Document:-
A/CN.4/3116

Summary record of the 3116th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2011, **vol. I**

57. Mr. DUGARD welcomed the Special Rapporteur's fair-minded summing up of the debate, in which he acknowledged the existence of views contrary to his own and provided an excellent exposition of the subject. He suggested that, together with the three reports prepared by the Special Rapporteur, it should form the basis for further consideration of the topic.

58. The CHAIRPERSON expressed appreciation to the Special Rapporteur for his excellent work in laying the foundations for future study of the question of immunity.

The meeting rose at 11.25 a.m.

3116th MEETING

Tuesday, 2 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*concluded*)* (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

1. The CHAIRPERSON invited the Special Rapporteur on the topic of "The obligation to extradite or prosecute (*aut dedere aut judicare*)" to summarize the debate on his fourth report (document A/CN.4/648).

2. Mr. GALICKI (Special Rapporteur) expressed his sincere gratitude to all the members of the Commission who had so actively participated in the debate on his fourth report. He was grateful for their constructive and friendly criticism, which was more valuable than traditional congratulations for moving ahead on a topic that had proved to be so complex, as most speakers had stressed. The topic had entailed an in-depth analysis of international norms, both conventional and customary, and of national regulations, which had grown more numerous in recent years and had changed significantly, as confirmed in 2009[416] and 2010[417] by the Working Group on the obligation to extradite or prosecute. Although one member of the Commission had suggested that consideration of the topic should be suspended or even terminated, the overwhelming majority of speakers had argued that the work should continue without interruption. Its suspension could create the false impression that the Commission believed that the topic was inappropriate, that it was not ready for a codification exercise or that it should be discontinued for other reasons. Some speakers had been of the view that the topic should be linked to and addressed together with the question of universal jurisdiction, which had already been discussed in a number of United Nations bodies. In his preliminary report,[418] he had proposed a joint analysis of the two questions, but that proposal had been criticized and had not received sufficient support from the Commission or from the Sixth Committee. As the question of universal jurisdiction was now on the agenda of other United Nations bodies, it seemed inevitable that the Commission should again consider, and the sooner the better, whether and to what extent the two topics should be examined together or separately.

3. Most of the new draft articles introduced in the fourth report had been approved. There had been agreement that, at the current stage, the Commission should simply take note of the draft articles and should not adopt them or submit them officially to the Sixth Committee for consideration. He suggested, however, that the draft articles could be quoted for information only in a footnote in the relevant chapter of the Commission's annual report.

4. The new draft article 2 (Duty to cooperate) had given rise to numerous comments, most speakers having agreed that States had such a duty and that the draft article should be included in the draft articles on the obligation *aut dedere aut judicare*. However, there had been differences of opinion on whether such a provision should be the subject of a separate draft article or should be contained in the preamble. Moreover, several speakers had criticized the use of the word "duty" and preferred "obligation", and others had expressed doubts as to whether the duty to cooperate could be considered to be a primary source of the obligation *aut dedere aut judicare*. A number of members had also argued that the phrase "the fight against impunity" was not appropriate for a legal text. However, the Commission had already stressed the importance of the duty to cooperate in the fight against impunity, which was one of the most important legal bases of the obligation to extradite or prosecute in the proposed general framework for the Commission's consideration of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" prepared by the Working Group in 2009 and included in the report of the Commission of that year.[419] That argument had been confirmed in 2010 in the discussions in the Working Group, in which it had been pointed out that "the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute".[420] Moreover, the words "fight against impunity" or "combat impunity" appeared in many international legal documents and did not weaken the legal value of draft

* Resumed from the 3113th meeting.

416 *Yearbook … 2009*, vol. II (Part Two), pp. 143–144, para. 204.

417 *Yearbook … 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340.

418 *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571.

419 *Yearbook … 2009*, vol. II (Part Two), pp. 143–144, para. 204.

420 *Yearbook … 2010*, vol. II (Part Two), pp. 191–192, para. 339.

article 2. Similarly, the formulation "duty to cooperate" was used at least as often as "obligation to cooperate", and the Commission had recognized its importance when it had provisionally adopted, in 2010, a draft article on the duty to cooperate in the event of disasters.[421] In his fourth report on the topic "Protection of persons in the event of disasters" (A/CN.4/643), Mr. Valencia-Ospina had also underscored the importance of such a duty in general, and with regard to cooperation in the event of disasters in particular. Thus, he personally was in favour of retaining the draft article on the duty to cooperate at the beginning of the draft articles, and he fully approved most of the suggestions made to improve its wording.

5. The proposal to divide draft article 2, paragraph 1, into two parts, the first dealing with inter-State cooperation and the second with cooperation with international courts and tribunals, was very useful. A specific reference could also be made to the obligation to cooperate with the United Nations which followed from article 89 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

6. Some speakers had been of the view that the question of sources or of the legal bases of the obligation to extradite or prosecute was not the most important aspect of the topic, but he agreed with the opinion expressed by most members that the legal basis of that obligation could and should be treated as a good starting point for a subsequent in-depth analysis of the subject. For that reason, draft article 3 (Treaty as a source of the obligation to extradite or prosecute) began by reproducing the provision already contained in the third report and which read: "Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party." Although that proposal had not given rise to any objections in the Commission or the Sixth Committee in 2008, at the current session a number of speakers had questioned the need to repeat the well-known principle *pacta sunt servanda* in draft article 3, paragraph 1. Admittedly, with that provision the Commission would not be saying anything new, but the paragraph on treaties as sources of the obligation to extradite or prosecute was a good starting point for later work. First of all, the relevant treaty provisions enunciating the obligation *aut dedere aut judicare* were the strongest and most unquestioned primary sources of that obligation. To omit them in the draft article might give the false impression that they were unimportant. Secondly, a brief review of existing treaties which contained the obligation *aut dedere aut judicare* showed that their numbers had grown significantly in recent years and that the number of States bound by that obligation was growing rapidly. As indicated in his preliminary report of 2006, some authors had tried to prove the existence of customary norms by citing the general practice deriving from treaties. The following opinion had already been expressed in the doctrine in 1998: "If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law."[422] That was not a majority view, but if a State had signed and ratified a significant number of treaties containing the obligation *aut dedere aut judicare*, it was reasonable to assert that that State had demonstrated through its practice that it also recognized the principle *aut dedere aut judicare* as a customary norm, at least with respect to certain international offences. In the debate during the current session, one speaker had stressed that extensive State practice could be a sign of an emerging rule of customary law. If States acceded to a large number of international treaties, all of which enunciated an obligation to extradite or prosecute in one form or another, that was strong evidence that those States were willing to be bound by that obligation. He shared the view that this practice could lead to the transformation of the obligation into a principle of international customary law. Consequently, in view of the possible link between international treaties and international custom as parallel bases for the obligation to extradite or prosecute, international treaties should not be omitted in the draft article on sources. He agreed that the affirmation that international treaties were the principal source of the obligation *aut dedere aut judicare* should be explained in greater detail, especially since a new paragraph 2 had been added in draft article 3 which provided that particular conditions for exercising extradition or prosecution could be formulated by the internal law of the State party concerned, even if the obligation to extradite or prosecute was established by an international treaty.

7. The reference in draft article 3, paragraph 2, to "general principles of international criminal law" had been criticized. However, the concepts of "general principles of international criminal law" and "general principles of criminal law" appeared to be accepted and were often used in the doctrine. For instance, the well-known work of Gerhard Werle on principles of international criminal law[423] dealt with the question in connection with the relevant provisions of the Rome Statute of the International Criminal Court. Werle correctly noted that Part 3 of the Statute currently contained comprehensive provisions on "general principles of criminal law" that formed the nucleus of a self-contained set of general principles of international criminal law, and he also underlined that, although Part 3 of the Statute listed numerous general principles of criminal law, it had not exhausted all of them, and they were to be supplemented especially by rules that were part of general international law. Since, in practice, both elements of the implementation of the obligation to extradite or prosecute appeared to be governed by both domestic legislation and international law, draft article 3, paragraph 2, on particular conditions for exercising extradition or prosecution, might also invoke general principles of international criminal law as a framework in accordance with which particular conditions for exercising extradition or prosecution might be established by individual States.

[421] *Ibid*., paras. 330–331 (draft article 5).

[422] C. Enache-Brown and A. Fried, "Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law", *McGill Law Journal/Revue de droit de McGill*, vol. 43 (1997–1998), pp. 613–633, at p. 629.

[423] G. Werle, *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2005.

8. He approved the suggestion that the particular problems connected with extradition and prosecution should be considered separately. It was true that, in practice, there was no equivalence or even a sustainable balance between legal requirements concerning extradition and prosecution deriving from international treaties and those established in national legislation. Hence the need for one paragraph on the conditions for extradition and a separate paragraph on the conditions relating to prosecution. In any case, the future draft article required further elaboration, since it concerned a complex set of extradition treaties.

9. The last important point related to international custom as a source of the obligation *aut dedere aut judicare*, which was the subject of draft article 4. Although all speakers had recognized the importance of the question, some had criticized the title of the draft article and had contended that it should not refer to the source of the obligation, but to the obligation itself as a rule of customary international law. The enumeration of crimes in draft article 4, paragraph 2, was not exhaustive, but merely cited possible examples of crimes. He fully recognized the need for a more precise definition of "core crimes" likely to give rise to the customary obligation *aut dedere aut judicare*. That approach seemed to be more realistic and promising than an attempt to establish the existence of a general customary rule. As noted in paragraphs 82 to 89 of the fourth report, article 9 of the Commission's 1996 draft code of crimes against the peace and security of mankind[424] was a good example of a list of "core crimes". He had also suggested in his previous reports to follow the pattern of the draft code in identifying crimes which could be classified as giving rise to a customary obligation to extradite or prosecute. Thus, he fully supported the viewpoint expressed during the debate that the 1996 draft code should be the starting point for any future consideration of crimes and offences likely to trigger that obligation. The Rome Statute of the International Criminal Court might also be useful in that regard. Future examination of those core crimes would not spare the Commission the task of considering problems relating to universal jurisdiction, its points in common with the obligation *aut dedere aut judicare* and differences between the two.

10. With regard to the provisions proposed in draft article 4, paragraph 3, he stressed, in order to avoid any misunderstanding, that even when the obligation to extradite or prosecute derived from a peremptory norm of general international law that was accepted and recognized by the international community of States, it did not automatically acquire the status of a *jus cogens* norm. The question of the mutual relationship and interdependence between *jus cogens* norms and the principle *aut dedere aut judicare* would require further analysis. As concerned future work on the topic, he shared the prevailing view that the exercise should be continued. The Commission should take into account the development of the topic during the past quinquennium, the conclusions of the Working Group of 2009 and 2010 and in particular the proposed general framework for the Commission's consideration of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" elaborated in 2009, which the Commission had included in its annual report.

[424] *Yearbook ... 1996*, vol. II (Part Two), pp. 30–32.

11. Mr. SABOIA asked whether the Special Rapporteur's proposal to include the new draft articles for information only in a footnote in the annual report of the Commission was in keeping with established practice.

12. The CHAIRPERSON confirmed that such a proposal did not pose any problem and was standard Commission practice.

13. Mr. DUGARD enquired whether the Commission would take a decision on the inclusion of universal jurisdiction in the topic or whether the question would be left to the Commission in its new composition to decide.

14. The CHAIRPERSON said that perhaps the question should be posed directly to the Member States in the relevant chapter of the Commission's annual report.

15. Mr. GALICKI (Special Rapporteur) said that he had no objection to posing the question directly to States, but it would be more practical for the Commission in its new composition to decide the question.

16. Mr. PETRIČ suggested that it be left to the Commission in its new composition to decide the important question of the link between the obligation to extradite or prosecute and universal jurisdiction, because that presupposed an in-depth debate which, for lack of time, the Commission would not be able to conduct at the current session.

It was so decided.

Protection of persons in the event of disasters (*concluded*)[*] (A/CN.4/638, sect. D, A/CN.4/643, A/CN.4/L.794)

[Agenda item 7]

Report of the Drafting Committee (*concluded*)[**]

17. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Committee on the topic "Protection of persons in the event of disasters" (A/CN.4/L.794).

18. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the report before the Commission related to draft articles 10 and 11 adopted by the Drafting Committee on 19 July 2011. The Committee had held three meetings on 18 and 19 July 2011 and had had before it draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report (A/CN.4/643). The three draft articles had been referred to the Drafting Committee at the 3107th meeting of the Commission, on 18 July 2011. Owing to a lack of time, the Drafting Committee had only been able to address draft articles 10 and 11. Accordingly, draft article 12 remained in the Drafting Committee for consideration at the 2012 session.

19. Draft article 10 concerned the duty of the affected State to seek assistance in a situation in which a disaster exceeded its national response capacity. Three issues

[*] Resumed from the 3107th meeting.

[**] Resumed from the 3102nd meeting.

were worth noting. First, the provision applied in a specific context, namely when the national response capacity of a State affected by a disaster was overwhelmed. The Drafting Committee had decided to move the contextual phrase to the beginning of the draft article so as to emphasize the exceptional nature of the duty. Such an assessment would be undertaken primarily by the affected State, in accordance with draft article 9. Nonetheless, the Drafting Committee had decided not to make that explicit out of recognition that the duty to seek assistance would also arise in situations in which it was manifestly clear that the national response capacity had been exceeded, but the affected State maintained the contrary. The assessment was intended to be objective. However, the Drafting Committee had included a subjective element in the new opening phrase ("To the extent that"), which acknowledged the possibility of a differentiated outcome, in the sense that situations might arise in which the response capacity was only partially overwhelmed. The duty to seek assistance would then only apply to that extent.

20. The second issue, which was perhaps key in connection with draft article 10, pertained to the nature of the obligation envisaged. There was a difference of opinion in the plenary as to whether a legal obligation, implying all the usual legal consequences in case of breach, was contemplated, or whether the provision should be cast in recommendatory or hortatory terms. While most members had been in favour of a legal obligation, as indicated by the word "duty", there was another view in the Drafting Committee which had preferred a formulation along the lines of "the affected State should seek assistance". Those who had favoured a legal obligation had maintained that it was grounded, *inter alia*, in existing obligations under international human rights law and that the duty had arisen as a corollary to draft article 9 establishing the duty of the affected State to ensure the protection of victims of a disaster. Others had taken the position that such an obligation did not reflect the current state of the law and was not called for as a matter of progressive development, given that, in most cases of disasters, and regardless of whether their national capacity was overwhelmed or not, affected States were willing to receive assistance from the international community as a matter of international cooperation and solidarity, and not out of a sense of legal obligation. The Drafting Committee had also agreed with the Special Rapporteur's proposal to use the word "seek" as opposed to "request", since the idea of "seeking assistance" implied a process of interaction with assistance providers.

21. The third issue that had arisen during the consideration of the draft article related to the actors from which assistance should be sought. The Drafting Committee had decided to retain the reference to the United Nations out of recognition of the central role that the Organization played in the coordination of humanitarian relief assistance. It had also decided to retain the reference to NGOs in view of the important role that such entities played in the actual delivery of assistance. Nonetheless, draft article 10 contained the same qualifier as in draft article 5, namely "relevant", which was an indication that it would be sufficient for the affected State to seek assistance from those NGOs in the best position to assist it.

22. The provision included two additional qualifiers. First, the reference to "from among" granted the affected State the discretion to choose which international actors it considered appropriate to seek assistance from. The Drafting Committee had also decided to include the qualifier "as appropriate", which had been proposed by the Special Rapporteur, but to do so at the end of the provision to avoid any interpretation that the duty to seek assistance only existed in cases where it would be appropriate to do so. Instead, the words served to provide a further indication of the margin of appreciation that the affected State had in determining not only from which actors to seek assistance, but also what types of assistance and what combination of offers of assistance to accept, it being implicit that the affected State was expected to make a good faith determination. The title of draft article 10 was "Duty of the affected State to seek assistance".

23. Draft article 11 concerned the important question of the consent of the affected State to external assistance. Paragraph 1 established the basic principle that the provision of external assistance was subject to ("requires") the consent of the affected State. The provision was based on paragraph 2 of the Special Rapporteur's proposal for draft article 8 in his third report.[425] Other than a drafting change introduced by rephrasing the beginning of the paragraph to read "The provision of", the main substantive issue that had arisen pertained to the limitation in the Special Rapporteur's proposal, according to which such assistance could "only" be provided with the consent of the affected State. In the view of the Drafting Committee, that was not in line with the overall approach of the draft articles, which granted the State the primary, but not exclusive, role in the protection of persons affected by disasters (draft article 9). The Committee had thus excluded such a qualifier on the understanding that the provision of assistance by external actors was to be undertaken, in principle, on the basis of the consent of the affected State, which reflected the legal position in the vast majority of cases. However, the resulting constructive ambiguity left room for the possibility that in some cases, such as when there was no functioning Government to grant consent or where consent was being refused arbitrarily in the face of a manifest need for external assistance, either such consent was to be implied or the lack of consent would not serve as a bar to the provision of such assistance.

24. Paragraph 2 recognized the right of the affected State not to grant consent, subject to the restriction that the withholding of consent could not be undertaken arbitrarily. The Drafting Committee had also considered the possibility of presenting the qualifier as one of unreasonableness, but had settled for arbitrariness. Whether a decision was unreasonable or not implied a subjective analysis, which could amount to second-guessing the decisions of an affected State. Arbitrariness, on the other hand, implied a more objective test. The commentary would discuss the meaning of "arbitrary withholding of consent" in more detail. The Drafting Committee had decided to exclude the reference to the affected State being "unable or unwilling" to give its consent, on the grounds that such situations would amount to the arbitrary denial of consent and thus were already covered in the text.

[425] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/629.

25. Paragraph 3 established a duty for the affected State to make known its decision regarding offers of assistance. The Drafting Committee had preferred the more general phrase "in accordance with the present draft articles" so as to avoid an interpretation that offers of assistance were dealt with only in draft article 12, as had been proposed in the Special Rapporteur's text. Instead, such offers were to be analysed in the context of the entire set of draft articles.

26. The Drafting Committee had then considered the question of the nature of the obligation of the affected State. Some members had suggested that emphasis be placed on a speedy response to an offer, through the possible inclusion of the words "without delay", and that the duty should not be limited to announcing the decision, but should also require that reasons be given when offers of assistance were refused. However, the Committee had not wanted to impose an onerous burden on the affected State at a time of crisis by requiring it to give reasons for its decisions. Instead, it had preferred a more flexible formulation that was designed to strike a balance between the need for responses to be given to offers of assistance and the exigencies of responding to a disaster. That had been done in two ways. First, the obligation applied "whenever possible", which implied that there might be situations in which responding to an offer might not be feasible. Greater flexibility had also been introduced by adopting a formulation that no longer referred to the authors of the offer. In an earlier version, it had been proposed that the affected State would be required to "notify all concerned". That had been changed to an obligation to "make its decision regarding the offer known". Hence, it would be for the affected State to determine the mode of communication. What was decisive was the result, namely that actors extending offers of assistance would learn the decision of the affected State on such offers. While the provision did not require that reasons be given, it was understood that failure to provide a reasoned response in the context of a denial of consent might give rise to a presumption of arbitrariness. That would be explained in the commentary. The title of draft article 11 was "Consent of the affected State to external assistance".

27. He hoped that the Commission would be in a position to adopt the draft articles as presented.

28. The CHAIRPERSON invited the members of the Commission to adopt the report of the Drafting Committee contained in document A/CN.4/L.794.

Article 10

29. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 10.

It was so decided.

Article 11

30. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 11.

It was so decided.

Draft articles 10 and 11, reproduced in document A/CN.4/L.794, were adopted.

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

Chapter VI. *Effects of armed conflicts on treaties* (A/CN.4/L.785 and Add.1–2)

31. The CHAIRPERSON invited the Commission to adopt chapter VI of its report, on the effects of armed conflicts on treaties, starting with the portion of chapter VI contained in document A/CN.4/L.785.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted, subject to the completion of paragraph 7 by the secretariat.

C. Recommendation of the Commission

Paragraph 9

Paragraph 9 was adopted, on the understanding that it would be completed once the Commission decided what it recommended to the General Assembly.

D. Tribute to the Special Rapporteur

Paragraphs 10 and 11

32. Mr. NOLTE was surprised that in paragraph 10, the contribution of the current Special Rapporteur, Mr. Caflisch, was termed "outstanding", whereas in paragraph 11, the contribution of the previous Special Rapporteur, Sir Ian Brownlie, was referred to as "valuable".

33. The CHAIRPERSON recalled that the Commission had already paid tribute to Sir Ian Brownlie[426] when he had left his functions as Special Rapporteur.

34. Mr. CANDIOTI suggested that the word "expressed" in paragraph 11 should be replaced by "reiterated".

Paragraphs 10 and 11, as amended, were adopted.

E. Text of the draft articles on the effects of armed conflicts on treaties (A/CN.4/L.785/Add.1–2)

1. Text of the draft articles

35. The CHAIRPERSON recalled that the Commission had already adopted the text of the draft articles on the effects of armed conflicts on treaties, including its annex,[427] and that if he heard no objection, he would take it that the Commission wished to adopt document A/CN.4/L.785 as a whole.

Sections A, B, D and E.1, reproduced in document A/CN.4/L.785, as amended, were adopted.

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* Resumed from the 3110th meeting.

[426] *Yearbook ... 2008*, vol. II (Part Two), p. 45, para. 64. See also *Yearbook … 2010*, vol. II (Part Two), p. 167, para. 191.

[427] See the 3089th meeting above, paras. 89–96.

2. Text of the draft articles with commentaries thereto

Part One.

SCOPE AND DEFINITIONS

Article 1. Scope

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

36. Mr. VÁZQUEZ-BERMÚDEZ said that, given that the adoption was on second reading, all references in the commentaries should be to articles rather than draft articles.

37. The CHAIRPERSON said he took it that the Commission wished to adopt the proposal made by Mr. Vázquez-Bermúdez.

It was so decided.

38. Sir Michael WOOD said that the French text was much clearer than the English text; in fact, sometimes a literal translation of the French into English was helpful. He was prepared to make his proposals for drafting changes to the English text available to the secretariat.

39. Mr. NOLTE suggested, for the sake of consistency, to replace the words "internal conflict" by "non-international armed conflict" throughout the commentaries.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

40. Mr. VÁZQUEZ-BERMÚDEZ said that, in the English text, the words "general proposition" in the third sentence should be replaced by "general principle".

41. Mr. CAFLISCH (Special Rapporteur) said that, in the same sentence of the English text, the words "armed conflicts" should be replaced by "treaties".

Paragraph (5), as corrected in the English text, was adopted.

The commentary to article 1, as amended, was adopted.

Article 2. Definitions

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

42. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. NOLTE, said that in the footnote, it would be preferable to delete the reference to the 1985 resolution of the Institute of International Law[428] and to start with the phrase "It should be noted …". Given that paragraph (4) referred to the *Tadić* decision, it did not seem logical to begin by a reference to the Institute, since the Commission had not accepted the definition of the words "armed conflict" contained in that resolution.

43. Mr. CAFLISCH (Special Rapporteur), supported by Mr. NOLTE, proposed a restructuring of the footnote, on the understanding that the secretariat would finalize the wording. The footnote could start with a reference to the *Tadić* decision, followed by the Internet address, which was already contained in the text. The relevant part of the decision could then be cited, after which it could be noted that the definition differed from the one used by the Institute of International Law in its 1985 resolution, without saying what the difference was.

Paragraph (4), as amended, was adopted.

Paragraph (5)

44. Mr. CAFLISCH (Special Rapporteur) said that the second sentence posed a problem. It began with the phrase "The formulation of the provision, particularly the reference to", but the words in quotes that followed were not in the provision in question. To address the problem, it would be preferable for the text to read "The formulation of the provision and the above reference to".

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

45. Mr. NOLTE said that, in the second sentence, the words "Civil wars" should be replaced by "Non-international armed conflicts". They could be retained in the third sentence, because they had been placed in quotation marks.

46. Mr. VÁZQUEZ-BERMÚDEZ said that, in the fourth sentence, it would be preferable to delete the words "if not more than", which went too far.

Paragraph (8), as amended, was adopted.

The commentary to article 2, as amended, was adopted.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

Part Two.

PRINCIPLES

Chapter I.

OPERATION OF TREATIES IN THE EVENT OF ARMED CONFLICTS

Commentary

47. Mr. VÁZQUEZ-BERMÚDEZ said that the third sentence of the general commentary weakened the assertion in the second. He therefore proposed replacing

[428] Institute of International Law, *Yearbook*, vol. 61, vol. II, Session of Helsinki (1985), p. 278 (available from www.idi-iil.org, resolutions).

it by the following sentence: "Continuity therefore may be subject to exceptions, depending on the circumstances of each case."

48. Mr. CANDIOTI endorsed the proposal by Mr. Vázquez-Bermúdez. In fact, he would be inclined to delete the third sentence entirely.

49. Mr. CAFLISCH (Special Rapporteur), supported by Mr. VASCIANNIE, remained convinced that the second sentence must be retained, because it reflected exactly the sense of the relevant provision.

50. Mr. HMOUD and Sir Michael WOOD stressed that it was not the time to reopen a substantive debate.

51. Mr. SABOIA and Mr. NOLTE said that, like Mr. Candioti, they were in favour of deleting the third sentence.

52. Mr. CAFLISCH (Special Rapporteur) said that he had no objection to the deletion of the third sentence.

53. The CHAIRPERSON said she took it that the members of the Commission agreed to delete the third sentence of the commentary.

The general commentary to chapter I, as amended, was adopted.

Article 3. General principle

Commentary

Paragraph (1)

54. Mr. VÁZQUEZ-BERMÚDEZ recalled that the principle *pacta sunt servanda* was at the basis of all the draft articles. The Special Rapporteur had referred to that fact in the commentary to article 8, whereas it would be more appropriate to do so in connection with article 3, which established the general principle of the continuity of treaties. He therefore proposed that, in the first sentence, the words "and seeks to preserve the principle *pacta sunt servanda*" should be inserted after "Draft article 3 is of overriding significance".

55. Mr. CAFLISCH (Special Rapporteur) said that he had sought to strike a balance: the text concerned the general principle of legal stability and the continuity of treaties, but it was also acknowledged that not all treaties necessarily survived. In that sense, article 3 was not always about the principle *pacta sunt servanda*. The reference to that principle in article 8 was in the right place.

56. Mr. HMOUD said that article 4 was also concerned, and he agreed with the Special Rapporteur that article 3 was not.

57. Mr. NOLTE said that the insertion proposed by Mr. Vázquez-Bermúdez actually ran counter to its desired goal. To say that article 3 sought to preserve the principle *pacta sunt servanda* suggested that the article was *lex ferenda*. It would be preferable not to amend the commentary.

58. Mr. CANDIOTI was of the view that the principle *pacta sunt servanda* belonged in article 3 rather than in article 8, which referred to the capacity of States to conclude agreements, and not the effects of the agreements. However, Mr. Nolte was right; perhaps the wording should be made more categorical by saying that article 3 preserved the principle *pacta sunt servanda*.

59. Mr. CAFLISCH (Special Rapporteur) agreed that paragraph (1) of the commentary to article 8 needed to be amended, but he continued to believe that the reference to the principle *pacta sunt servanda* had no place in article 3.

60. Mr. VÁZQUEZ-BERMÚDEZ reiterated his view that that principle was not relevant for article 8, which, as rightly noted by Mr. Candioti, concerned the capacity to conclude treaties, and not the obligation to comply with them. He conceded, however, that his proposed wording might weaken the principle. He maintained his position, but in the light of the comments by other speakers, he would not insist on the insertion of the reference in question.

61. Sir Michael WOOD said that, like the Special Rapporteur and Mr. Hmoud, he did not think that such an insertion was appropriate. The Commission should not reopen old debates.

62. The CHAIRPERSON, speaking as a member of the Commission, said that she endorsed the proposal to reformulate the sentence along the lines suggested by Mr. Nolte and Mr. Candioti, but she took it that the members of the Commission wished to retain paragraph (1) of the commentary as it stood.

Paragraph (1) was adopted as it stood.

Paragraph (2)

63. Sir Michael WOOD suggested the deletion of the phrase "expressing what are substantially British views" in the third sentence.

64. Mr. VÁZQUEZ-BERMÚDEZ said that there was a mistake in the penultimate sentence of the English text: the phrase "compatible with the existence of hostilities" should read "incompatible with the existence of hostilities".

Paragraph (2), as amended, was adopted.

Paragraph (3)

65. Sir Michael WOOD suggested the deletion of the second sentence, in which it was stated that "[t]he term 'outbreak' in article 73 of the Vienna Convention was also not used because it is uncommon to refer to the outbreak of internal armed conflicts". That might be the case in French, but not in English.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to article 3, as amended, was adopted.

Article 4. Provisions on the operation of treaties

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 4 was adopted.

Article 5. Application of rules on treaty interpretation

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

66. Sir Michael WOOD proposed the deletion of the last sentence, which sought to explain that the fact that the Commission did not refer to the Vienna Convention did not mean that it did not think that the Vienna Convention reflected customary international law. The way it was drafted suggested that the Commission left open the question of whether or not the rules on the interpretation of treaties in the Vienna Convention reflected customary international law.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor grammatical correction to the English text.

The commentary to article 5, as amended, was adopted.

Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension

Commentary

Paragraph (1)

67. Mr. VÁZQUEZ-BERMÚDEZ suggested replacing the word "necessarily" in the second sentence by "*ipso facto*" to bring it into line with article 3 and the commentary thereto.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

68. Sir Michael WOOD suggested deleting the word "very" in the penultimate sentence and saying more modestly, as in the French text, that such treaties exhibited a high likelihood of continued applicability.

Paragraph (3), as amended in the English text, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Article 7. Continued operation of treaties resulting from their subject matter

Commentary

The commentary to article 7 was adopted.

CHAPTER II.

OTHER PROVISIONS RELEVANT TO THE OPERATION OF TREATIES

Article 8. Conclusion of treaties during armed conflict

Commentary

Paragraph (1)

69. Mr. CAFLISCH (Special Rapporteur) proposed the deletion of the reference to the principle *pacta sunt servanda* and a merging of the first two sentences, which would then read: "Draft article 8 is in line with the basic policy in the present draft articles, which seeks to ensure the legal security and continuity of treaties".

Paragraph (1), as amended, was adopted.

Paragraph (2)

70. Mr. CAFLISCH (Special Rapporteur) drew attention to two corrections that needed to be made in the French text: the words "*proposition fondamentale*" should be replaced by "*thèse fondamentale*", and the phrase "*En visant de manière générale le 'droit international'*" should be replaced by "*En se référant de manière générale au 'droit international'*".

Paragraph (2), as corrected in the French text, was adopted.

Paragraph (3)

71. Mr. CAFLISCH (Special Rapporteur) said that, in the French text, the words "*à des fins déclaratives*" should be replaced by "*pour la clarté de l'exposé*".

Paragraph (3), as corrected in the French text, was adopted.

Paragraph (4)

72. Mr. CAFLISCH (Special Rapporteur) said that, regarding the quote from Sir Gerald Fitzmaurice, in the French text, the words "*dans le cadre de ses conférences de La Haye*" in the fourth sentence should be corrected to read "*dans le cadre de son cours de La Haye*".[429]

Paragraph (4), as corrected in the French text, was adopted.

[429] G. G. Fitzmaurice, "The juridical clauses of the peace treaties", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 73 (1948-II).

Paragraph (5)

73. Mr. CAFLISCH (Special Rapporteur) said that, in the French text, the word "*viser*" was inappropriate and should be replaced by "*parler de*".

Paragraph (5), as corrected in the French text, was adopted.

Paragraph (6)

74. Sir Michael WOOD said that the word "third" in the second line should be deleted.

Paragraph (6), as amended, was adopted.

The commentary to article 8, as amended, was adopted.

Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor drafting change in the English text.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

75. Sir Michael WOOD said that paragraph (6) was unclear. In particular, with regard to the second sentence, he did not see why acknowledgement of receipt of a notification (made by virtue of article 9, paragraph 1) was essential for the right to object to the content of the notification to be triggered (by virtue of paragraph 3). The whole paragraph seemed to suggest that treaty relations were "frozen" or "paralysed", without actually saying what that meant. If the paragraph was really essential, the Special Rapporteur should provide some clarification on it.

76. Mr. CAFLISCH (Special Rapporteur) stressed that paragraph (6) aimed to contribute to the understanding of article 9, but he would not object if the Commission wished to delete it.

77. The CHAIRPERSON pointed out that the deletion of the paragraph would mean that all the commentary to article 9, paragraph 4, would also be deleted.

78. Mr. SABOIA said that, like Sir Michael, he did not see how acknowledgement of receipt of a notification could have the effect in question. If the second sentence was deleted, the remaining paragraph would be clear.

79. Mr. NOLTE said that perhaps a new wording could be found in informal discussions before the next meeting was held.

80. The CHAIRPERSON proposed that the Commission continue its discussion on paragraph (6) at the next meeting.

It was so decided.

The meeting rose at 1.05 p.m.

3117th MEETING

Thursday, 4 August 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

Chapter VI. *Effects of armed conflicts on treaties* (continued) (A/CN.4/L.785 and Add.1–2)

E. Text of the draft articles on the effects of armed conflicts on treaties (*concluded*) (A/CN.4/L.785/Add.1–2)

2. Text of the draft articles with commentaries thereto (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter VI of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.785/Add.1.

Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension (concluded)

Commentary (concluded)

Paragraphs (1) and (2) (*concluded*)

2. Mr. VÁZQUEZ-BERMÚDEZ said that, if he might be permitted to revert to the commentary to draft article 6, paragraphs (1) and (2), discussed at the previous meeting, he wished to point out that, as currently drafted, the last sentence of paragraph (1) implied that all the criteria which might assist in ascertaining whether the treaty was susceptible to termination, withdrawal or suspension were external to it, which was not the case. He proposed that the last sentence should be redrafted to read: "The draft article highlights certain criteria, including certain criteria external to the treaty…". In the light of that change to paragraph (1), the words "external to the treaty" should be deleted from the second sentence of paragraph (2).

The additional amendments to paragraphs (1) and (2) were adopted.

The commentary to article 6, as amended, was adopted.