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Summary record of the 3050th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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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

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.

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

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).