, made since the beginning of the examination of the topic.” The third and last sentence would read: “The Commission also invites further comments relating to the entire set of draft guidelines contained in the Guide to Practice, which should be received by the Secretariat before 31 January 2011.”

3. Sir Michael WOOD said that while he supported the proposal to end the first sentence after “sixty-third session”, he would prefer to maintain the second part of the initial text as it stood. The second sentence would thus begin: “In doing so, the Commission will take into consideration...”

Sir Michael's proposal was adopted.

Paragraph 12 bis, as amended, was adopted.

* Resumed from the 3074th meeting.

** Resumed from the 3073rd meeting.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*)* (A/CN.4/L.764/Add.2–10)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (*continued*)* (A/CN.4/L.764/Add.3–10)

Commentary to guideline 4.3 (Effect of an objection to a valid reservation) (A/CN.4/L.764/Add.8)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

4. Mr. GAJA noted that the words “of article 21, paragraph 3,” should be inserted in the second sentence between “at the end” and “of the Vienna Conventions”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to guideline 4.3, as amended, was adopted.

Commentary to guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted with minor editing changes to the English version.

The commentary to guideline 4.3.1, as amended, was adopted.

Commentary to guideline 4.3.2 (Entry into force of the treaty between the author of a reservation and the author of an objection)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted with minor editing changes.

The commentary to guideline 4.3.2, as amended, was adopted.

Commentary to guideline 4.3.3 (Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required)

Paragraph (1)

Paragraph (1) was adopted with a minor editing change.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

5. Mr. GAJA said that paragraph (3), which was unrelated to guideline 4.3.3, should be moved to the end of the commentary to guideline 4.3.

6. Mr. PELLET (Special Rapporteur) said that he would redraft paragraph (3) with that end in view.

Paragraph (3) was adopted subject to editing changes and on the understanding that it would be moved in accordance with Mr. Gaja's proposal.

The commentary to guideline 4.3.3, as amended, was adopted.

Commentary to guideline 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

7. Mr. GAJA proposed replacing “an objection to a reservation results in the entry into force of the treaty” with “an objection to a reservation does not constitute an obstacle to the entry into force of a treaty”, since an objection never resulted in the entry into force of a treaty.

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor editing change.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted with a minor editing change to the English version.

Paragraphs (8) to (13)

Paragraphs (8) to (13) were adopted.

The commentary to guideline 4.3.4, as amended, was adopted.

Commentary to guideline 4.3.5 (Effects of an objection on treaty relations)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

Paragraph (14)

8. Mr. GAJA proposed deleting paragraph (14), which seemed to contradict the remainder of the commentary.

It was so agreed.

Paragraph (14) was deleted.

* Resumed from the 3074th meeting.

Paragraphs (15) to (20)

Paragraphs (15) to (20) were adopted.

Paragraph (21)

9. Mr. HMOUD said that the objection in the example cited seemed to constitute an objection with “super-maximum” effect.

10. Mr. PELLET (Special Rapporteur) said that almost all objections concerning the incompatibility of a reservation with the object and purpose of a treaty were couched in such terms, but they were clearly objections with minimum effect since they did not preclude the entry into force of the treaty. The objection by the Netherlands³⁸¹ to the reservation entered by the United States³⁸² to the International Covenant on Civil and Political Rights, cited in paragraph (4) of the commentary to draft guideline 4.3.1, was an example that Mr. Hmoud should find more convincing. It could not constitute an objection with “super-maximum” effect since it contained an explicit reference to article 21, paragraph 3, of the Vienna Convention, according to which the effect of reservations could only be minimum or maximum. The objection could only be one with minimum effect, since the Netherlands had not ruled out the entry into force of the Covenant between the United States and the Netherlands. It was therefore clearly an objection with minimum effect and had been designated as such by the objecting State’s reference to article 21, paragraph 3, of the Vienna Convention, even though it characterized the reservation as being “incompatible with the object and purpose of the treaty”. In his view, it was sufficient, in the paragraph under discussion, to refer to the quotation in paragraph (4) of the commentary to draft guideline 4.3.1 and to amend the related footnote accordingly. He offered to transmit a text of paragraph (21) amended along those lines to the secretariat.

It was so decided.

Paragraph (21) was adopted subject to the requisite editing changes.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

11. Mr. GAJA proposed replacing “the Commission” with “the Conventions” in the second sentence for reasons of accuracy.

It was so agreed.

Paragraph (23), as amended, was adopted.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were adopted.

Paragraph (26)

Paragraph (26) was adopted with a minor editing change to the English version.

Paragraphs (27) to (35)

Paragraphs (27) to (35) were adopted.

Paragraph (36)

Paragraph (36) was adopted with a minor editing change to the English version.

Paragraphs (37) to (44)

Paragraphs (37) to (44) were adopted.

The commentary to guideline 4.3.5, as amended, was adopted.

Commentary to guideline 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editing change.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

Paragraph (7) was adopted with a minor editing change.

Paragraphs (8) to (12)

Paragraphs (8) to (12) were adopted.

Paragraphs (13) to (15)

12. Sir Michael WOOD proposed deleting the phrase “Falling within the domain of the progressive development of international law” at the beginning of the first sentence of paragraph (14), because it implied that the other provisions fell within the domain of customary law.

13. Mr. PELLET (Special Rapporteur) said that the consensual position of the members of the Commission should be reflected, namely that the case in question fell within the domain of *lex ferenda* rather than *lex lata*.

14. Mr. GAJA expressed support for Sir Michael’s proposal. He proposed amending the beginning of the first sentence of paragraph 15 to read: “It seemed reasonable, as a step of progressive development, to set a time period...”.

15. Mr. PELLET (Special Rapporteur) concurred with the proposals. If they were adopted, however, he suggested that paragraph (14) be merged with paragraph (13).

The proposals made by Sir Michael, Mr. Gaja and the Special Rapporteur were adopted.

Paragraphs (13) to (15), as amended, were adopted.

³⁸¹ *Multilateral Treaties* ... (see footnote 81 above), chap. IV.4.

³⁸² *Ibid.*

Paragraph (16)

Paragraph (16) was adopted.

The commentary to guideline 4.3.6, as amended, was adopted.

Commentary to guideline 4.3.7 (Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editing change to its footnote.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

16. Mr. GAJA proposed deleting paragraph (6), which seemed to have no bearing on the guideline to which the commentary under discussion referred.

It was so agreed.

Paragraph (6) was deleted.

The commentary to guideline 4.3.7, as amended, was adopted.

4.4 (Effects of a reservation on rights and obligations outside of the treaty)

Commentary to guideline 4.4.1 (Absence of effect on rights and obligations under another treaty)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 4.4.1 was adopted.

Commentary to guideline 4.4.2 (Absence of effect on rights and obligations under customary international law)

Paragraph (1)

17. Mr. NOLTE said that the words “as such” in the tenth line of the English version of the paragraph should be replaced with “of itself”, which were the words used in the draft guideline.

It was so agreed.

18. Sir Michael WOOD noted that the term “norm”, which was used in the paragraph under discussion and in those that followed, was highly ambiguous and was generally used only in the context of *jus cogens* to designate peremptory norms. He proposed using the word “rule” instead of “norm” throughout the document under discussion.

19. Mr. PELLET (Special Rapporteur), supported by Mr. DUGARD and Mr. NOLTE, said that he was puzzled by Sir Michael’s proposal to outlaw the word “norm”.

While he had no objection to his proposal to replace “norm” with “rule” in the commentary to draft guideline 4.4.2, since the guideline itself used the word “rule”, he wished to retain the word “norm” in other parts of the document under discussion. He also wished to place on record his view that there was no taboo against using the word “norm”.

Paragraph (1), as amended in the English version by Mr. Nolte, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

20. Mr. McRAE said that the word “dispute” should be inserted before “settlement clause” in the second sentence for the sake of clarity.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

21. Mr. NOLTE said that the second sentence of the paragraph was confusing because it stated that the guideline had more to do with the effects of a reservation than its validity, although paragraph (1) of guideline 3.1.8, cited in paragraph (5), concerned the validity of a reservation.

22. Mr. PELLET (Special Rapporteur) said that there was indeed some ambiguity, at least in the English text.

23. Mr. GAJA proposed resolving the ambiguity by replacing “the guideline” by “that paragraph” in the English version and “elle” by “ce paragraphe” in the French version.

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

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

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

24. Mr. NOLTE, noting that he had supported the insertion of the term “of itself” in guideline 4.4.3, said that he wished to add the phrase “despite a view to the contrary” after the words “in guideline 4.4.3” in the last sentence of the paragraph.

Paragraph (4), as amended, was adopted.

The commentary to guideline 4.4.3, as amended, was adopted.

25. The CHAIRPERSON invited the members of the Commission to consider the addendum to chapter IV of the Commission's draft report (Reservations to treaties) published as document A/CN.4/L.764/Add.1 which completed section B.

B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.764/Add.1)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

26. Mr. NOLTE said that the third sentence should be amended to make it clear that the views expressed were those of the Special Rapporteur and not those of the Commission. He proposed replacing "that constituted" with "which in his view constituted" and deleting the phrase "and which he considered reasonable".

It was so decided.

27. Sir Michael WOOD proposed inserting the French words "*juste milieu*" in brackets in the English version after the words "happy medium".

It was so decided.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 18

Paragraphs 8 to 18 were adopted.

Document A/CN.4/L.764/Add.1, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its sixty-second session (A/CN.4/L.762)

28. The CHAIRPERSON invited the members of the Commission to consider chapter II of the Commission's draft report (Summary of the work of the Commission at its sixty-second session) published as document A/CN.4/L.762.

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

29. Mr. GAJA said that the chapter presented an overview of the Commission's work at the current session. He therefore proposed adding the following sentence at the end of the paragraph: "The Commission thus completed the provisional adoption of the set of draft guidelines on reservations to treaties."

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

30. Mr. GAJA proposed amending the paragraph to read: "The Commission did not consider the topic 'Immunity of State officials' (chap. IX)."

It was so decided.

31. Sir Michael WOOD proposed inserting the words "at the present session" after "State officials".

It was so decided.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

32. Mr. McRAE proposed mentioning the documents considered by the Study Group at the current session.

Paragraph 11 was adopted on that understanding.

Paragraphs 12 to 13

Paragraphs 12 to 13 were adopted.

Chapter II of the Commission's draft report, as amended, was adopted.

The meeting rose at 5.45 p.m.

3077th MEETING

Thursday, 5 August 2010, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

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

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

CHAPTER IV. Reservations to treaties (*continued*) (A/CN.4/L.764 and Add.1–10)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.764/Add.2–10)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (*continued*) (A/CN.4/L.764/Add.3–10)

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter IV of the draft

report, and drew attention to the portions of that chapter contained in document A/CN.4/L.764/Add.9.

Commentary to guideline 3.3.2 [3.3.3] (Effect of individual acceptance of an impermissible reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

2. Mr. GAJA said that a sentence should be added at the end of the paragraph to reflect a different view—one which might be held by only one Commission member, but which appeared to be in line with the prevailing practice of States and depositaries. Although reference was made later in paragraph (29) of the commentary to guideline 4.5.1 to “one isolated view” on the matter, he thought that it was important to flag it in the commentary to guideline 3.3.2, which outlined the Commission’s general approach to the requirement for the validity of a reservation. The new sentence should read: “However, according to a different view, the prevailing practice shows that the State party to a treaty may consider the treaty to apply subject to the reservation in its relations with the reserving State, whether or not the reservation is regarded as valid by other States.”

3. Mr. VÁZQUEZ-BERMÚDEZ proposed that the word “valid” should be replaced by “invalid”, since that was the focus of the guideline.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to guideline 3.3.2 [3.3.3], as amended, was adopted.

Commentary to guideline 3.3.3 [3.3.4] (Effect of collective acceptance of an impermissible reservation)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to guideline 3.3.3 [3.3.4] was adopted.

General commentary to section 4.5 (Consequences of an invalid reservation)

Paragraphs (1) to (17)

Paragraphs (1) to (17) were adopted.

Paragraph (18)

4. Mr. NOLTE said that the paragraph (18) established the general approach that would be followed in subsequent guidelines. Since paragraph (35) of the commentary to guideline 4.5.2 indicated that the positive presumption contained an element of progressive development, he proposed that in the last sentence of paragraph (18), after the words “It is a question not of creating, but of systematizing, the applicable principles and rules in a reasonable

manner”, the phrase “and with elements of progressive development” should be inserted.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

The general commentary to section 4.5, as amended, was adopted.

Commentary to guideline 4.5.1 [4.5.1 and 4.5.2] (Nullity of an invalid reservation)

Paragraphs (1) to (12)

Paragraphs (1) to (12) were adopted.

Paragraph (13)

5. Mr. NOLTE questioned the need for the paragraph, which implied that the lateness of certain objections to reservations meant that they were intended as objections with “super-maximum” effect. He was not convinced by that argument.

6. Mr. PELLET (Special Rapporteur) said that was not what was implied. The paragraph was intended to reflect a point raised by Mr. Gaja during the debate, namely that when States parties considered a reservation to be incompatible with the object and purpose of the treaty, they were not concerned about the period of time within which they were allowed to react to the reservation. They acted on the assumption that the reservation was null and void in objective terms, not that their objection could be the grounds for nullity. He found that argument convincing.

7. Mr. NOLTE said that he would find the argument more convincing if it was clear that States behaved differently with respect to other reservations and did not formulate late objections in these cases. However, if no other members had a problem with the paragraph, he would not press his point.

Paragraph (13) was adopted.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were adopted.

Paragraph (17)

8. Mr. GAJA pointed out that the example of the objection by the Netherlands to the reservation by the United States to the International Covenant on Civil and Political Rights,³⁸³ given in the first footnote in the paragraph, had been rather overused.

9. Mr. PELLET explained that he had found an example of an objection by Belgium that was more to the point in the commentary to guideline 4.3.1, which the Commission could consider on second reading. The example of the Netherlands would then not be overworked if it were retained in that footnote.

Paragraph (17) was adopted.

³⁸³ See footnotes 381 and 382 above.

Paragraphs (18) to (22)

Paragraphs (18) to (22) were adopted.

Paragraph (23)

10. Mr. NOLTE said that he questioned the appropriateness of the phrase in the last sentence “this practice of making objections with ‘super-maximum’ effect”. Since arguments relating to objections with “super-maximum” effect were developed only later in the text of the commentaries, a reference to them at this juncture was premature. He therefore proposed deleting the words “of making objections with ‘super-maximum’ effect”.

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (28)

Paragraphs (24) to (28) were adopted.

Paragraph (29)

11. Mr. NOLTE, referring to the first sentence, queried whether the reference to “one, isolated view expressed within the Commission” was accurate, since, to his recollection, there had been at least two Commission members who had identified themselves as sharing that view.

12. Mr. GAJA said that, although the wording referred to by Mr. Nolte was not consistent with the way in which the Commission usually expressed dissenting views, he was more concerned with the Special Rapporteur’s description of that viewpoint and the need, in his opinion, to reformulate it. It was not that the question of validity could not be assessed if there was no third-party settlement but rather that a reservation could be totally deprived of effects only by means of a decision that was binding on all parties to the treaty. He therefore proposed to replace the portion of the first sentence that followed the colon with “a reservation would be totally deprived of effects only if it was held impermissible by a decision binding on all the parties to the treaty”. He had no problem with the rest of the paragraph.

13. Mr. HASSOUNA said that, like Mr. Nolte, he too had some doubts about the formulation of the beginning of the first sentence. He therefore proposed to delete the word “isolated” and to have the sentence begin with the phrase “According to one view expressed within the Commission”.

14. Mr. PELLET (Special Rapporteur) said that, each time the matter had come up during the debate, he had indicated that this dissenting view was held by only one person, and no one had contested his assessment. Perhaps other members shared that minority viewpoint, but none had overtly expressed as much. That said, he was totally indifferent to how the Commission wished to qualify it. For the rest, Mr. Gaja was entitled to his opinion and he wished to reflect it accurately in paragraph (29).

15. Mr. GAJA said that the Commission members had really had no opportunity, following the Special Rapporteur’s summing up of the debate, to indicate whether they shared the isolated view in question.

Paragraph (29), as amended, was adopted.

The commentary to guideline 4.5.1 [4.5.1 and 4.5.2], as amended, was adopted.

Commentary to guideline 4.5.2 [4.5.3] (Status of the author of an invalid reservation in relation to the treaty)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

16. Mr. NOLTE said that the first footnote to the paragraph cited reservations that had been formulated by a number of countries and were purported to have “super-maximum” effect; he wondered, however, whether the example concerning Finland might be deleted, since its objection did not refer to the entry into force of the Convention in question in its entirety.

Paragraph (5), with the amendment to its first footnote, was adopted.

Paragraphs (6) to (15)

Paragraphs (6) to (15) were adopted.

Paragraphs (16) and (17)

17. Sir Michael WOOD proposed to delete paragraph (17) as it did not seem to add force to the Commission’s argument. Moreover, it was unfair to depositaries to retain it, because there was—in practice, if not intellectually—all the difference in the world between reservations that were clearly prohibited by a treaty and those that might or might not be contrary to the object and purpose of the treaty.

18. Mr. PELLET (Special Rapporteur) said that he would not object to the deletion of paragraph (17); however, he would find it a bit strange to do so since it echoed exactly what was stated in guideline 3.3. If the Commission nevertheless wished to delete it, he suggested that, at the end of the footnote to paragraph (16), a reference to guideline 3.3 be included, which would read: “Concerning this distinction, however, see guideline 3.3 (Consequences of the non-permissibility of a reservation) and the commentary thereto.”

Paragraph (16), with an amendment to the footnote, was adopted.

Paragraph (17) was deleted.

Paragraph (18)

19. Sir Michael WOOD said that the wording of the paragraph and the examples provided in order to illustrate the inconsistency of State practice were confusing, in that they seemed to indicate that the practice of Israel contrasted with that of Italy and the United Kingdom, when, in fact, it was virtually identical.

20. Mr. PELLET (Special Rapporteur) said that the inconsistency in State practice the paragraph was intended to illustrate was between the practice of the three States referred to in the first footnote to the paragraph, on the

one hand, and that of the two referred to in the second footnote, on the other. If that was unclear, the text of the reservations of Italy and the United Kingdom could be deleted from the first footnote, leaving only the reference to their source.

21. Mr. GAJA said that the text needed further clarification. As it currently read, the phrase “the other two States” appeared to refer to Italy and the United Kingdom, not to the Federal Republic of Germany and France, as intended. He proposed that, in the third sentence, the phrase “the other two States” should be replaced by “two other States”, followed by the names of those States.

22. Mr. HASSOUNA said that Sir Michael had raised a valid point. He agreed with Mr. Pellet’s suggestion to delete the text of the objections currently contained in the first footnote.

23. Sir Michael WOOD said that, in the third sentence, the first words “But whereas” should be replaced by “For example”, followed by the quoted material describing the of practice Israel. That, in turn, could be followed by a new sentence that would begin: “Two other States, the Federal Republic of Germany and France,”. That would make it clear that there were two distinct groups—one made up of three States that followed one practice, and a second one made up of two States that followed another practice.

24. Mr. PELLET (Special Rapporteur) said that, while the comments of Sir Michael had helped to clarify matters, he would suggest an alternative formulation for the third sentence that would eliminate the direct quotation and would read: “But whereas these three States regarded the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and were unable to consider Burundi as having validly acceded to the Convention until such time as the reservation was withdrawn, two other States that objected to the reservation by Burundi—the Federal Republic of Germany and France—did not include such a statement in their objections.” The first footnote would then consist only of the reference to the source where the objections could be found. The first two sentences of the paragraph would remain unchanged.

Paragraph 18, as amended and with an amendment to the first footnote of the paragraph, was adopted.

Paragraph (19)

Paragraph (19) was adopted.

Paragraph (20)

25. Sir Michael WOOD, referring to the second sentence, proposed to delete the phrase “Struck by this practice, which may seem inconsistent”, as it seemed excessive to state that the Commission had been astonished.

Paragraph (20), as amended, was adopted.

Paragraphs (21) to (30)

Paragraphs (21) to (30) were adopted.

Paragraph (31)

26. Sir Michael WOOD proposed that, in the second sentence, the phrase “serious consideration” should be replaced by “inclusion”, since that was, in effect, what the Commission was proposing.

27. Mr. PELLET (Special Rapporteur), agreeing with Sir Michael’s proposal, suggested that the beginning of the second sentence could be reformulated to read: “The Commission has included this position in the Guide to Practice since it offers a reasonable compromise”.

Paragraph (31), as amended, was adopted.

Paragraphs (32) to (34)

Paragraphs (32) to (34) were adopted.

Paragraph (35)

28. Sir Michael WOOD said that the first sentence of paragraph (35) seemed, perhaps, a little overcautious. The Commission should not emphasize that the positive presumption was not based on existing law, since it was, after all, supported by State practice. For that reason, the phrase “it is clear that” [“*sans aucun doute*”] should be deleted and the end of the sentence should read “nor probably of customary international law”.

Paragraph (35), as amended, was adopted.

Paragraph (36)

29. Sir Michael WOOD said that the quotation of Ryan Goodman was not particularly helpful and might perhaps be deleted.

30. Mr. PELLET (Special Rapporteur) said that even if the quotation, which he rather liked, was deleted from the commentary, it would still appear in his fifteenth report (A/CN.4/624 and Add.1–2, para. 179 [469]).

Paragraph (36), as amended, was adopted.

Paragraph (37)

31. Mr. NOLTE, noting that paragraph (37) concerned the relationship between the positive presumption and the reservations dialogue, said that the last sentence was somewhat surprising in that it stated that the goal might more readily be achieved if the reserving State or reserving international organization was deemed to be a party to the treaty. His position, which he would like to have seen reflected in the commentary, had been that a presumption that the author of an invalid reservation became a party to the treaty without the benefit of the reservation was not likely to facilitate the reservations dialogue, since such a dialogue might be regarded as unnecessary, if the parties concerned were fully bound by the treaty. If the premise of a positive presumption were accepted, it was doubtful that States would have any interest in discussing whether a reservation was valid.

32. Mr. PELLET (Special Rapporteur) said that he was quite prepared to reflect what was, after all, the view of a minority of Commission members in the commentary

and suggested that the sentence could begin “Although this point of view was challenged, the Commission considered that”.

33. Sir Michael WOOD said that the French wording, “*Cet objectif est plus facilement réalisable*”, was too definite. Something corresponding to the English words “This goal may well be more easily achieved” would convey the underlying idea better.

34. Mr. NOLTE said that he agreed with the new wording proposed by the Special Rapporteur, as amended by Sir Michael, which conveyed the idea that the issue had been controversial.

Paragraph (37), as amended, was adopted.

Paragraph (38)

35. Mr. NOLTE said that in the second sentence the presumption was described as “*pas irréfragable*”. It would be wiser to employ a positive rather than a negative formulation, as a double negative sometimes had different connotations than a positive. The English in the first set of brackets would then read: “which is rebuttable”. The phrase “fill the inevitable legal vacuum” should also be replaced with a more appropriate expression.

36. Sir Michael WOOD suggested the phrase “contribute to resolve the uncertainty”. He further proposed that, after the phrase in brackets “which may last several years”, the words “or indefinitely” should be inserted since no decision was usually taken on the nullity of the reservation. He wondered how best to convey the sense in English of the French verb “*s’avérer*”. In his opinion, it meant that nullity was established authoritatively by someone with the power to do so.

37. Mr. HASSOUNA agreed that “establish” was the correct meaning of “*s’avérer*”.

38. Mr. GAJA said that “ascertain” might be the right translation of “*s’avérer*”.

39. Mr. PELLET (Special Rapporteur) said that he was unconvinced that the term “*réfragable*” existed in French, the correct term would be “*présomption simple*”, but as the word “rebuttable” was commonly used in English he had tried to find a mirror concept in French. As the word “*réfragable*” was used elsewhere, he would employ it in paragraph (38), even if it led to protests from French speakers. He also agreed to replace “legal vacuum” with “uncertainty”. On the other hand, Sir Michael’s proposal regarding the insertion of the word “indefinitely” posed a problem, since the uncertainty usually came to an end, although many years might have elapsed before it did so. Logically it would be impossible to say “the author of the reservation has conducted itself” if the word “indefinitely” were inserted. He would prefer to keep the second phrase in brackets as it stood and to add a footnote stating that if no competent body reached a decision, the uncertainty could last indefinitely.

Paragraph (38), as amended and completed by the addition of a footnote, was adopted.

Paragraph (39)

40. Sir Michael WOOD said that the words “relative and” should be deleted from the phrase “relative and rebuttable presumption” because they did not mean much. The key idea was that the presumption was rebuttable. The word “*effectivement*” should likewise be deleted from the phrase “*effectivement entré en vigueur*” in the French text, as it had been removed elsewhere in the commentaries.

41. Mr. NOLTE said that the paragraph stated that the Commission adhered to the positive presumption. It would, however, be fair to indicate that this was the majority position. He therefore suggested that the first sentence should begin: “In the light of these considerations, the majority of the members of the Commission”. That rewording might also elicit some discussion by States on that key issue.

Paragraph (39), as amended, was adopted.

Paragraph (40)

42. Mr. NOLTE suggested that in the footnote the adjective “English-speaking” should be deleted.

Paragraph (40), with the amendment to the footnote, was adopted.

Paragraph (41)

43. Sir Michael WOOD said that the word “recommendation” should be replaced by the word “provision”. The expression “declared invalid” should probably be rendered as “ascertained to be invalid”, for the sake of consistency with paragraph (38). While it was elegant to say “Although certain members of the Commission found that proposal attractive”, it might be better to say simply that “It appeared necessary to certain members”. Lastly, it was a bit strong to say that it would be impossible to reconcile such a recommendation, or provision, with what was prescribed in the Vienna Convention. It would therefore be better to say “it would, perhaps, be difficult to reconcile”.

44. Mr. PELLET (Special Rapporteur) said that it was Mr. Hmoud who had urged the use of the term “recommendation”. As far as he knew, Mr. Hmoud had never suggested that the Commission draw up a guideline calling for particular action and what he had always had in mind was a recommendation to States. For that reason, it was rather disconcerting that Sir Michael wished to make the wording stronger. The phrase “*déclarée non valide*” was fine in French and “established to be invalid” would be acceptable in English. The word “attractive” [“*séduisant*”] might seem a trifle literary, but he had never thought it necessary to ease the conditions for the withdrawal from a treaty in the event that a reservation was declared invalid. “Difficult to reconcile” without the qualification of “perhaps” would be sufficient.

45. Mr. GAJA said that, since readers of the Guide to Practice might not know by heart the provisions of the Vienna Conventions, he would suggest that the end of the last sentence should be amended by placing a full stop after “law of reservations” and by starting a new sentence which would read: “It would be difficult to reconcile that proposal with the text of article 42 of the Vienna Conventions,

according to which ‘the withdrawal of a party may take place only as a result of the application of the provisions of the treaty or of the present Convention’; articles 54 and 56 of the Vienna Conventions confirm this point.”

46. Mr. HMOUD said that initially he had in fact proposed the inclusion in the draft guidelines of a provision on withdrawal, but the Drafting Committee had deemed it advisable to speak of a “recommendation”. It would be preferable to speak of “giving States the possibility of withdrawal” or “providing States with the option of withdrawal”, rather than “easing the conditions for withdrawal”, because there was a gap in the provisions of the Vienna Convention with regard to the effects of an invalid reservation. He was of the view that the gap could have been filled by providing the State which was the author of the invalid reservation with the possibility of withdrawal. The majority had not agreed, but that view should be accurately reflected.

47. Mr. Gaja’s suggestion that a quotation of article 42 of the Vienna Convention be included in the commentary would unduly lengthen the paragraph and would not solve the dilemma, because that article stated that withdrawal could take place only in accordance with the treaty or with the Convention, but the Convention had a gap in that respect. On balance, he was happy with the paragraph as it stood, without any additions, apart from changing the word “impossible” to “difficult” and changing the words “easing the conditions for withdrawal” to “giving the reserving State the possibility of withdrawal”.

48. Mr. NOLTE agreed with Sir Michael that the Commission had originally considered a provision rather than a recommendation.

49. Mr. HASSOUNA said that since Mr. Hmoud had originally intended that the Commission should make something much stronger than a “recommendation”, replacing the word “recommendation” with “formulation” would obviate the question of whether what the Commission was proposing was a recommendation or a provision. “Attractive” might not be quite the right term, perhaps “valid” would be more apt. Thirdly, he agreed that “impossible” should be replaced with “difficult”, but there was no need for the qualification “perhaps”—“difficult” would suffice.

50. Mr. PELLET (Special Rapporteur) suggested that, in order to explain the reasons behind the proposal made by Mr. Hmoud, in the first sentence, the words “recommendation ... that advised easing the conditions for withdrawal from a treaty” should be replaced by the phrase “provision ... recommending that additional options should be provided for withdrawal from a treaty”. The words “since the Vienna Conventions do not envisage such a situation” should be added at the end of the first sentence. In the second sentence, the words “certain members of the Commission found that proposal attractive” should be replaced by “that proposal had been supported by certain members of the Commission”. In the third sentence, the word “recommendation” should be replaced by “formulation”. The end of the sentence, following the words “difficult to reconcile”, should be replaced by the wording proposed by Mr. Gaja, which he endorsed.

51. Mr. HMOUD said that he endorsed the wording proposed by the Special Rapporteur, except that he was not in favour of Mr. Gaja’s proposed addition.

52. Mr. GAJA noted that several members of the Commission did not agree with Mr. Hmoud. The Vienna Convention contained a list of cases of withdrawal that could not be supplemented, as article 42 clearly indicated.

Paragraph (41), with the amendments outlined by Mr. Pellet, was adopted.

Paragraph (42)

53. Sir Michael WOOD suggested that in the first sentence, the words in the French text “*est délicat*” should be amended to read “*peut être délicat*”, with a corresponding change in English, and that in the second sentence, the words “in international society at the present stage” should be omitted from the quotation.

Paragraph (42), as amended, was adopted.

Paragraph (42) bis

54. Sir Michael WOOD proposed the addition of a new paragraph to describe briefly the thrust of the second paragraph of guideline 4.5.2. It would read: “The second paragraph of the guideline therefore provides that the intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, and then gives a non-exhaustive list of such factors.” It would then be clear that the following paragraphs discussed those factors.

55. Mr. PELLET (Special Rapporteur) said it would be sufficient simply to say that “several factors come into play, which are presented in a non-exhaustive list in the second paragraph”.

The proposed paragraph (42) bis, as amended, was adopted.

Paragraph (43)

Paragraph (43) was adopted.

Paragraph (44)

56. Sir Michael WOOD suggested that the word “attitude” should be replaced by “conduct”, as in the guideline.

Paragraph (44), as amended, was adopted.

Paragraph (45)

Paragraph (45) was adopted.

Paragraph (46)

57. Mr. NOLTE said that the paragraph briefly summarized one of the important points made during the debate. He had argued for the inclusion of the nature of the treaty among the factors for determining the intention of the author of a reservation, and he had the impression that others shared his view. A sentence should therefore be added, to read: “Some members of the Commission,

however, considered that the nature of the treaty should have explicitly been included, as an element of its object and purpose, in the list of factors to be taken into account when determining the intent of the author of the reservation.”

58. Mr. PELLET (Special Rapporteur) said it was true that the Commission had had a long discussion on the subject, and he had no objection to the inclusion of the sentence, on the understanding that it would be harmonized with the second footnote to the paragraph, which explained why the Commission had not ceded to Mr. Nolte’s argument.

On that understanding, paragraph (46), as amended, was adopted.

Paragraph (47)

59. Sir Michael WOOD proposed that the word “criteria” in the first sentence should be replaced by “factors” as in the first sentence in paragraph (48).

60. Mr. PELLET (Special Rapporteur) said he had no objection to that proposal, although the French language was apparently more amenable to elegant variation than English.

Paragraph (47), as amended, was adopted.

Paragraphs (48) to (50)

Paragraphs (48) to (50) were adopted.

The commentary to guideline 4.5.2 [4.5.3], as amended, was adopted.

Commentary to guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

61. Mr. GAJA said that the final clause described one of the several ways in which objections were formulated when the validity of a reservation was being questioned: the objection precluded the treaty’s entry into force in its entirety in the author’s relations with the reserving State. Often, however, States did not specify that the treaty entered into force in its entirety, and that left the door open to various interpretations of their objection. He proposed that the words “in its entirety” be deleted, as they applied to some but not all of the objections in question.

62. Mr. PELLET (Special Rapporteur) said Mr. Gaja’s analysis was correct, but his solution was unsatisfactory: it would be better to add, at the end of the sentence, “and sometimes it remains silent on that point”.

63. Mr. GAJA said that he agreed with the Special Rapporteur’s approach but thought that the wording could be clearer. The point was that the State objecting to an invalid reservation but stating that the treaty nevertheless entered into force in its bilateral relations with the reserving State

sometimes did not specify whether it meant that the treaty in its entirety entered into force. Perhaps the Special Rapporteur could devise language to convey that idea more succinctly.

Paragraph (3), as amended, was adopted.

Paragraph (4)

64. Sir Michael WOOD, drawing attention to the first sentence, which stated that the jurisprudence of the ICJ “was not a model of consistency”, said that surely a more diplomatic formula could be found, something along the lines that the Court’s jurisprudence was developing on that point.

65. Mr. PELLET (Special Rapporteur) said that the statement was nothing but the truth: the Court’s jurisprudence was so inconsistent that it was practically useless.

66. Mr. NOLTE suggested the wording “was not entirely clear”, which was softer while still being slightly critical.

67. Mr. McRAE said that clarity was not the problem with the Court’s jurisprudence: the point was that it was not consistent.

68. Mr. GAJA proposed the phrase “does not appear to be entirely consistent”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (13)

Paragraphs (5) to (13) were adopted.

Paragraph (14)

69. Mr. GAJA proposed that the third and fourth sentences should be deleted, as they blurred the distinction between objections to invalid reservations, which could be made at any time, and late objections to valid reservations that were subject to a 12-month deadline.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

The commentary to guideline 4.5.3 [4.5.4], as amended, was adopted.

The meeting rose at 12.55 p.m.

3078th MEETING

Thursday, 5 August 2010, at 3.10 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu,

Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

CHAPTER IV. *Reservations to treaties (concluded)* (A/CN.4/L.764 and Add.1–10)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*concluded*) (A/CN.4/L.764/Add.2–10)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (*concluded*) (A/CN.4/L.764/Add.3–10)

1. The CHAIRPERSON invited the Commission to continue its adoption of section C.2 of chapter IV with the consideration, paragraph by paragraph, of the commentaries to the draft guidelines contained in document A/CN.4/L.764/Add.10.

Commentary to guideline 4.6 (Absence of effect of a reservation on the relations between the other parties to the treaty)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to guideline 4.6 was adopted.

Commentary to guideline 4.7 (Effect of an interpretative declaration)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 4.7 was adopted.

Commentary to guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration)

Paragraphs (1) to (33)

Paragraphs (1) to (33) were adopted.

The commentary to guideline 4.7.1 was adopted.

Commentary to guideline 4.7.2 (Effect of the modification or the withdrawal of an interpretative declaration in respect of its author)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 4.7.2 was adopted.

Commentary to guideline 4.7.3 (Effect of an interpretative declaration approved by all the contracting States and contracting organizations)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 4.7.3 was adopted.

5. *Reservations, acceptances of and objections to reservations, and interpretative declarations in the case of succession of States*

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

2. Mr. GAJA proposed to amend the first sentence of the paragraph to read:

“That said, this Part of the Guide to Practice assumes that the rules and principles set out in the 1978 Vienna Convention on succession of States in respect of treaties correspond to the rules of customary international law, even if the practice of States may raise certain doubts in this regard.”

3. The Commission would thereby indicate that the 1978 Vienna Convention corresponded to customary international law as it applied to a very small number of States. At the same time, it would remain prudent with regard to what it took as settled, so as to remain consistent with its previous work and with the position taken by States at the Conference during which the Convention had been adopted.

4. Mr. PELLET (Special Rapporteur) said that he did not entirely agree with Mr. Gaja, because he would prefer the Commission to refrain from taking a stance on the issue of whether the rules in question constituted customary rules of general international law. Personally, he would prefer to use the term “applicable rules”.

5. Sir Michael WOOD said that the issue could be settled by replacing the words “assumes that” with the phrase “is based on”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

6. Mr. GAJA said that the final part of the paragraph was superfluous. He therefore proposed deleting all of the words that followed the footnote symbol.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to Part 5 of the Guide to Practice, as amended, was adopted.

5.1 *Reservations and succession of States*

Commentary to guideline 5.1.1 [5.1] (Newly independent States)

Paragraph (1)

7. Mr. NOLTE said that, without reopening the debate, it would be useful to recount the discussion sparked by Sir Michael on whether it was appropriate for the Commission to begin Part 5 of the Guide to Practice with the case of newly independent States. He therefore proposed

to add the following two sentences at the end of paragraph (1): “The Commission considered whether it was appropriate to begin this Part of the Guide to Practice with a guideline relating to the case of newly independent States. It ultimately decided that it should proceed from the only provision of the 1978 Vienna Convention on succession of States in respect of treaties dealing explicitly with succession to reservations.”

8. Sir Michael WOOD said that the discussion that he had had and to which Mr. Nolte was referring had been unnecessary. It was reflected in the summary record, and there was no need to mention it in the commentary.

9. Mr. VASCIANNIE supported Mr. Nolte’s proposal, which was aimed at describing a discussion that had, in fact, taken place.

10. Mr. PELLET (Special Rapporteur) said that, while he was not opposed to the principle behind Mr. Nolte’s proposal, the insertion of the new sentences in paragraph (1) would give more importance to the issue than it warranted.

11. Mr. NOLTE proposed that the two sentences in question should constitute a new paragraph (8) of the general commentary to Part 5.

12. Sir Michael WOOD said that doing so would give too much importance to the matter. If it must be mentioned, it would be preferable to do so in the commentary to guideline 5.1.1, for example, by adding the following sentence: “This guideline is placed first in Part 5 since it is based on the only provision of the 1978 Vienna Convention on succession of States in respect of treaties dealing with succession to reservations.”

13. Mr. VÁZQUEZ-BERMÚDEZ said that it would suffice to add the second sentence proposed by Mr. Nolte to paragraph (1) of the commentary to guideline 5.1.1.

14. Sir Michael WOOD proposed, as a compromise, to add the following sentence at the end of paragraph (1): “The Commission decided to place this guideline first in Part 5 since it is based on the only provision of the 1978 Vienna Convention on succession of States in respect of treaties which deals with succession to reservations.”

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (20)

Paragraphs (2) to (20) were adopted.

The commentary to guideline 5.1.1 [5.1], as amended, was adopted.

Commentary to guideline 5.1.2 [5.2] (Uniting or separation of States)

Paragraphs (1) to (12)

Paragraphs (1) to (12) were adopted.

Paragraph (13)

15. Mr. PELLET (Special Rapporteur) said that the French text of the separate opinion annexed by Judge

Tomka to the judgment of the ICJ of 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was available and should replace the English text, and the text in brackets at the end of the footnote should be deleted.

Paragraph (13), as amended, was adopted.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were adopted.

The commentary to guideline 5.1.2 [5.2], as amended, was adopted.

Commentary to guideline 5.1.3 [5.3] (Irrelevance of certain reservations in cases involving a uniting of States)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.1.3 [5.3] was adopted.

Commentary to guideline 5.1.4 (Establishment of new reservations formulated by a successor State)

Paragraph (1)

16. Mr. GAJA proposed that the words “in accordance with guideline 5.1.1 or 5.1.2” be replaced with the phrase “with regard to reservations formulated by a newly independent State, this results from the reference to articles 20 to 23 of the Vienna Convention on the Law of Treaties, contained in article 20, paragraph 3, of the 1978 Vienna Convention on succession of States in respect of treaties. The present guideline also covers new reservations that the successor State may formulate according to guideline 5.1.2, paragraph 3”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to guideline 5.1.4, as amended, was adopted.

Commentary to guideline 5.1.5 [5.4] (Maintenance of the territorial scope of reservations formulated by the predecessor State)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.1.5 [5.4] was adopted.

Commentary to guideline 5.1.6 [5.5] (Territorial scope of reservations in cases involving a uniting of States)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 5.1.6 [5.5] was adopted.

Commentary to guideline 5.1.7 [5.6] (Territorial scope of reservations of the successor State in cases of succession involving part of a territory)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 5.1.7 [5.6] was adopted.

Commentary to guideline 5.1.8 [5.7] (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.1.8 [5.7] was adopted.

Commentary to guideline 5.1.9 [5.9] (Late reservations formulated by a successor State)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.1.9 [5.9] was adopted.

5.2 Objections to reservations and succession of States

Commentary to guideline 5.2.1 [5.10] (Maintenance by the successor State of objections formulated by the predecessor State)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 5.2.1 [5.10] was adopted.

Commentary to guideline 5.2.2 [5.11] (Irrelevance of certain objections in cases involving a uniting of States)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.2 [5.11] was adopted.

Commentary to guideline 5.2.3 [5.12] (Maintenance of objections to reservations of the predecessor State)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.3 [5.12] was adopted.

Commentary to guideline 5.2.4 [5.13] (Reservations of the predecessor State to which no objections have been made)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.2.4 [5.13] was adopted.

Commentary to guideline 5.2.5 [5.14] (Capacity of a successor State to formulate objections to reservations)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

The commentary to guideline 5.2.5 [5.14] was adopted.

Commentary to guideline 5.2.6 [5.15] (Objections by a successor State other than a newly independent State in respect of which a treaty continues in force)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.6 [5.15] was adopted.

5.3 Acceptances of reservations and succession of States

Commentary to guideline 5.3.1 [5.16 bis] (Maintenance by a newly independent State of express acceptances formulated by the predecessor State)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 5.3.1 [5.16 bis] was adopted.

Commentary to guideline 5.3.2 [5.17] (Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.3.2 [5.17] was adopted.

Commentary to guideline 5.3.3 [5.18] (Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State)

The single paragraph constituting the commentary to guideline 5.3.3 [5.18] was adopted.

The commentary to guideline 5.3.3 [5.18] was adopted.

5.4 Interpretative declarations and succession of States

Commentary to guideline 5.4.1 [5.19] (Interpretative declarations formulated by the predecessor State)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 5.4.1 [5.19] was adopted.

Section C.2 of chapter IV of the draft report of the Commission, as amended, was adopted.

1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.764/Add.2)

17. The CHAIRPERSON invited the Commission to adopt, as a whole, the text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission, constituting section C.1 of chapter IV of the draft report of the Commission, as contained in document A/CN.4/L.764/Add.2.

18. Sir Michael WOOD proposed to amend the title of section C and its introductory paragraph to read: "Text of the set of draft guidelines provisionally adopted by the Commission."

19. Mr. PELLET (Special Rapporteur) suggested that, in the title of section C and in the introductory paragraph, the words “constituting the Guide to Practice” should be inserted after “guidelines”.

Section C.1 of chapter IV of the draft report of the Commission (A/CN.4/L.764/Add.2), as a whole, as amended, was adopted.

Section C of chapter IV of the draft report of the Commission, contained in document A/CN.4/L.764/Add.2–10, as a whole, as amended, was adopted.

CHAPTER VIII. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.768)

20. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of chapter VIII of the draft report, contained in document A/CN.4/L.768.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

Paragraph 7 was adopted, subject to minor editorial changes to the English text.

Paragraph 8

21. Sir Michael WOOD said that the current wording of the third sentence was somewhat confusing. He proposed to reformulate it by replacing the words “the Survey on multilateral treaty practice on which the Secretariat study had been focused” by “the multilateral treaty practice on which the Secretariat survey had focused”. In the following sentence, the words “in respect of criminality” were superfluous and should therefore be deleted.

Paragraph 8, as amended, was adopted.

Paragraph 9

22. Sir Michael WOOD proposed to add at the end of the paragraph the phrase “based on the general framework agreed in 2009”.

Paragraph 9, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VIII of the draft report, as a whole, as amended, was adopted.

CHAPTER X. Treaties over time (A/CN.4/L.770)

23. The CHAIRPERSON invited the Commission to begin its consideration of chapter X of the draft report, contained in document A/CN.4/L.770.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 11

Paragraphs 2 to 11 were adopted.

Section B was adopted.

Chapter X of the draft report, as a whole, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.763 and Add.1)

24. The CHAIRPERSON invited the Commission to begin its consideration of the portion of chapter III of the draft report contained in document A/CN.4/L.763 and Add.1.

B. Treaties over time (A/CN.4/L.763)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Paragraph 2 was adopted, subject to minor editorial changes.

Paragraph 3

25. Mr. NOLTE proposed amending the paragraph to read: “In this context, the Commission would also be interested in instances of interpretation which involved taking into account other factors arising after the entry into force of the treaty (factual or legal developments).”

Paragraph 3, as amended, was adopted.

Section B of chapter III of the draft report of the Commission, contained in document A/CN.4/L.763, as a whole, as amended, was adopted.

A. Reservations to treaties (A/CN.4/L.763/Add.1)

26. The CHAIRPERSON invited the Commission to begin its consideration of the portion of chapter III of the draft report contained in document A/CN.4/L.763/Add.1.

Section A, contained in document A/CN.4/L.763/Add.1, was adopted.

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

CHAPTER IV. Reservations to treaties (concluded)**B. Consideration of the topic at the present session (concluded)* (A/CN.4/L.764 and Add.1)**

27. The CHAIRPERSON suggested that, at the end of section B (Consideration of the topic at the present session), a paragraph be added, to read:

“At its 3078th meeting on 5 August 2010, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Alain Pellet, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to provisionally adopt the complete Guide to Practice on Reservations to Treaties.”

It was so decided.

Section B of chapter IV of the draft report of the Commission, as a whole, as amended and completed, was adopted.

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

CHAPTER XI. The most-favoured-nation clause (A/CN.4/L.771)**A. Introduction**

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

1. DISCUSSIONS OF THE STUDY GROUP

Paragraphs 5 to 14

Paragraphs 5 to 14 were adopted.

2. CONSIDERATION OF FUTURE WORK OF THE STUDY GROUP

Paragraphs 15 to 19

Paragraphs 15 to 19 were adopted.

Section B was adopted.

Chapter XI of the draft report, as a whole, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.761)

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

* Resumed from the 3076th meeting.

B. Casual vacancy

Paragraph 3

Paragraph 3 was adopted.

C. Officers and the Enlarged Bureau

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

D. Drafting Committee

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

E. Working Groups and Study Groups

Paragraph 9

28. Mr. GALICKI proposed that Mr. Candiotti's name be added to subparagraph (b).

Paragraph 9, as amended, was adopted.

F. Secretariat

Paragraph 10

Paragraph 10 was adopted.

G. Agenda

Paragraph 11

Paragraph 11 was adopted.

Chapter I of the draft report, as a whole, as amended, was adopted.

CHAPTER XIII. Other decisions and conclusions of the Commission (concluded)* (A/CN.4/L.773 and Add.1)**A. Programme, procedures and working methods of the Commission and its documentation (A/CN.4/L.773)**

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

1. SETTLEMENT OF DISPUTES CLAUSES

Paragraph 4

29. The CHAIRPERSON said that the words “sixty-second session” should be replaced by “sixty-first session”.

30. Sir Michael WOOD said that in the third sentence, the phrase “were missed” should be replaced by “were raised”.

31. Mr. GAJA proposed that in the final sentence, the name of the member in question, namely Sir Michael Wood, should be cited.

Paragraph 4, as amended, was adopted.

2. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 64/116 OF 16 DECEMBER 2009 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

* Resumed from the 3075th meeting.

3. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 10

32. Mr. CANDIOTI suggested inverting the order of the second sentence so that it read: “The Planning Group took note of an oral progress report presented by the Chairperson of the Working Group on 27 July 2010.”

Paragraph 10, as amended, was adopted.

4. METHODS OF WORK OF THE COMMISSION

Paragraph 11

33. Sir Michael WOOD proposed beginning the second sentence with the words “The Working Group” instead of “Such a working group”.

Paragraph 11, as amended, was adopted.

5. HONORARIA

Paragraph 12

Paragraph 12 was adopted.

6. ASSISTANCE TO SPECIAL RAPPORTEURS

Paragraph 13

Paragraph 13 was adopted.

7. ATTENDANCE OF SPECIAL RAPPORTEURS IN THE GENERAL ASSEMBLY DURING THE CONSIDERATION OF THE COMMISSION’S REPORT

Paragraph 14

Paragraph 14 was adopted.

8. DOCUMENTATION AND PUBLICATIONS

Paragraphs 15 to 19

Paragraphs 15 to 19 were adopted.

9. COMMUNICATION FROM THE CHAIRPERSON OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

Paragraph 20

Paragraph 20 was adopted.

B. Date and place of the sixty-third session of the Commission

Paragraph 21

Paragraph 21 was adopted.

Sections A and B of chapter XIII, as a whole, as amended, were adopted.

Chapter XIII of the draft report of the Commission, contained in document A/CN.4/L.773 and Add.1, as a whole, as amended, was adopted.

The meeting rose at 5.20 p.m.

3079th MEETING

Friday, 6 August 2010, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-second session (concluded)**CHAPTER V. Expulsion of aliens (A/CN.4/L.765)**

1. The CHAIRPERSON invited the Commission to begin its consideration of chapter V of the draft report, contained in document A/CN.4/L.765.

A. Introduction

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

2. Mr. GAJA said that, since the Commission had had two different draft articles 8 before it at different times—one contained in the fifth and one in the sixth report on the topic—the reference to that text should be clarified. He proposed that the words “contained in the fifth report” should be inserted after “draft articles 8 to 15”.

3. Mr. MIKULKA (Secretary to the Commission) explained that document A/CN.4/617 cited in the text contained the revised version of the draft articles, which was the version referred to the Drafting Committee.

4. Mr. GAJA said that it would nevertheless be helpful to the reader, and would certainly do no harm, to add the words he had proposed.

Paragraph 8, as amended, was adopted.

Paragraph 9

5. Mr. GAJA queried whether draft article A1 had been referred to the Drafting Committee.

6. Sir Michael WOOD suggested that it could be left to the secretariat to verify whether that had in fact been the case.

Paragraph 9 was adopted, subject to verification by the secretariat that all the draft articles cited had been referred to the Drafting Committee.

1. CONSIDERATION OF THE REVISED AND RESTRUCTURED DRAFT ARTICLES ON PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED

(a) Presentation of the draft articles by the Special Rapporteur

Paragraphs 10 to 21

Paragraphs 10 to 21 were adopted.

(b) Summary of the debate

Paragraphs 22 to 28

Paragraphs 22 to 28 were adopted.

2. CONSIDERATION OF THE SIXTH REPORT OF THE SPECIAL RAPPORTEUR

(a) Presentation of the Special Rapporteur

Paragraphs 29 to 40

Paragraphs 29 to 40 were adopted.

(b) Summary of the debate

Paragraphs 41 to 47

Paragraphs 41 to 47 were adopted.

Paragraph 48

7. Mr. GAJA said that, for the reasons he had outlined earlier in connection with paragraph 8, the words “in his sixth report” should be inserted after “the Special Rapporteur”.

Paragraph 48, as amended, was adopted.

Paragraphs 49 to 66

Paragraphs 49 to 66 were adopted.

(c) Concluding remarks of the Special Rapporteur

Paragraph 67

8. The CHAIRPERSON drew attention to revised paragraph 67 proposed by the Special Rapporteur. It read:

“The Special Rapporteur wished, firstly, to react to a number of general comments that had been made during the debate. In response to the remark that the topic was more suited for political negotiation than for an exercise of codification and progressive development, he observed that all the topics considered by the Commission were in reality, and with no exception, possible subjects of negotiations. The Special Rapporteur recalled that the methodology adopted in his reports was firstly to examine the sources of international law recognized in Article 38 of the Statute of the International Court of Justice; only in the absence of a rule derived from one or the other of those sources could domestic practice serve as a basis for proposing draft articles as a matter of progressive development. Replying to certain criticisms of his use of sources and examples in his sixth report, the Special Rapporteur explained that he had tried to make the best use of the material available, the sources of which had always been clearly cited, and that he had clearly stated in his report that the cases cited were not comprehensive and certainly not intended to

stigmatize the countries mentioned. Based on available information, the Special Rapporteur had also attempted to take into account the jurisprudence of several regions as well as the positions and practice of States belonging to various regions of the world. Finally, the consideration of old sources—some of which appeared to be unavoidable—was in no way anachronistic; it aimed at providing an account of the evolution of the topic.”

9. Mr. DUGARD said that he much preferred the original text of paragraph 67. If the revised version was to be adopted, however, the opening phrase should be amended to read: “The Special Rapporteur reacted to a number of general comments”.

10. Mr. HASSOUNA queried the propriety of revising the Special Rapporteur’s own remarks and said that if the Commission made any changes to his text, they should be minimal.

11. Mr. MELESCANU said that he agreed with Mr. Hassouna’s remarks. The text proposed by the Special Rapporteur reflected his own concluding remarks and was not a summary of the debate in the Commission. The revised paragraph 67 should be adopted, with the amendment proposed by Mr. Dugard.

Paragraph 67, as revised by the Special Rapporteur and amended by Mr. Dugard, was adopted.

Paragraph 67 bis

12. The CHAIRPERSON drew attention to a proposal by the Special Rapporteur for an additional paragraph 67 bis, to read:

“Concerning the proposal aimed at restructuring the draft articles, the Special Rapporteur was of the view that it would be better, at this stage, to continue working on the basis of the revised workplan contained in document A/CN.4/618; once all the draft articles had been elaborated, it would be appropriate to restructure, in a coherent and logical way, the whole set of draft articles.”

Paragraph 67 bis was adopted.

Paragraph 68

Paragraph 68 was adopted.

Paragraph 69

13. Mr. GAJA proposed that the words “during the course of the discussion” be deleted, as the revised version of draft article 8 had actually been proposed after the discussion of the sixth report had been completed.

Paragraph 69, as amended, was adopted.

Paragraphs 70 to 76

Paragraphs 70 to 76 were adopted.

Section B of chapter V of the draft report of the Commission, as a whole, as amended, was adopted.

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

The report of the International Law Commission, as a whole, as amended, was adopted.

Chairperson's concluding remarks

14. The CHAIRPERSON said that the sixty-second session had been a productive one. He was grateful to his colleagues on the Bureau for their advice and guidance. He was also grateful for the competent assistance and continuous support provided by the Secretariat, the Codification Division and the Legal Liaison Office in Geneva. He wished to thank all the précis-writers, interpreters, conference officers, translators and other members of conference services who performed services for

the Commission daily. The documents services in particular had faced up to the challenge of unusually voluminous documentation and tight deadlines because of the Commission's busy work schedule. He expressed wholehearted gratitude and appreciation for their impressive work, which had greatly contributed to the success of the session.

Closure of the session

15. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-second session of the International Law Commission closed.

The meeting rose at 11.50 a.m.

United Nations publication
Sales No. E.15.V.2
ISSN 0082-8289

ISBN 978-92-1-133834-8



9 789211 338348

Printed at United Nations, Geneva – 1601966 (E) – June 2016 – 637
