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Summary record of the 3029th meeting

Topic:
<multiple topics>

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11. Mr. CANDIOTI, speaking on a point of order, said that the consideration of the draft articles should be postponed until the next session, as had been suggested, or else the debate should continue in a closed meeting.

12. The CHAIRPERSON said that, if he heard no objection, he would take it that Mr. Candiotti's proposal to continue the debate in a closed meeting was adopted.

It was so decided.

The meeting was suspended at 10.30 a.m. and resumed at 10.55 a.m.

13. The CHAIRPERSON said that, following consultations held during the closed meeting, the Committee had decided to postpone the consideration of the draft articles contained in document A/CN.4/617 and of the workplan contained in document A/CN.4/618 until the next session, so that the discussion could take place in the presence of the Special Rapporteur.

The meeting rose at 11 a.m.

3029th MEETING

Friday, 31 July 2009, at 10.10 a.m.

Chairperson: Mr. Ernest PETRIČ

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

Protection of persons in the event of disasters (*concluded*)* (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 1 to 5 provisionally adopted by the Drafting Committee from 13 to 17 July 2009, as contained in document A/CN.4/L.758, which read:

“Article 1. Scope

“The present draft articles apply to the protection of persons in the event of disasters.

* Resumed from the 3019th meeting.

“Article 2. Purpose

“The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.

“Article 3. Definition of disaster

“‘Disaster’ means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.

“Article 4. Relationship with international humanitarian law

“The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.

“Article 5.²⁷² Duty to cooperate

“In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.”

2. At its 3019th meeting, on 10 July 2009, the Commission had referred to the Drafting Committee draft articles 1 to 3, as proposed by the Special Rapporteur in his second report, on the understanding that if no agreement was reached on draft article 3, it could be referred back to the plenary Commission with a view to establishing a working group to discuss the draft article. In eight meetings, held from 13 to 17 July 2009, the Drafting Committee had successfully completed its consideration of all the draft articles referred to it and had provisionally adopted five draft articles.

3. The Drafting Committee had undertaken its work on the basis of a revised set of proposed draft articles prepared by the Special Rapporteur, taking into account the various drafting and structural suggestions made in the plenary. In keeping with a number of those suggestions, the Special Rapporteur had proposed dividing some of the draft articles in order to produce a total of five.

4. The current wording of draft article 1 (Scope) was based on the first part of the formulation initially proposed by the Special Rapporteur in his second report and reflected the title of the topic. The latter point had had a bearing on the debate in the Drafting Committee. While there had been general agreement that the scope of the draft articles should include the pre-disaster phase, suggestions as to how best to reflect that had ranged from replacing the phrase “in the event of” with “in relation to”

²⁷² Draft article 5 was 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.

or “in case of”, in order to allow more room for the inclusion of pre-disaster activities, to making express reference to the various phases of a disaster. Ultimately, it had been decided to maintain the existing formulation, out of a concern that amending the text of draft article 1 might require amending the title of the topic. Moreover, the Committee had understood the phrase “in the event of disasters” to include all phases of a disaster and would provide a corresponding explanation in the commentary.

5. The subject matter of draft article 2 (Purpose) had been taken from the second half of the Special Rapporteur’s initial proposal for draft article 1 on scope; in the revised text he had presented to the Drafting Committee, the Special Rapporteur had proposed placing the provision in a separate draft article dealing with purpose. Although it was unusual for texts prepared by the Commission to include a provision outlining the objectives of the draft articles in question, it was not without precedent. Principle 3 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities²⁷³ had included a provision on the purposes of the draft principles. Hence, although the view had been expressed in the Committee that the provision would be better placed in the preamble, most of the members had supported its inclusion as a separate draft article.

6. The Special Rapporteur’s revised proposal incorporated a number of changes in response to suggestions made during the plenary debate. One such change involved inverting the references to “rights” and “needs”, so that instead of referring to “the realization of the rights of persons ... by providing an adequate and effective response to their needs”, the text of the revised proposal referred to ensuring “an adequate and effective response to ... the needs of persons ..., with full respect for their rights”. The new word order placed the emphasis on the link between a high-quality (“adequate and effective”) response and meeting the needs of the persons concerned, both of which had to be carried out with full respect for the existing rights of disaster victims. That approach had met with general agreement in the Drafting Committee. In one of the versions developed by the Committee, the phrase “in particular” had been placed before the concluding reference to respect for the rights of the persons concerned, but was eventually deleted as it implied that the rights in question were a subcategory of needs.

7. With regard to other aspects of draft article 2, it should be noted that the Special Rapporteur’s initial proposal made a reference to “States”, understood as a general statement of the obligation of States to ensure an adequate and effective response to disasters. That point had given rise to debate in the Drafting Committee. While some members had supported an express reference to the basic duty of States to provide for the needs of disaster victims, others had taken issue with the general terms in which the provision had been drafted. A general reference to the obligations of States did not, in the opinion of a number of members, sufficiently convey the specific rights and obligations of the affected State or make it clear that the affected State and assisting States had differing obligations. The matter had eventually been resolved by deleting the reference to

States, on the understanding that such a reference was not strictly necessary in a provision concerning the purpose of the draft articles and that specific provisions on the obligations of States would be taken up at a later stage.

8. As to the matter of the temporal application of the draft articles, the Drafting Committee had, as mentioned previously, approved of including the pre-disaster phase in the scope of the draft articles. The question had arisen again in relation to draft article 2. Some members had preferred including a specific reference to “all phases of the disaster”. However, the prevailing view had been that draft article 2 could be made more concise by referring to “an adequate and effective response to disasters” without having the effect of excluding the pre-disaster phase. That issue would be explained in the commentary.

9. The Special Rapporteur’s initial proposals had referred to the need “to ensure” the realization of rights by providing an adequate and effective response. After considering various options, such as the phrase “to provide for”, the Drafting Committee had opted instead for the verb “to facilitate”, since the draft articles would not themselves ensure a response, but rather, it was hoped, help to facilitate an adequate and effective response.

10. It had also been decided to introduce the qualifier “essential” before the term “needs”, in order to convey more clearly that the needs being referred to were those related to survival in the aftermath of a disaster. There had been an earlier proposal to use the adjective “basic”, but it was thought that “essential” more clearly described the context in which such needs arose. Moreover, the commentary would clarify that the term “persons concerned” meant the individuals directly affected by a disaster, as opposed to those indirectly affected.

11. The Special Rapporteur’s earlier proposal had referred to “the realization” of rights, which carried an affirmative connotation. However, since some of the applicable rights were economic and social rights that States were obliged progressively to ensure or to “take steps” towards ensuring, a more neutral formulation had been sought. The Drafting Committee had opted for the commonly used phrase “with full respect for their rights”, which left the question of how those rights were to be enforced to be determined by the relevant rules themselves; it had also considered the phrase “with due respect for their rights”, but had eventually settled on the adjective “full”, which had a more active connotation.

12. The Drafting Committee had also considered several proposals to add a further qualifier, which had included the alternative formulations “as appropriate”, “as far as possible”, “to the extent possible”, “as required by the present draft articles”, “in accordance with relevant provisions of international and domestic law” and “applicable rights”. However, none of those suggestions had ultimately met with acceptance. The concern was that the introduction of additional qualifiers risked turning what was a straightforward statement of purpose into a complicated provision and unnecessarily diluting existing legal rights. The commentary would nevertheless explain that there was an implied leeway in assessing for the applicability of rights, which was conditioned by the extent of the impact of the

²⁷³ *Yearbook ... 2006*, vol. II (Part Two), para. 66.

disaster. The extent of that conditionality, insofar as it was not covered by the draft articles being developed by the Commission, would be determined by the relevant rules recognizing or establishing the rights in question.

13. Lastly, by the term “rights”, the Commission was referring not only to general human rights, but also to rights acquired under domestic law. Some members of the Drafting Committee had expressed the view that the reference to “rights” was vague because it did not clarify whether what was being referred to was human rights—meaning pre-existing rights—or the rights to be enumerated in the draft articles. Nevertheless, the Drafting Committee had not approved a suggestion to draw up a list of applicable rights for the simple reason that it was impossible to ensure that such a list was exhaustive, and that could lead to an *a contrario* interpretation that rights not expressly mentioned were not applicable.

14. Draft article 3 (Definition of disaster) defined the term for the purposes of the draft articles. The Drafting Committee’s primary concern with regard to the provision had been to properly delimit the scope of the definition of “disaster” so as to capture the elements that fell within the scope of application of the topic without inadvertently including other serious events, such as political and economic crises, which could also undermine the functioning of society. The delimitation of the scope had been accomplished in two ways.

15. The first step had been to reorient the definition to focus on the existence of an event causing the disruption of society. The initial version of the definition, as proposed by the Special Rapporteur in his second report, had followed the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. In other words, the definition had focused on the consequences of an event—the serious disruption of the functioning of society caused by that event—rather than on the event itself. A preference for the opposite approach, which had been expressed by several Commission members during the plenary debate, had been reiterated in the Drafting Committee. It had been explained that the approach taken in the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations represented the current thinking in the humanitarian assistance community, as confirmed by the 2005 World Conference on Disaster Reduction convened by the United Nations General Assembly in Hyogo (Japan),²⁷⁴ as well as by recent treaties and other instruments, including the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,²⁷⁵ which had been adopted by the IFRC in 2007. Nevertheless, the prevailing view in the Drafting Committee had been that the Commission was free to shift the emphasis of the approach, especially since it was embarking on the formulation of a legal instrument, which required a tighter definition than one that was policy-oriented. Moreover, linking the definition of “disaster” to the existence of an event more clearly conveyed the logical sequence of a disaster situation.

16. The scope of the definition of “disaster” had been limited further through a series of textual refinements. Inspired by the definition adopted by the Institute of International Law at the latter’s 2003 Bruges session,²⁷⁶ which had deliberately set a higher threshold so as to exclude other acute crises, the Drafting Committee had decided to qualify the term “event” with the word “calamitous” so as to emphasize the extreme nature of the event being considered. The commentary would further clarify the kinds of events not covered by the draft articles. The Committee had also decided to approve a suggestion made in the plenary to use the phrase “event or series of events” in order to encompass the types of disasters that might not, taken separately, meet the necessary threshold, but that, taken together, would constitute a calamitous disaster for the purposes of the draft articles.

17. Three types of consequences had been anticipated in the provision: widespread loss of life, great human suffering and distress, and large-scale material or environmental damage. The “loss of life” element was a refinement that had been inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief²⁷⁷ and had been implied in the Special Rapporteur’s initial proposal, which had referred to “widespread human ... loss”. It had been agreed that the qualifier “widespread” would be explained in the commentary. It had also been agreed that the phrase “great human suffering and distress” was a necessary element of the definition.

18. The phrase “large-scale material or environmental damage” had been included in draft article 3 on the understanding that it was not the environmental loss *per se* that would be covered by the topic, but rather the impact of such loss on individuals, which would preclude the consideration of economic loss in general. At the same time, the view had been expressed that to link the definition of disaster to actual loss might prevent the draft articles from applying to activities intended to mitigate potential future human loss arising from existing environmental damage. Those matters would be taken up in the commentary.

19. The Drafting Committee had also considered a suggestion that an express reference to the exclusion of armed conflict from the scope of the definition should be included in the draft article. It had, however, opted to solve the question in the context of draft article 4. The two draft articles would need to be read in conjunction.

20. Draft article 4 (Relationship with international humanitarian law) dealt with the extent to which the draft articles covered situations of armed conflict. In his original proposed definition of disaster, the Special Rapporteur had expressly excluded armed conflict. In the plenary debate, it had been suggested that the matter would be best dealt with in a separate “without prejudice” clause. In his revised proposal, the Special Rapporteur had adopted that approach, eliminating the reference to armed conflict from the definition and adding a provision stating that the draft articles were without prejudice to the rules applicable

²⁷⁴ See footnote 177 above.

²⁷⁵ See footnote 176 above.

²⁷⁶ See footnote 204 above.

²⁷⁷ *International Review of the Red Cross*, vol. 36, No. 310 (1996), annex VI, p. 119.

in armed conflict. Two issues had been raised during the discussion in the Drafting Committee. First, it had been proposed that the express exclusion of armed conflict in the definition should be restored. The second issue had been whether a “without prejudice” clause would be sufficient. The first matter had been resolved by the solution found for the second.

21. It had been argued that, whether or not a “without prejudice” clause was introduced, armed conflicts would, in principle, unless expressly excluded under the definition, be considered disasters for the purposes of the draft articles, if they satisfied the threshold criteria set out in draft article 3. The Drafting Committee had thus considered a proposal to include a second paragraph in draft article 3 expressly excluding armed conflict. That approach had not, however, been adopted, largely because of the concern raised by some members that a categorical exclusion would be counterproductive, particularly in complex emergencies, where a disaster, whether emanating from natural or human causes, occurred in an area of armed conflict. To exclude the applicability of the draft articles because of the simultaneous existence of an armed conflict would be detrimental to the protection of victims, especially where the onset of the disaster had pre-dated the armed conflict.

22. It had been agreed that, while the draft articles did not seek to regulate the consequences of armed conflict, they could nonetheless apply in situations of armed conflict where existing rules of international law, particularly international humanitarian law, did not apply. It had been thought that a “without prejudice” clause would not achieve that result, since it would merely preserve the applicability of both sets of rules, thereby suggesting that the draft articles applied in the context of armed conflict to the same extent as existing rules of international law. It had therefore been proposed that a new provision should be drafted to clarify the relationship between the draft articles and the rules of international humanitarian law, giving precedence to the latter in situations where they were applicable.

23. Draft article 5 (Duty to cooperate) had been the last to be adopted by the Drafting Committee at the current session. Different opinions had been expressed within the Commission as to the timeliness of referring the draft article to the Drafting Committee. Similarly, the view had been expressed in the Committee that it was premature to adopt a general provision on the obligation of States to cooperate without an exposition of other applicable principles and further consideration of the implications of such obligation, particularly for the affected State. A majority of members, however, had supported the adoption of the draft article, on the understanding that a provision on the primary responsibility of the affected State would be included in the draft articles at a later stage. A footnote to that effect had been appended to the draft article.

24. One change was that the draft article was presented as a single sentence rather than as a series of clauses. The Special Rapporteur’s initial proposal had been to distinguish cooperation between States from that between States and international organizations (particularly the United Nations), between States and the IFRC, and

between States and civil society. In response to suggestions by the plenary Commission, the Special Rapporteur had presented a revised proposal that had sought to distinguish further between different levels of cooperation: mandatory with some entities but recommendatory with others. The Drafting Committee had, however, been unable to agree on how best to capture the exact legal relationship between States and the various entities listed. There had also been a concern that the provision was becoming unnecessarily complex. The Committee had felt that it was unnecessary to spell out the exact nature of the legal obligation to cooperate (whether “shall” or “should”) in the general provision on cooperation and had decided to deal with that question in specific provisions to be adopted in the future.

25. The Drafting Committee had therefore returned to a position closer to the original wording, in which the key phrase was “as appropriate”. The phrase, which qualified the entire draft article, served both as a reference to existing specific rules on cooperation between the various entities mentioned in the draft article (including any such rules added to the draft articles in the future) and as an indication that, in a given situation, there was some leeway for determining whether cooperation was “appropriate”.

26. The Drafting Committee had decided to insert the word “competent” before “intergovernmental organizations” as an indication that, for the purposes of the draft articles, cooperation would be necessary only with entities that were involved in the provision of humanitarian assistance. Following a suggestion made in the plenary debate, a reference to the ICRC had been added, since the draft articles might also apply in complex emergencies involving armed conflict. The Committee had also standardized the earlier reference to “civil society” by changing the phrase to “relevant non-governmental organizations”. The commentary would make it clear that cooperation was inherently reciprocal in nature, so that a duty for a State to cooperate with an international organization implied the same duty on the part of the organization.

27. Mr. NOLTE said that there was just one point on which he wondered whether the Chairperson of the Drafting Committee fully reflected the discussions within the Committee. He had reported that the Committee had referred to “essential needs” to indicate those related to survival. It had not been his impression that the Committee had meant the term to be understood so narrowly, especially in the light of the definition of disaster in draft article 3, which referred not only to loss of life but also to great human suffering and distress and large-scale material or environmental damage.

28. Mr. MELESCANU said that the report of the Chairperson of the Drafting Committee reflected the long and exhaustive debate held in the Committee. He commended the Special Rapporteur not only for the speed with which he had drafted new texts when requested but also for his deep knowledge of the subject. The Special Rapporteur had the ability to be flexible while remaining firm about the general approach that he had established.

29. Along with Ms. Escameia and others, he attached particular importance to the inclusion in draft article 2

of provisions that could cover the pre-disaster phase as well as the disaster *per se* and the reconstruction stage, although he had doubts as to whether “an adequate and effective response” could be made in the pre-disaster phase. Although the Drafting Committee had accepted that wording of draft article 2, the Special Rapporteur had promised to reflect in the commentary the concerns expressed in that regard. A broader approach to protection could thus be extended to future draft articles.

30. The definition of disaster in draft article 3 was crucial and, thanks to the Special Rapporteur, it covered every aspect of the topic. The definition would enable the Drafting Committee to make faster progress at the next session.

31. Lastly, although neither French nor English was his first language, he felt that, in draft article 5, the English word “relevant” and the French word “*pertinentes*” did not have precisely the same meaning. He would prefer the word “*compétentes*” in the French text. The matter could be dealt with by the Drafting Committee at the next session.

32. Mr. KOLODKIN said that he too had a query about the text of draft article 5 in the various languages, which could be discussed at the next session.

33. The CHAIRPERSON said that he took it that the Commission wished to take note of the report of the Chairperson of the Drafting Committee.

It was so decided.

The most-favoured-nation clause²⁷⁸

[Agenda item 11]

REPORT OF THE STUDY GROUP

34. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured nation clause) recalled that, at its 3012th meeting on 29 May 2009, the Commission had decided to establish a Study Group on the most-favoured-nation clause, to be chaired by Mr. McRae and himself. The Study Group had held two meetings on 3 June and 20 July 2009, at which it had considered a road map for future work and had made a preliminary assessment of the draft articles adopted by the Commission in 1978, with a view to identifying subsequent developments.

²⁷⁸ In 1978, at its thirtieth session, the Commission adopted draft articles on the most-favoured-nation clause and commentaries thereto, which it transmitted to the General Assembly (*Yearbook ... 1978*, vol. II (Part Two), para. 74). In 2006, at its fifty-eighth session, the Commission discussed whether the topic of the most-favoured-nation clause should be included in its long-term programme of work and then invited the views of Governments (*Yearbook ... 2006*, vol. II (Part Two), p. 186, para. 259). In 2007, at its fifty-ninth session, the Commission established an open-ended Working Group that, after consideration of a working paper prepared by Mr. McRae and Mr. Perera, recommended that the topic be included in the long-term programme of work of the Commission (*Yearbook ... 2007*, vol. II (Part Two), pp. 98–99, para. 377). In 2008, at its sixtieth session, the Commission decided to include the topic in its programme of work and to create a Study Group therefor at its sixty-first session (*Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 354). The Commission also considered a document examining what had been decided in 1978, why it had not been taken any further and what had changed since 1978 (*ibid.*, annex II).

35. The Study Group had first examined the nature, origins and development of most-favoured-nation clauses, the earlier work of the Commission on the topic, the Sixth Committee’s reaction to the 1978 draft articles, subsequent developments, current challenges posed by the clause and the Commission’s possible contribution in the light of the substantial changes which had occurred since 1978. Those changes included the context in which most-favoured-nation clauses were employed, the body of available practice and jurisprudence and emergent problems, connected in particular with the application of such clauses in investment agreements.²⁷⁹ As a result of that discussion, the Study Group had agreed on a work schedule for the preparation of papers which, it hoped, would shed additional light on the scope of most-favoured-nation clauses and their interpretation and application.

36. Eight topics had been identified along with the members of the Study Group who would assume primary responsibility for researching them and preparing specific papers on them:

(i) catalogue of most-favoured-nation provisions—Mr. McRae and Mr. Perera;

(ii) the 1978 draft articles of the International Law Commission—Mr. Murase;

(iii) the relationship between most-favoured-nation and national treatment—Mr. McRae;

(iv) most-favoured-nation in the General Agreement on Tariffs and Trade (GATT) and the WTO—Mr. McRae;

(v) the work of the United Nations Conference on Trade and Development on most-favoured-nation—Mr. Vasciannie;

(vi) the work of the Organisation for Economic Co-operation and Development on most-favoured-nation—Mr. Hmoud;

(vii) the *Maffezini* problem in investment treaties—Mr. Perera; and

(viii) regional economic integration agreements and free trade agreements (to be decided)—Mr. McRae.

37. Pending the fuller analysis of the 1978 draft articles to be undertaken by Mr. Murase, Mr. McRae, Co-Chairperson of the Study Group, had reviewed the approach adopted in the Commission’s earlier work, which had relied on GATT practice prior to the establishment of WTO and had regarded the most-favoured-nation clause as a unique legal institution. It had been found that those draft articles were couched in language that had little bearing on current practice.

38. On reviewing the 1978 draft articles to see which were of relevance for the areas to be scrutinized by the Study Group, it was noted that draft article 2 (Use of terms) aptly encapsulated the relationship between the

²⁷⁹ *Yearbook ... 2008*, vol. II (Part Two), annex II.

granting State, the beneficiary State and third States; most-favoured-nation treatment was accorded in a narrowly bound “determined relationship” (draft article 5); such treatment was treaty-based (draft article 7); and that it was premised on the notion that the treaty containing the most-favoured-nation clause was the basic treaty establishing the juridical link between the granting State and the beneficiary State and that no third party rights were acquired under a treaty in which a granting State extended favours to a third State, but rather that the most-favoured-nation clause conferred the rights enjoyed by the third party upon the beneficiary State (draft article 8). The issues broached by draft articles 7 and 8 were of current relevance, since they pertained to the context in which most-favoured-nation treatment was accorded.

39. Draft articles 9 and 10 were also still relevant because they raised the issue of the scope of the most-favoured-nation clause, the question on which the *Maffezzini* case hinged, although they did not necessarily answer that question. The limits of the subject matter of a most-favoured-nation clause had sometimes been determined by the *ejusdem generis* rule, or in the context of WTO/GATT by the concept of “like product” as defined by external characteristics, or in the North American Free Trade Agreement and some bilateral investment agreements by the concept of “like circumstances”.

40. Draft article 16 raised an issue of significance for the current relevance of the 1978 draft articles. The notion that it was immaterial if a third State acquired rights under a multilateral treaty restricting the application of rights to the parties themselves had been regarded as a problem by States that wanted the draft articles to make an exception for customs unions and free-trade areas. The principle had, however, been attenuated in respect of trade in goods by article XXIV of GATT and by a comparable provision on trade in services, both of which permitted exceptions for custom unions and free-trade areas, or interim agreements relating to the formation of customs unions or free-trade areas. The nature of the problem had also altered as membership of WTO had been extended to countries from the former Council for Mutual Economic Assistance (COMECON).

41. In the past, draft articles 23 and 24, which had been influenced by the debate on the new international economic order, had been deemed important because they addressed the questions of development and the generalized system of preferences. Developments within WTO/GATT had meant that those issues were being handled through the “enabling clause” and the concept of “special and differential treatment”. On the other hand, bilateral investment agreements were based, not on any system of preferences or preferential treatment, but on an economic relationship predicated on equality. Wider use of those agreements had sidestepped issues raised by a system of preferences and moved beyond the debate on the new international economic order. Current debate centred on a new wave of investment agreements that would depart from the assumption of equality and acknowledge the need to provide some protection for States receiving investments because relations between developed and developing States under investment agreements tended to be asymmetrical. A further development that might

merit some attention was the growing body of investment agreements between developing countries.

42. Although draft articles 25 and 26 were of some interest, their current scope was unclear, since some of the issues they covered had been further elaborated, for example, in article 126 of the United Nations Convention on the Law of the Sea. They might, however, be considered in the Commission’s forthcoming studies.

43. Conversely, draft articles 11 to 15, on compensation, were premised on an obsolete distinction between conditional and unconditional most-favoured-nation clauses and were not of any core relevance to the Study Group, because they did not reflect current reality in the WTO/GATT context. Under article 1 of GATT and in other WTO agreements, most-favoured-nation treatment was unconditional, although the negotiating process was reciprocal.

44. Similarly, articles 17 to 21 did not seem to raise matters of importance for the Study Group, as they reflected self-evident propositions that were consistent with current practice. The remaining articles were essentially “without prejudice” clauses.

45. In the ensuing discussion within the Study Group, it had been agreed that it would be necessary to clarify the status of the Commission’s earlier work on the topic in order to ensure that there was a clear delineation between that work and the current exercise, without undermining earlier achievements or hampering work and developments in other forums. It was to be hoped that the papers to be prepared would flesh out the issues that ought to be addressed. It has also been pointed out that the Study Group would have to be careful in extrapolating from one area to another, in particular bearing in mind that there was no multilateral regime covering the whole subject of investment. It had been noted that while draft articles 9 and 10 of the 1978 draft articles would form the points of departure for examining most-favoured-nation treatment in the context of investment, further thought should be given to the scope of the exercise; if it were limited solely to investment treaties, it would be necessary to consider the thorny question of the definition of investment.

46. The CHAIRPERSON said he took it that the Commission wished to take note of the progress report of the Study Group on the most-favoured nation clause.

It was so decided.

Treaties over time²⁸⁰

[Agenda item 10]

REPORT OF THE STUDY GROUP

47. Mr. NOLTE (Chairperson of the Study Group on treaties over time) recalled that the Commission, at

²⁸⁰ At its sixtieth session, in 2008, the Commission decided to include the topic “Treaties over time” in its programme of work, based on a proposal by Mr. Nolte, updated and revised, and to establish a Study Group therefor (see *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 353 and p. 164, annex II). For a summary of the topic, see *ibid.*, annex I.

its 2997th meeting on 8 August 2008, had decided to include the topic “Treaties over time” in its programme of work. At its 3012th meeting on 29 May 2009, it had established the Study Group on the topic. At its two meetings on 7 and 28 July 2009, the Study Group had based its discussions on two informal papers presented by its Chairperson outlining the possible scope of future work on the topic; the proposed approach to the topic set out in annex I to the Commission’s report on the work of its sixtieth session,²⁸¹ some background material, including relevant excerpts from the Commission’s articles on the law of treaties and commentaries thereto,²⁸² from the *Official Records of the United Nations Conference on the Law of Treaties*,²⁸³ and from the conclusions and report of the Study Group on the fragmentation of international law;²⁸⁴ together with a letter of 17 February 2009 from the Legal Service of the European Commission containing comments and observations on the subject.

48. The Study Group had mainly endeavoured to identify the issues to be covered, its working methods and the possible outcome of the Commission’s work on the topic. The main question with regard to the scope of the topic had been whether the Study Group should focus on subsequent agreement and practice, or whether it should also examine the effects of certain acts or circumstances on treaties—such as termination and suspension, other unilateral acts, material breaches and changed circumstances; the effects of other sources of international law—such as subsequent treaties, supervening custom, *desuetudo* and obsolescence; and amendments and *inter se* modifications of treaties.

49. Several members of the Study Group had expressed a preference for a narrow approach initially confined to the subject of subsequent agreement and practice, which in itself was wide-ranging, as it took in not only treaty interpretation but also related aspects. Others had contended that the Group’s approach should be considerably broader. Some members had been of the view that it was inadvisable to restrict the scope of the topic to subsequent agreement and practice from the outset, and that work could be conducted in parallel on that subject as well as on some other aspects of the topic.

50. As far as working methods were concerned, several members had been in favour of a collective effort

and had emphasized the need for a proper distribution of tasks among interested members, but if that were done, contributions to the deliberations of the Study Group should be adequately reflected. At the same time, some members had felt that the Chairperson should play a strong role in coordinating and guiding the Study Group’s work.

51. As regards the possible outcome of the Commission’s consideration of the topic, several members had stressed that the final product should offer practical guidance to States. There had been broad support for the idea of drawing up a repertory of practice accompanied by a number of conclusions. Other members had been of the opinion that the Commission should keep an open mind as to the outcome of its work.

52. The Study Group had agreed that it should begin its work by considering subsequent agreement and practice on the basis of papers to be prepared by its Chairperson, but that the possibility of adopting a broader approach should be explored. In 2010, the Chairperson would therefore submit a report on subsequent agreement and practice, which would draw on the case law of the ICJ and other international courts and tribunals with general or *ad hoc* jurisdiction. Other members of the Study Group were encouraged to contribute information on the way in which subsequent agreement and practice was handled at a regional level, under special treaty regimes or in specific areas of international law. Members were likewise invited to contribute papers on other issues falling within the broader scope of the topic.

53. The CHAIRPERSON said he took it that the Commission wished to take note of the progress report of the Study Group on treaties over time.

It was so decided.

The obligation to extradite or prosecute (*aut dedere aut judicare*)²⁸⁵ (A/CN.4/606 and Add.1, sect. H, A/CN.4/612²⁸⁶)

[Agenda item 7]

REPORT OF THE WORKING GROUP

54. Mr. PELLET (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) recalled that at its sixtieth session the Commission had decided to set up an open-ended Working Group on the topic and had implemented that decision during the current session at its 3011th meeting. The Working Group had held three meetings, on 28 May and 29 and 30 July 2009. For its first meeting, it had

²⁸¹ See the footnote above.

²⁸² *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 187 *et seq.* See also *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

²⁸³ *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); *ibid.*, second session, Vienna, 9 April–22 May 1969, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6); and *ibid.*, first and second sessions, Vienna, 26 March–27 May 1968 and 9 April–22 May 1969, *Official Records, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5).

²⁸⁴ *Yearbook ... 2006*, vol. II (Part Two), para. 251, and document A/CN.4/L.682 and Corr.1 and Add.1 (mimeographed; available on the Commission’s website, documents of the fifty-eighth session; the final text will appear as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

²⁸⁵ In 2008, at its sixtieth session, the Commission considered the third report of the Special Rapporteur (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603) and the comments and observations received from Governments (*ibid.*, document A/CN.4/599). At the same session, in addition to considering the topic, the Commission decided to establish a Working Group, chaired by Mr. Pellet, whose mandate would be determined at the sixty-first session (*ibid.*, vol. II (Part Two), para. 315).

²⁸⁶ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

had before it an informal paper prepared by the Special Rapporteur, Mr. Galicki, containing an overview of the debate on the topic in the Commission at its sixtieth session and in the Sixth Committee at the sixty-third session of the General Assembly, as well as a list of issues that might be considered by the Working Group. For the second meeting, the Special Rapporteur had prepared an annotated list of the questions and issues raised by the topic. Members of the Working Group had also had before them copies of a report by Amnesty International, dated February 2009, entitled *International Law Commission: the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare).²⁸⁷

55. The Working Group had first considered the question of its mandate. While some members would have liked it to address some of the substantive issues, most had deemed it more appropriate to develop a general framework for consideration of the topic, so as to determine the questions to be dealt with and establish an order of priority.

56. At its third meeting, the Chairperson had submitted a document setting out a general framework for the topic containing a set of questions and issues, organized thematically. Members of the Group had suggested the inclusion of additional questions or issues. On that basis, the Chairperson had drafted a revised version of the document, which was now before members of the Commission.²⁸⁸ It was short and schematic in nature, since it would have been impossible and indeed premature to enter into a drafting exercise. The document thus simply attempted to set out, as comprehensively as possible, the questions to be addressed, without establishing hierarchy among them. The general categories within which the questions were grouped did not conform to Cartesian logic and were in some cases quite heterogeneous. That was especially true of section (d) (Relationship between the obligation to extradite or prosecute and other principles).

57. On the substance of the document, he noted that the first two sections could be seen as covering the general issues pertaining to the topic, whereas the remaining sections dealt with the legal regime governing the obligation to extradite or prosecute. It was obviously crucial to know whether that regime was exclusively treaty-based or also had a source in customary law, but it was not the purpose of the document to take a position on that point. Whatever the answer to that question, the work on the topic must be continued, because the regime of treaty obligations to extradite or prosecute was far from clear, and nothing prevented the Commission from engaging in the progressive development of international law, to which the topic undoubtedly lent itself.

58. As to the legal regime of the principle, or better, of the “standard”, it was possible, and in fact probable, that it was not uniform, but variable, depending on the wording of the relevant treaty provisions and on the nature of the offences in question. The same legal regime was unlikely to apply to piracy, genocide and offences under domestic law, for example.

59. As indicated by the title of section (d) (Relationship between the obligation to extradite or prosecute and other principles), the obligation to extradite or prosecute might at times compete with other fundamental principles, and to specify how those principles should be reconciled or how they interrelated was surely one of the major challenges posed by the topic. The questions raised in sections (e) to (g) concerning the conditions that triggered the obligation, the implementation of the obligation and its relationship to the “third alternative” of surrender to a competent international criminal tribunal, though technical, were far from trivial, and the responses that might be given would surely be of great use to States. Indeed, he wished to warn against the intellectual excitement that might be generated by sections (a) and (b) on the legal bases and material scope of the obligation to the detriment of the other sections, which were equally important.

60. The document before the Commission was intended simply to facilitate the Special Rapporteur’s work on future reports; it would be his task to determine the order, structure and interrelationship of the draft articles. Opposing views had emerged within the Working Group on a number of points, particularly the order in which the questions should be addressed and whether the Commission should adopt a general approach emphasizing the sources of the obligation or a more specific approach centred on the relevant treaty provisions and the customary or treaty regimes applicable to specific offences. Some members had been of the view that it was essential for the Commission to examine the customary basis of the obligation, while others had thought that the Commission did not need to settle that question or could defer it until after a thorough examination of practice. Differing views had likewise been expressed on whether and to what extent the question of surrender to an international tribunal should be addressed. Some members had thought the focus should be less on extradition and more on the obligation to prosecute when extradition did not take place. All had agreed, however, that work on the topic should not include detailed consideration of extradition law or the principles of international criminal law. With regard to methodology, the importance of taking account of domestic legislation and decisions had been stressed and the possibility had been raised of drawing on the work of certain academic institutions and NGOs.

61. Mr. GALICKI (Special Rapporteur) expressed his appreciation to the Working Group for helping to identify the most important questions raised by the topic and to its Chairperson for his dedicated efforts.

62. The CHAIRPERSON said he took it that the Commission wished to take note of the report.

It was so decided.

The meeting rose at 12.30 p.m.

²⁸⁷ London, Amnesty International Publications, 2009.

²⁸⁸ *Yearbook ... 2009*, vol. II (Part Two), para. 204.