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Summary record of the 3152nd meeting

Topic:
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3152nd MEETING

Monday, 30 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Formation and evidence of customary international law (*concluded*) (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPporteur (*concluded*)

1. Sir Michael WOOD (Special Rapporteur), summing up the first debate on the new topic “Formation and evidence of customary international law”, said that, overall, Commission members had welcomed the topic, and their preliminary views had confirmed the broad thrust of the note he had prepared, which was contained in document A/CN.4/653. Speakers had drawn attention to the importance of customary international law within the constitutional order and domestic law of many States. It was important that public international law should form part of the core curriculum at law schools and be part of continuing legal education for lawyers and judges alike.

2. Mr. Murase had expressed serious doubts about the topic, suggesting that it was impractical, if not impossible, to consider the whole of customary international law, even on a very abstract level, and the Commission was bound to fail in that regard, since it would end up either stating the obvious or stating the ambiguous. However, as Mr. Gevorgian had pointed out, what was obvious to the Commission was not necessarily obvious to everyone. A clear, straightforward set of conclusions by the Commission could constitute an important reference for those lawyers, many of whom lacked experience in the area, who were confronted by issues of customary international law. As to the issue of ambiguity, Mr. Murase had seemed to be referring to the difficulty of reaching conclusions that could apply across the whole field of customary international law, at least not without a great number of saving clauses. Saving clauses, however, had proven to be very useful, not least in the Commission’s work. It was not his intention to consider the substance of customary international law but rather to examine systemic rules concerning the identification of such law.

3. He was fully aware of the inherent difficulty of the topic and of the need to approach it with a degree of caution, and he wished to assure colleagues that he shared their concern that the work of the Commission should

not be overly ambitious in that area. He would work towards an outcome that would be useful, practical and—hopefully—well received.

4. With regard to the suggestion by Mr. Murase that the Commission should look at possible intended, or “target”, audiences, he said that he did not entirely understand the relevance of the differentiation between subjective, “intersubjective” and objective perspectives. To him, such a distinction came close to a denial of law. Yet if law was to have any meaning, the accepted method for identifying it must be the same for all; a shared, general understanding was precisely what the Commission might hope to achieve. In contrast to Mr. Murase’s description of the approach taken by the International Court of Justice, he did not believe that courts felt bound to determine the existence of a rule of customary international law solely on the basis of arguments advanced by one or even both of the parties appearing before it; rather, courts had a theory about what customary international law was and how it was formed that was brought to the bench regardless of what the parties said. Judge Abraham, in his separate opinion in the recent case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, also seemed to have rejected the “intersubjective” perspective.

5. There had been broad agreement that the ultimate outcome of the Commission’s work on the topic should be practical. The aim was to provide guidance for anyone, particularly those not expert in the field of public international law, faced with the task of determining whether a rule of customary international law existed. It was not the Commission’s task to resolve theoretical disputes about the basis of customary law or the various theoretical approaches to be found in the literature to its formation and identification; as Mr. Hmoud had said, practice—not theory—was the cornerstone of the topic. Initially, at least, the main focus should be on ascertaining what courts and tribunals, as well as States, actually did in practice, and in that regard he agreed with Mr. Petrič, Mr. Kamto and others who had rightly stressed the need to consider the practice of States from all the principal legal systems of the world and from all regions. At the same time, as Mr. McRae and others had pointed out, the eventual practical outcome must be grounded in detailed and thorough study, including of the theoretical underpinnings of the subject, if it was to be accepted as being to some degree authoritative.

6. There had been general agreement that the outcome of the Commission’s work on the topic should be a set of propositions, conclusions or guidelines. The Commission would not be drafting a “Vienna convention on customary international law”; it would not be appropriate to be unduly prescriptive. As many speakers had emphasized, it was a central characteristic of customary international law—and one of its strengths—that its formation was a flexible process. He did not agree, however, with the position expressed by one speaker that ambiguity was part of the essence of customary international law, which seemed to be a statement about the substance of the law as much as about the process of identification. Ambiguity in the rules of international law was not, in his view, an inherently good quality; it was not the way to assure

the rule of law in international affairs. Flexibility in the process of formation of customary law should not lead to ambiguity in the substance of the law. While it had been pointed out that approaches to customary international law could change over time, the objective was to explain the current process and, as Mr. Murphy had said, help to clarify the current rules on formation and evidence of international law, not to advance new rules.

7. There had been broad agreement with what he had said regarding the scope of the topic in paragraphs 20 to 22 of his note and general support for the development of standardized terminology, with a glossary of terms in the official languages of the United Nations. Views were divided as to whether the Commission should open what Mr. Park had referred to as the Pandora's box of *jus cogens*. Most, though not all, speakers had seemed to think that *jus cogens* should not be addressed head on, although it might be necessary to refer to it in relation to particular aspects of the project. The matter could be revisited as the topic progressed.

8. Many suggestions had been made as to what could be covered under the topic. They included a study of the origins of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice (or, rather, the corresponding provision of the Statute of the Permanent Court of International Justice) and how it had been understood by the courts; the relationship between custom and treaty, including the impact of widely ratified though not universal treaties (in that connection, article 38 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was particularly relevant); the relationship between custom and general principles of law; the distinction between customary international law and general international law; the question of regional custom; the effect of resolutions of international organizations; the role of the practice of subjects of international law other than States, in particular international organizations such as the European Union; the relationship between "soft law" and custom; the extent to which approaches might differ in different areas of the law; the importance, or not, to be accorded to inconsistent practice; the relevance of acquiescence, silence and acts of omission; and the concepts of "specially affected States" and "persistent objector".

9. With regard to the comments made concerning the use of the words "formation" and "evidence" in the title of the topic, including the translation of the latter word into other languages, he said that whatever words were used, the topic should cover both the method for identifying the existence of a rule of customary international law—for example, State practice plus *opinio juris sive necessitatis*—and the types of information that could be used as the raw material for conducting an analysis of customary international law, as well as the places where such information could be found. It was important to get the title right so that it reflected as clearly as possible what the Commission intended to consider under the topic.

10. If he had understood correctly, Mr. Forteau and others had suggested that the main issue to be addressed under the topic was the method to be followed for the

identification of existing rules of customary international law. He shared that view. The word "identification" would perhaps have been a better word to use in the English title of the topic, and he was open to the possibility of amending the title at a later stage. Meanwhile, he agreed with those who thought that the inclusion of the word "formation" was useful: determining whether an allegedly emerging rule existed might well involve a consideration of the modalities of the formation of customary rules in international law. As some speakers had said, the two aspects could not be entirely separated.

11. Mr. Hassouna had suggested that the Commission might wish to reappraise its 1949 preparatory study within the purview of article 24 of its statute on "Ways and means of making the evidence of customary international law more readily available",³³⁹ which was still the basis for important ongoing activities. In response to a query from Ms. Escobar Hernández regarding paragraph 16 of his note, he explained that the paragraph was intended for those who seemed to deny the binding force of customary international law. With regard to paragraph 18, he said that the wording "codification efforts by non-governmental organizations" was intended to cover the work of the International Law Association³⁴⁰ and any other collective efforts of a non-governmental nature, including the work of ICRC³⁴¹ and the Institute of International Law.³⁴²

12. He shared the views of colleagues who had emphasized the importance of drawing on writings from as wide a range of authors as possible, in various languages, and looked forward to assistance from Commission members and possibly also from organizations with which the Commission enjoyed a close relationship.

13. There had been broad agreement on the proposed plan of work on the topic for the quinquennium, which was purely indicative and subject to adjustment. While the projected reports for 2014 and 2015 might prove to be overly ambitious, it was important to approach State practice and *opinio juris* at the same time, given the interconnections between them. The point made by Ms. Escobar Hernández that States should have an opportunity to comment on the complete set of conclusions or guidelines before their adoption would be

³³⁹ Document A/CN.4/6 and Corr.1 (available from the Commission's website or *Yearbook ... 1949*).

³⁴⁰ "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid.*). The "London statement" also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*). The six interim reports by the Committee contain more detailed information.

³⁴¹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

³⁴² Institute of International Law, *Yearbook*, vol. 62, Part II, Session of Cairo (1987), resolution and conclusions of the Thirteenth Commission on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective, p. 66.

borne in mind. It would be useful, notwithstanding the doubts expressed by Mr. McRae, for the Commission to ask States for information about their practice that could not otherwise be readily obtained. A number of speakers had made the valid point that the Commission should not rely exclusively on the pronouncements of international courts and tribunals but should pay particular attention to State practice, including the practice of all organs of the State. He had taken due note of the comments made by Ms. Jacobsson and Mr. Gevorgian regarding the footnote that appeared at the end of the first subparagraph of paragraph 27 of the note and suggested that the request to States could be simplified to read as follows: "The Commission requests States for information on their State practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation. Such practice might include: (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and subregional courts." He hoped that the Commission would be ready to mandate the Secretariat to prepare, if possible in time for the sixty-fifth session, a memorandum identifying elements in the Commission's previous work that could be of particular relevance to the topic.

The obligation to extradite or prosecute³⁴³ (*aut dedere aut judicare*) (A/CN.4/650 and Add.1, sect. D)

[Agenda item 3]

REPORT OF THE WORKING GROUP

14. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that the Working Group had held five meetings to evaluate the progress of work on the topic and to explore possible future options for the Commission to take. The Working Group had based its work on the four informal working papers prepared by its Chairperson.

15. Some members had wished to have a clearer picture of the issues involved in order to facilitate an appropriate response by the Commission. It had been suggested that the Commission might find it useful to harmonize the multilateral treaty regimes relating to the obligation to extradite or prosecute. However, some members had noted that the obligation to extradite or prosecute operated in so many different ways in different treaty regimes that any attempt at harmonization outside such treaty frameworks would not be meaningful. Not much would be gained from elaborating draft articles on existing provisions in multilateral treaties.

³⁴³ Between 2006 and 2011, the Commission examined four reports from the Special Rapporteur, Mr. Zdzislaw Galicki (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report), *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585 (second report), *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648 (fourth report)). In 2009, the Commission established an open-ended Working Group, with Mr. Alain Pellet as Chairperson, which defined a general framework to consider the topic (*Yearbook ... 2009*, vol. II (Part Two), para. 204). The Working Group was reconstituted at the sixty-second session, with Mr. Enrique Candioti as Chairperson (*Yearbook ... 2010*, vol. II (Part Two), paras. 337–340), and at the present session with Mr. Kriangsak Kittichaisaree as Chairperson.

16. A second possible course of action that had been suggested was for the Commission to assess the interpretation, application and implementation of extradite-or-prosecute clauses. However, some members had argued that the issue involved was one of fact and was not something that could be resolved by the Commission.

17. A third possibility would be to conduct a systematic survey and analysis of State practice that would show that a customary rule reflecting a general obligation to extradite or prosecute was emerging, or that the obligation to extradite or prosecute was a general principle of law. However, some members had questioned the usefulness of such an endeavour, pointing out that draft article 9 of the draft Code of Crimes against the Peace and Security of Mankind,³⁴⁴ adopted by the Commission at its forty-eighth session in 1996, already contained an obligation to extradite or prosecute for core crimes. If the Commission wished to postulate a general obligation in order to cover a wider range of crimes, it would have to delve into the general consideration of extradition law as well as broad matters relating to the exercise of prosecutorial discretion, areas in which practice varied considerably, thereby calling into question the existence of such a general obligation.

18. It had been acknowledged by some members that the main obstacle to progress on the topic had been the lack of basic research on whether the obligation to extradite or prosecute had attained the status of customary law. They had noted that when the Commission had elaborated the draft Code of Crimes against the Peace and Security of Mankind, its adoption of draft articles 8 and 9 had constituted progressive development, driven by the need for an effective system of criminalization and prosecution rather than an assessment of actual State practice and *opinio juris*. It was understood that the inclusion of certain crimes in the draft Code did not affect the status of other crimes under international law, nor did it in any way preclude further developments in that important area of law. In that regard, those members had suggested that an analysis of how the law had evolved since 1996 could be useful.

19. There had been a consensus that, in general, the topic concerned the obligation to extradite or prosecute but not the extradition practices of States or an obligation to extradite, or the obligation to prosecute, *per se*. There had also been a consensus that exploring the possibility of the obligation to extradite or prosecute as a general principle of international law would not advance work on the topic any further than the avenue of customary international law.

20. On the relationship between the topic and universal jurisdiction, some members had emphasized that an analysis of universal jurisdiction would inevitably have to be undertaken, in view of the close relationship between the two. Some members had drawn attention to the ongoing work on the scope and application of the principle of universal jurisdiction being undertaken in the Sixth Committee. Several members had suggested that the Commission could proceed with an analysis of the role of

³⁴⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 31.

universal jurisdiction *vis-à-vis* the obligation to extradite or prosecute without waiting for the Sixth Committee to complete its work on universal jurisdiction.

21. With regard to the feasibility of the topic, some members had acknowledged the importance States attached to the topic, which was perceived as useful not only from a practical standpoint, in that it would resolve problems encountered by States in implementing the obligation to extradite or prosecute, but also because the obligation played a key coordinating role between the national and international systems in the overall architecture of international criminal justice. In that connection, some members had suggested that the Commission might, taking both progressive development and codification into account, focus its work on the obligation to extradite or prosecute as evidenced especially in multilateral treaties; that effort could address, *inter alia*, the material scope and the content of the obligation, the relationship between the obligation and other principles, the conditions for the triggering of the obligation, the implementation of the obligation and the relationship between the obligation and the surrender of the alleged offender to a competent international criminal tribunal. Other members, however, had urged caution, pointing to the complexity of the topic as justification for not taking any hasty decisions with regard to the appointment of a new special rapporteur and to whether, and how, to proceed with the topic.

22. The relevance of treaties and customary international law in the consideration of the topic had been highlighted. Several members had considered it prudent to await the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* before taking any definitive positions, since that judgment might clarify some of the issues.

23. Some members had suggested that the Commission should terminate its work on the topic, arguing that it was an area of law to which the Commission was not currently able to make a substantial contribution. Those members felt that the Commission could provide reasoned explanations for its termination of the topic.

24. On 24 July 2012, the Working Group had conducted a preliminary review of the aforementioned judgment of the International Court of Justice, recognizing that an in-depth analysis would be required to fully assess the implications of that decision for the topic under consideration. The Working Group had requested its Chairperson to prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various analyses conducted in relation to the topic in the light of that judgment as well as any further developments and observations made in the Working Group and in the Sixth Committee at the sixty-seventh session of the General Assembly. On the basis of its discussions at the Commission's sixty-fifth session, the Working Group would submit concrete suggestions to the Commission for consideration. It was envisaged that if the Commission should decide to continue its work on the topic, a new special rapporteur would be appointed; if, however, the Commission decided to terminate its work on the topic, it would need to provide explanations for its decision.

Treaties over time (*concluded*)* (A/CN.4/650 and Add.1, sect. E)

[Agenda item 8]

REPORT OF THE STUDY GROUP (*concluded*)**

25. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that in 2012 the Study Group had held a total of eight meetings, on 9, 10, 15, 16 and 24 May and on 19, 25 and 26 July.

26. At the Commission's 3135th meeting, he had presented his first oral report on some aspects of the work undertaken by the Study Group at its five meetings in May. Those aspects had been mostly related to the format and modalities of the Commission's future work on the topic. On that occasion, he had explained that the Study Group was recommending a change in the format of the work on the topic and the appointment of a special rapporteur.

27. At its 3136th meeting, the Commission had decided to change the format of its work on the topic as from its sixty-fifth session, as suggested by the Study Group, and to appoint him Special Rapporteur for the topic, which was to be entitled "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

28. His report at the current meeting would cover some aspects of the work done during the first part of the session that had not been addressed in his first oral report, as well as the work undertaken by the Study Group during its three meetings during the second part of the session.

29. At the current session, the Study Group had considered the third report of its Chairperson on subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings and had completed its consideration of the Chairperson's second report dealing with jurisprudence under certain special regimes as it related to subsequent agreements and subsequent practice.

30. The third report covered a variety of issues, including the following: the forms, evidence and interpretation of subsequent agreements and subsequent practice, as well as a number of general aspects concerning, *inter alia*, the possible effects of subsequent agreements and subsequent practice (e.g. how they might clarify the meaning of a treaty provision or confirm the degree of discretion left to the parties by a treaty provision); the extent to which an agreement within the meaning of article 31, paragraphs 3 (a) and 3 (b) of the 1969 Vienna Convention must express the legal opinion of States parties regarding the interpretation or application of the treaty; subsequent practice as a possible indication of agreement on the temporary non-application or temporary extension of the treaty's scope, or as indicating a *modus vivendi*; bilateral and regional practice under treaties with a fairly broad membership; the relationship between subsequent practice and agreements, on the one hand, and technical and scientific developments, on the other; the relationship between subsequent practice by the parties to a treaty and

* Resumed from the 3136th meeting.

** Resumed from the 3135th meeting.

the parallel formation of rules of customary international law; the possible role of subsequent agreements and subsequent practice in respect of treaty modification and the exceptional role that might be played by subsequent practice and subsequent agreements in terminating a treaty. The third report had also addressed other questions such as the influence of specific forms of cooperation on the interpretation of some treaties through subsequent practice, and the potential role played by conferences of the States parties and treaty monitoring bodies in relation to the emergence or consolidation of subsequent agreements or practice. In its analysis of those various issues, the third report provided some examples of subsequent agreements and subsequent practice, assessed those examples and attempted to draw some preliminary conclusions.

31. The Study Group's debate on the third report had been very rich. During the discussion, several members had touched on the general issue of the level of determinacy of the draft conclusions contained in the third report. While some members had been of the view that many of them were formulated in rather general terms, others had considered that certain conclusions were too determinate in the light of the examples identified in the report. In that regard, some members had observed that the main challenge facing the Commission in its future work on the topic would lie in attempting to elaborate propositions that had sufficient normative content yet preserved the flexibility inherent in the concept of subsequent practice and agreements.

32. A number of points had been raised in relation to the section of the report dealing with conferences of the parties. They included the extent to which such forums deserved special treatment in the consideration of the topic; whether a single notion of "conference of the parties" existed or whether that term covered a variety of different bodies whose only common feature was the fact that they were not organs of international organizations; the extent to which the conferral or non-conferral of decision-making or review powers on conferences of the parties had an impact on their possible contribution to the formulation of subsequent agreements or to the formation of subsequent practice in relation to a treaty; and the significance and relevance, in the current context, of consensus and other decision-making procedures that might be followed by conferences of the parties.

33. The Study Group had also considered six additional general conclusions proposed in its Chairperson's second report on jurisprudence under special regimes as it related to subsequent agreements and subsequent practice. The discussions had focused on the following issues: whether, in order to serve as a means of interpretation, subsequent practice must reflect the position of one or more parties regarding the interpretation of the treaty; the extent to which subsequent practice would need to be specific; the requisite degree of active participation in a practice and the significance of silence by one or more of the parties to the treaty with respect to the practice of one or more other parties; the possible effects of contradictory subsequent practice; the possibility of treaty modification through subsequent practice; and the relationship between subsequent practice and formal amendment or interpretation procedures.

34. In the light of those discussions in the Study Group, he had reformulated the text of what had become six additional preliminary conclusions by the Chairperson. They read as follows:

"1. Subsequent practice as reflecting a position regarding the interpretation of a treaty"

"In order to serve as a means of interpretation, subsequent practice must reflect a position of one or more parties regarding the interpretation of a treaty. The adjudicatory bodies reviewed, however, do not necessarily require that subsequent practice must expressly reflect a position regarding the interpretation of a treaty, but may view such a position as implicit in the practice.

"2. Specificity of subsequent practice"

"Depending on the regime and the rule in question, the specificity of subsequent practice is a factor that can influence the extent to which it is taken into account by adjudicatory bodies. Subsequent practice thus need not always be specific.

"3. The degree of active participation in a practice and silence"

"Depending on the regime and the rule in question, the number of parties which must actively contribute to relevant subsequent practice may vary. Most adjudicatory bodies that rely on subsequent practice have recognized that silence on the part of one or more parties can, under certain circumstances, contribute to relevant subsequent practice.

"4. Effects of contradictory subsequent practice"

"Contradictory subsequent practice can have different effects depending on the multilateral treaty regime in question. Whereas the WTO Appellate Body discounts practice which is contradicted by the practice of any other party to the treaty, the European Court of Human Rights, faced with non-uniform practice, has sometimes regarded the practice of a 'vast majority' or a 'near consensus' of the parties to the European Convention on Human Rights to be determinative.

"5. Subsequent agreement or practice and formal amendment or interpretation procedures"

"There have been instances in which adjudicatory bodies have recognized that the existence of formal amendment or interpretation procedures in a treaty regime does not preclude the use of subsequent agreement and subsequent practice as a means of interpretation.

"6. Subsequent practice and possible modification of a treaty"

"In the context of using subsequent practice to interpret a treaty, the WTO Appellate Body has excluded the possibility that the application of a subsequent agreement could have the effect of modifying existing treaty obligations. The European Court of Human Rights and the Iran-United States Claims Tribunal

seem to have recognized the possibility that subsequent practice or agreement can lead to modification of the respective treaties.”

35. The Study Group recommended that the text of those preliminary conclusions by its Chairperson, as reformulated in the light of the Group’s discussions, should be reproduced in the chapter of the Commission’s report on the topic “Treaties over time”, as had been done in the case of the first nine preliminary conclusions, which had been reproduced in the report of the Commission on the work of its sixty-third session (2011).³⁴⁵ The Commission’s report would indicate that the Study Group had understood those conclusions by its Chairperson to be of a preliminary nature, as they would have to be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur, which might include additional aspects of the topic, and of the future discussions within the Commission. In view of the Commission’s decision to change the future format of its work on the topic, he had not proposed the reformulation of the draft conclusions in his third report in the light of the Study Group’s discussions, since he would prefer to take those discussions into account when he prepared his first report as Special Rapporteur. That first report would synthesize the three reports that he had submitted to the Study Group.

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

It was so decided.

Programme, procedures and working methods of the Commission and its documentation (concluded)* (A/CN.4/650 and Add.1, sect. G)

[Agenda item 10]

REPORT OF THE PLANNING GROUP (A/CN.4/L.798)

37. Mr. NIEHAUS (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.798), said that the Planning Group had held four meetings to consider section G (Other decisions and conclusions of the Commission) of the “Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat” (A/CN.4/650 and Add.1), General Assembly resolution 66/98 of 9 December 2011 on the report of the International Law Commission on the work of its sixty-third session, in particular paragraphs 22 to 28 thereof, General Assembly resolution 66/102 of 9 December 2011 on the rule of law at the national and international levels, and chapter XIII of the report of the International Law Commission on the work of its sixty-third session.³⁴⁶ The Planning Group’s report reflected the outcome of the Group’s deliberations. However, the Planning Group had also decided to prepare a detailed section on the rule of law in response to the request made by the General Assembly in its resolution 66/102. If the Planning Group’s

recommendations were approved by the Commission, they would be included in the Commission’s report on the work of its sixty-fourth session, in the chapter entitled “Other decisions and conclusions of the Commission”.

38. The CHAIRPERSON invited the members of the Commission to consider the report of the Planning Group, contained in document A/CN.4/L.798, section by section.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 3

39. Sir Michael WOOD pointed out that the second sentence had been deleted because the Planning Group would probably be submitting reports throughout the quinquennium.

40. Mr. NIEHAUS (Chairperson of the Planning Group) confirmed that that was the case.

Paragraph 3, as orally revised, was adopted.

2. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL

Paragraph 4

Paragraph 4 was adopted.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 66/102 OF 9 DECEMBER 2011 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 5 to 11

41. Mr. NOLTE said that he believed that paragraph 10 had been deleted.

42. Mr. NIEHAUS (Chairperson of the Planning Group) said that Mr. Nolte was quite right.

43. Ms. JACOBSSON said that paragraph 8 seemed to be truncated, as it did not specify the participants of the high-level meeting. She suggested that the Secretariat should complete that paragraph.

Paragraphs 5 to 11, as orally revised and with the amendment suggested by Ms. Jacobsson, were adopted.

4. HONORARIA

Paragraph 12

44. Mr. CANDIOTI said that the words “the Planning Group” should be amended to read “the Commission”.

Paragraph 12, as amended, was adopted.

5. DOCUMENTATION AND PUBLICATIONS

Paragraphs 13 to 15

45. Sir Michael WOOD said that the Commission benefited enormously from the work of certain sections

³⁴⁵ *Yearbook ... 2011*, vol. II (Part Two), para. 344.

* Resumed from the 3150th meeting.

³⁴⁶ *Ibid.*, paras. 363–412.

of the Secretariat. In particular, the rapid progress with the publication of the *Yearbook of the International Law Commission* was the result of the hard work of the Publications, Editing and Proofreading Section in Geneva. The processing of the Commission's documents in Geneva and New York had been extremely efficient during the current session, notwithstanding the difficulties caused by the late submission of some reports. Last but not least, the Library in Geneva had greatly assisted the members of the Commission. He therefore proposed that three new paragraphs should be added to the section on documentation and publications. They would read as follows:

“16. The Commission welcomes the progress in the elimination of the backlog in the publication of the *Yearbook of the International Law Commission*. It commends the Publications, Editing and Proofreading Section for its efforts and encourages it to continue its valuable work in the preparation of this important publication.

“17. The Commission expresses its gratitude to the Documents Management Section, both in Geneva and New York, for their timely and efficient processing of the Commission's documents, often under narrow time constraints, which contributes to the smooth conduct of the Commission's work.

“18. The Commission wishes to express its appreciation to the Geneva Library, which assists its members very efficiently and competently.”

46. Mr. NIEHAUS (Chairperson of the Planning Group) said that he was in favour of the inclusion of the additional paragraphs proposed by Sir Michael.

47. Mr. VALENCIA-OSPINA said that the reference to the “Geneva Library” should be amended to make it clear that it referred to the library at the Palais des Nations and not to a municipal public library.

Paragraphs 13 to 15, as amended, were adopted.

6. TRUST FUND ON THE BACKLOG RELATING TO THE *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION*

Paragraph 16

Paragraph 16 was adopted.

7. ASSISTANCE OF THE CODIFICATION DIVISION

Paragraph 17

48. Mr. CANDIOTI said that in the first sentence, the words “Planning Group” should be replaced with “Commission”, since it was the Commission, and not the Planning Group, that expressed appreciation for the assistance of the Codification Division.

Paragraph 17, as amended, was adopted.

8. WEBSITES

Paragraph 18

Paragraph 18 was adopted.

B. Date and place of the sixty-fifth session of the Commission

Paragraph 19

Paragraph 19 was adopted.

The report of the Planning Group contained in document A/CN.4/L.798, as a whole, as amended, was adopted.

Protection of persons in the event of disasters (concluded)* (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

49. Mr. HMOUD (Chairperson of the Drafting Committee) said that the Drafting Committee had provisionally adopted five draft articles—draft articles 5 *bis*, 12, 13, 14 and 15—over the course of five meetings held from 5 to 11 July 2012. During the session, the Drafting Committee had also had before it a proposal for draft article 12 made by the Special Rapporteur in his fourth report³⁴⁷ in 2011, which the Committee had been unable to consider owing to a lack of time. In addition, the Drafting Committee had had before it draft articles A, 13 and 14, proposed by the Special Rapporteur in his fifth report (A/CN.4/652) and referred to the Drafting Committee at the 3142nd meeting. He wished to pay tribute to the Special Rapporteur, whose constructive approach and patient guidance had once again greatly facilitated the work of the Drafting Committee, and to thank the other members of the Commission for their active participation and significant contributions, as well as the Secretariat for its valuable assistance.

50. The five draft articles that had been provisionally adopted were contained in document A/CN.4/L.812, which read as follows:

“Article 5 bis. Forms of cooperation

“For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

“Article 12. Offers of assistance

“In responding to disasters, States, the United Nations and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

“Article 13. Conditions on the provision of external assistance

“The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles,

* Resumed from the 3142nd meeting.

³⁴⁷ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

“Article 14. *Facilitation of external assistance*

“1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

“(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

“(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport and disposal thereof.

“2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

“Article 15. *Termination of external assistance*

“The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.”

51. Draft article 5 *bis* was entitled “Forms of cooperation”, which the Drafting Committee had viewed as best reflecting the content of the draft article. It concerned the various forms of cooperation contemplated in the draft articles and was designed to elaborate on draft article 5, which dealt with the duty to cooperate generally, without establishing any additional legal obligations. The Drafting Committee had based its work on the Special Rapporteur’s proposal for a draft article A, contained in his fifth report. That draft article had been modelled on article 17, paragraph 4, of the articles on the law of transboundary aquifers, adopted by the Commission at its sixtieth session, which dealt with “emergencies”,³⁴⁸ a concept analogous to disasters. The Drafting Committee had decided to exclude the first sentence of the text originally proposed by the Special Rapporteur as it overlapped with draft article 5. In doing so, the Drafting Committee had understood that the provision nonetheless had to be read in the light of draft article 5 and, accordingly, that the element of reciprocity implicit in the duty to cooperate was equally applicable to it.

52. The Drafting Committee had therefore focused on refining the language of the remainder of the text, which was the second sentence of the Special Rapporteur’s initial proposal. It had also decided to include an explicit

reference to the purpose of the cooperation envisaged, namely the protection of persons affected by a disaster, in order to explain the thrust of the draft article. It had done that by inserting the opening phrase “For the purposes of the present draft articles”, which thus connected the provision, *inter alia*, with draft article 2 establishing the purpose of the draft articles as a whole.

53. The Special Rapporteur’s initial proposal had been formulated in terms of what States were obliged to do under the duty to cooperate established in draft article 5. On the basis of suggestions made during the debate in plenary meeting, the provision had been recast in more descriptive terms to indicate the forms of assistance contemplated in draft article 5. Accordingly, the earlier reference to “States and other actors ... shall provide” had been deleted.

54. With regard to specific forms of humanitarian assistance listed in the provision, the Drafting Committee had decided to tailor the formulation more closely to the context of disasters by placing the reference to humanitarian assistance, which appeared last in the articles on the law of transboundary aquifers, first in draft article 5 *bis*, since it was the most important form of cooperation in the event of disaster response. A reference to medical expertise had also been added. The Drafting Committee had decided to retain the reference to scientific cooperation, as an important type of cooperation, and had decided to use the word “resources” at the end of the provision, as an all-encompassing term that would include, but not be limited to, “expertise”, the word used in the Special Rapporteur’s initial text. The word “includes” was meant to indicate that the list was non-exhaustive in nature. It was also understood that the forms of cooperation were without prejudice to any decision that the Commission might take in the future, when it addressed the question of disaster prevention and risk reduction.

55. The Drafting Committee had decided to place draft article 5 *bis* immediately after draft article 5, given its link to that provision, but without prejudice to its possible incorporation into draft article 5, perhaps as a second paragraph, during the second reading.

56. Draft article 12 was entitled “Offers of assistance”. The earlier version suggested by the Special Rapporteur had included the words “right to” in the title, but the Drafting Committee had decided to delete that reference in keeping with its decision not to use such a formulation in connection with non-governmental organizations.

57. The Drafting Committee had proceeded on the basis of the text proposed by the Special Rapporteur in his fourth report. In the light of the plenary debate on that text, the Drafting Committee had agreed to draw a distinction between the respective positions of States and competent international organizations, on the one hand, and non-governmental organizations, on the other. That had been done by splitting the original text into two sentences and placing a different emphasis in each one.

58. The first sentence dealt with the position of States, the United Nations and other competent intergovernmental organizations. The Drafting Committee had taken the

³⁴⁸ General Assembly resolution 63/124 of 11 December 2008, annex. Draft article 17 and the commentary thereto appear in *Yearbook ... 2008*, vol. II (Part Two), pp. 40–42.

stance that the majority of the responses given by States to the question posed by the Commission in its 2011 report, as well as the views expressed in the plenary Commission, had given a clear indication that there was currently no legal obligation on States to provide assistance to affected States. In addition, referring to the actions of international organizations in terms of duties was complicated, since those organizations operated in terms of their respective mandates and competencies. The Drafting Committee had deleted the word “shall” from the Special Rapporteur’s original proposal in order to make that clear.

59. Accordingly, the Drafting Committee had chosen to follow the approach adopted by the Special Rapporteur in his proposal, which had focused on the right of States and international organizations to “offer” assistance, which should not *a priori* be regarded as interference in the internal affairs of the affected State. The key question faced by the Drafting Committee had been how best to word the text, namely, whether to use the term “right to offer” or to use another formulation, such as “can offer” or “may offer”. A plurality in the Drafting Committee had preferred the first formulation, and the Committee had eventually settled on the phrase “have the right to offer assistance”. That had been done for reasons of emphasis: while it had been the prevailing view of the Drafting Committee that States were not obliged to provide assistance, as a matter of policy they were to be encouraged to do so. The sense of the Drafting Committee had been that the words “have the right to offer” sent a signal to States and competent international organizations that not only could they offer assistance, but that they were in fact encouraged to do so.

60. He wished to place on record the fact that a minority in the Drafting Committee had had reservations about the use of the word “right”, preferring the more traditional terms “may” or “can”. According to that view, the nuance intended in the distinction between “right” and “may” was not conveyed by the actual meanings of the words and might in fact lead to unintended interpretations, including of the use of the word “may” in other draft articles.

61. The Drafting Committee had decided to use the word “may” in the second sentence in order to introduce a distinction regarding the position of non-governmental organizations, which were not considered to be on the same level as States and international organizations but were nevertheless free to offer assistance to the affected State. The Drafting Committee had been reluctant to recognize a “right” to offer assistance on the part of non-governmental organizations, given that the activities of such entities were governed by national law, which could place restrictions on offers of assistance. The Committee had considered making that point explicit in the draft article itself, but had decided instead to explain it in the commentary.

62. Draft article 13, entitled “Conditions on the provision of external assistance”, addressed the conditions that affected States might place on the provision of external assistance. In response to suggestions made during the plenary debate that the Drafting Committee should consider further elaborating draft article 13 that the Special Rapporteur had proposed in his fifth report, the Drafting Committee had based its work on a revised

proposal by the Special Rapporteur for two draft articles. The second draft article had been adopted as new draft article 14, which he would address later.

63. Draft article 13 consisted of four sentences. The first sentence recognized the basic rule that the affected State might place conditions on the provision of external assistance. The Drafting Committee had considered a proposal to delete the reference to “external” but had decided to retain it because the scope of the provision was limited to the assistance provided by third States or other assisting actors, such as international organizations, and did not cover assistance from internal sources. An earlier version had referred to conditions “imposed” on the provision of assistance, but the Drafting Committee had decided to adopt the formulation “may place conditions on”, which was more consistent with the voluntary spirit in which such assistance was provided yet recognized the right of the affected State to place conditions, not only in general terms, in advance of a disaster, but also in relation to specific offers of assistance made by specific actors during the response phase.

64. The second sentence identified the legal framework within which the permissibility of such conditions was to be evaluated, namely the draft articles, other applicable rules of international law and the national law of the affected State. The commentary would explain that the reference to national law should not be read as requiring the existence of national law. While there might be cases where national law was non-existent or insufficient, the Drafting Committee had worked on the assumption that most States had some national legislation that was applicable, albeit indirectly, to the special context of the response to disasters.

65. The third sentence established the basic requirement that conditions should be informed by the identified needs of the persons affected by a disaster, as well as by the quality of assistance being offered. The phrase “take into account” implied that conditions relating to the identified needs and the quality of assistance were not the only ones that States could place on the provision of external assistance. The word “identified” was understood as implying a duty to justify; it was not simply any assertion of needs, but rather the needs of the persons affected by the disaster that were identified and justified, according to the means available to the affected State, and on a continuing basis as the scale and impact of the disaster became apparent.

66. The last sentence placed the burden on the affected State, when formulating conditions, to indicate the scope and type of assistance sought. The Drafting Committee had also considered a suggestion that the last sentence should be moved to draft article 10 but had decided to defer that matter until the second reading.

67. Draft article 14, entitled “Facilitation of external assistance”, likewise had its origins in the Special Rapporteur’s proposed draft article 13. The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur for two new draft articles, the second of which was the text of draft article 14 before the Commission.

68. The Special Rapporteur's initial text had addressed the question of compliance with national law as a specific form of conditionality. However, the Drafting Committee had decided to amend the provision and approach the issue from the perspective of facilitation of assistance. In other words, while the text had initially dealt with waiving or making exceptions to national law, it now dealt more squarely with applying national law in order to facilitate assistance.

69. The phrase "take the necessary measures, within its national law", in paragraph 1, referred, *inter alia*, to legislative, executive and administrative measures, which could include actions taken under emergency legislation. It might also extend to non-legal, practical measures designed to facilitate assistance. The initial proposal had referred to the possibility that the affected State might waive its national law, which had proved difficult for some members of the Drafting Committee, since it could have been misinterpreted as contemplating the circumvention by States of their internal rules. It had also raised concerns about constitutional limitations on the possible waiving of internal rules. Moreover, the waiver of national law would not cover other scenarios, such as the extension of privileges and immunities. However, the possibility of a State waiving or suspending the application of its national legislation or regulations in order to facilitate the prompt and effective provision of external assistance was still covered by the concept of "necessary measures".

70. Examples of two particularly pertinent areas of assistance were listed in subparagraphs (a) and (b). The words "in particular" had been included to indicate that the lists in the two subparagraphs were not exclusive. Subparagraph (a) dealt with personnel and included a reference to military personnel, in recognition of the role played by the military in major disaster response operations. Subparagraph (b) dealt with goods and equipment. The commentary would elaborate on both categories, as well as on the use of search dogs.

71. Paragraph 2 emphasized the duty of the affected State to facilitate compliance with its national law by ensuring that its relevant legislation and regulations were readily accessible. That duty had been framed in flexible terms so as not to impose too onerous a burden on the affected State. The phrase "to facilitate the compliance with national law" introduced the element of conditionality, which was the subject of draft article 13, in the context of requirements established by the national law of the affected State.

72. Draft article 15, entitled "Termination of external assistance", had its origins in draft article 14 as proposed by the Special Rapporteur in his fifth report. The Drafting Committee had worked on the basis of a revised text prepared by the Special Rapporteur, which had taken into account the views expressed in the plenary debate and focused less on the issue of termination and more on that of the duration of the external assistance, which by definition would include its termination. The Drafting Committee, however, had brought the provision more into line with the Special Rapporteur's initial proposal, focusing on the point of termination of external assistance.

73. The provision consisted of two sentences. The first sentence was concerned with the requirement that

the affected State, the assisting State and other assisting actors, as appropriate, should consult each other regarding the termination of external assistance, including the modalities of such termination. In adopting that wording, the Drafting Committee had sought to strike a balance between recognizing the right of the affected State to terminate the external assistance it was receiving, a right implicit in the fact that that State played the primary role in disaster response (under draft article 9, paragraph 2), and not prejudicing the position of the various actors, including assisting States, that had provided, or were providing, such assistance.

74. Accordingly, the provision had not been drafted in terms of granting the affected State a unilateral right of termination. Instead, the Committee had recognized that assisting States and other assisting actors might themselves need to terminate their assistance activities. The provision thus preserved the right of any of the mentioned States or actors to seek to terminate the assistance being provided, on the understanding that such termination would be undertaken in consultation with the other States or actors, as appropriate.

75. The Drafting Committee had decided to retain the words "assisting actors", which were drawn from existing instruments, to describe international organizations and non-governmental organizations, on the understanding that more complete definitions would be provided in an article on the use of terms to be elaborated in the future. The provision was drafted in bilateral terms but did not exclude the scenario of multiple assisting States providing external assistance. The word "modalities" referred to the procedures to be followed in order to bring about the termination of external assistance.

76. The second sentence established a requirement of notification, which ought to be given by the party wishing to terminate the external assistance. The provision had deliberately been drafted in flexible terms to allow for notification to take place at any time before, during or after the consultation process.

77. The draft article should be read in the context of the entire set of draft articles, and in particular in the light of the purpose of the draft articles as set out in draft article 2, so that the termination of external assistance should not adversely affect persons affected by a disaster. In conclusion, he expressed the hope that the Commission would take note of the draft articles as presented.

78. The CHAIRPERSON said he took it that the Commission wished to take note of the draft articles contained in document A/CN.4/L.812.

It was so decided.

Draft report of the International Law Commission on the work of its sixty-fourth session

Chapter IV. *Expulsion of aliens* (A/CN.4/L.802 and Add.1)

79. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.802.

A. Introduction

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 9 to 15

Paragraphs 9 to 15 were adopted, subject to the completion by the Secretariat of paragraphs 13 to 15.

C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading

1. TEXT OF THE DRAFT ARTICLES

Paragraph 16

Paragraph 16 was adopted.

80. The CHAIRPERSON drew attention to the fact that the title of section 2 and paragraph 17 had been accidentally omitted from the English version. They would be inserted subsequently by the Secretariat. He took it that the Commission wished to adopt the portion of chapter IV contained in document A/CN.4/L.802, as a whole, subject to its completion by the Secretariat.

It was so decided.

81. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter IV contained in document A/CN.4/L.802/Add.1.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (A/CN.4/L.802/Add.1)

General commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary to the draft articles was adopted.

PART ONE. GENERAL PROVISIONS

Commentary to draft article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

82. Mr. MURPHY said that he had no problem with the text of the paragraph as it stood, except that it failed to reflect a minority view that he and other Commission members had expressed both in the plenary and in the Drafting Committee, to the effect that the draft articles should not cover aliens unlawfully present in the territory of the expelling State. Indeed, most of the major multilateral treaties that addressed expulsion did not cover such aliens. He proposed that a sentence should be added to the end of paragraph (3) that would read as follows: "Some Commission members, however, favoured addressing

in these draft articles only aliens lawfully present in the expelling State, given that the restrictions on expulsion contained in the 1951 Convention relating to the Status of Refugees, the 1966 International Covenant on Civil and Political Rights, the 1955 European Convention on Establishment and the 2004 League of Arab States' Arab Charter on Human Rights³⁴⁹ are limited to such aliens."

83. Mr. KAMTO (Special Rapporteur) said that Mr. Murphy's proposal was not in line with the Commission's normal procedure. If it was decided to include Mr. Murphy's point of view in the commentary, it should be a short sentence that stated very clearly that it reflected the opinion of one member and not that of several Commission members. During the adoption of the commentaries to the draft articles, members should generally refrain from proposing what he would term "a commentary within a commentary".

84. Mr. PETRIČ said that in his first statement on the topic of expulsion of aliens several years earlier, he had stated his preference for an approach that dealt with the two categories of aliens separately, since aliens lawfully present in the territory of an expelling State enjoyed a high degree of protection that approximated that enjoyed by citizens, whereas aliens unlawfully present were in an entirely different situation. Although his view had not been accepted and the majority had considered that the two categories should be combined, if a new member was now raising the same point, then he believed that the commentary should state that two members of the Commission held that view.

85. Mr. GEVORGIAN said that he supported the views expressed by Mr. Petrič and Mr. Murphy, as they coincided with what had been his position during the debate on the draft articles. He had taken the floor on that very point and had said that he agreed with the content of the draft articles but disagreed with the definition of the term "alien" since, like Mr. Petrič, he believed that the two categories of aliens should be dealt with separately. He therefore supported the inclusion of a sentence in the commentary to that effect.

86. Mr. ŠTURMA (Rapporteur) suggested that the Commission should suspend its discussion of paragraph (3) and that the Special Rapporteur, Mr. Murphy and other interested Commission members should meet in order to draft language that would be acceptable to the Special Rapporteur and to the majority of the members.

87. Mr. KAMTO (Special Rapporteur) said that although Mr. Gevorgian and Mr. Petrič claimed to agree with Mr. Murphy, the latter's view was that the draft articles should not apply to aliens unlawfully present in the territory of an expelling State at all, whereas the other two were saying that the draft articles should address each category of aliens separately; those were two different arguments.

88. Even though he could understand the rationale behind the Rapporteur's suggestion to suspend consideration of the paragraph, it was not the way the Commission usually

³⁴⁹ Reproduced in document CHR/NONE/2004/40/Rev.1.

proceeded, in his experience. He was prepared to add a short sentence saying that one member had expressed the opinion that aliens illegally present should not be covered by the scope of the draft articles. On the other hand, there was nothing in the legal instruments listed in Mr. Murphy's proposed text that prohibited the inclusion of aliens illegally present in the territory of an expelling State in the scope of a set of general draft articles on the expulsion of aliens.

89. The CHAIRPERSON said that the Commission would suspend its discussion of paragraph (3) so that interested Commission members could draft a proposal for a briefly worded addition to paragraph (3).

Paragraph (4)

90. Mr. NOLTE proposed to delete the word "forcible" from the second sentence, given that the sentence concerned diplomats, consular officials and others who did not tend to be expelled forcibly, and the Commission could therefore convey what it meant without using the word "forcible". Another argument for deleting that word was that the concept of expulsion was not limited to forcible expulsion.

91. Mr. KAMTO (Special Rapporteur) recalled that paragraph 2 of the draft article indicated that the draft articles did not apply to aliens enjoying privileges and immunities under international law. Therefore, the only way such aliens could be required to leave the territory of an expelling State—whether their expulsion took place in spite of the immunity they enjoyed or was the result of their immunity not being recognized—was forcibly. As far as the normal comings and goings of diplomats to and from a foreign State were concerned, there was no need to provide for the eventuality of expulsion. However, since the Commission was excluding the expulsion of such aliens from the scope of the draft articles, it was necessarily their forcible expulsion that it was excluding.

92. Mr. NOLTE said that paragraph 2 of the draft article referred to a situation in which a diplomat was declared *persona non grata* and left the country without being forcibly expelled. The Commission's description of the purpose of that provision in paragraph (4) of the commentary should encompass the whole scope of the provision, which was not limited to forcible departure.

93. Ms. ESCOBAR HERNÁNDEZ suggested that the word "forcible" ("*forzosa*" in Spanish) could be replaced by "obligatory" ("*obligatoria*" in Spanish), since even when diplomats who had been declared *persona non grata* left a country voluntarily, they were nonetheless complying with their obligation to do so under that proscription.

94. Mr. ŠTURMA (Rapporteur) said that he supported the proposal made by Ms. Escobar Hernández. Alternatively, he suggested that the word "forcible" should be replaced by "involuntary", which did not convey the idea of the use of forcible means, such as deportation, and might address Mr. Nolte's concerns.

95. Sir Michael WOOD proposed that the word "forcible" should be replaced with "enforced", which did not necessarily connote the use of physical force.

96. Mr. KAMTO (Special Rapporteur) said that Mr. Nolte's argument was unconvincing because, in any case, a diplomat who was declared *persona non grata* was forced to leave the territory, and "force" in that sense did not necessarily mean physical force. He suggested that a formulation using the word "*constraints*" in the French version might solve the problem.

97. Mr. HASSOUNA proposed that the translation of "*contraint*" into English should be "compelled".

98. Ms. ESCOBAR HERNÁNDEZ proposed that its translation into Spanish should be "*obligada*" or "*obligatoria*".

99. Mr. NOLTE proposed that, in the last sentence, the word "constrained" should be replaced with "compelled".

It was so decided.

100. Sir Michael WOOD said that the placement in the second sentence of the phrase "including, as appropriate, members of their families" made it unclear as to which of the preceding categories of persons in the sentence it applied. The phrase might also apply, depending on circumstances, to other officials in the territory of a foreign State and to military personnel. He therefore proposed that it should be moved to the end of the second sentence. He further proposed that the words "posted abroad" in the second sentence should be replaced with "on mission", which would better correspond to the French version. He further proposed the deletion of the concluding clause "and whose presence in that territory is governed by specific agreements between the States concerned" in order not to exclude, for example, visits by officials on special mission that were not covered by specific agreements in the formal sense of the term. Taking into account all of his proposed amendments, the part of the sentence following "staff members of international organizations" might thus be reformulated to read, "and other officials or military personnel on mission in the territory of a foreign State, including, as appropriate, members of their families".

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

101. Sir Michael WOOD proposed that the phrase "not excluded from the scope of the draft articles are" should be deleted from the first sentence and the phrase "are within the scope of the draft articles" added to the end of the sentence. That would give the sentence a positive, rather than a negative, tone.

102. The CHAIRPERSON, supported by Mr. GEVORGIAN and Mr. HMOUD, said that if Sir Michael's proposal was accepted, the English and other language versions of the text would not be exact translations of each other, since "are within" was not the same as "not excluded".

103. Mr. HMOUD (Chairperson of the Drafting Committee) proposed that the words "not excluded from the

scope of the draft articles” should be retained but moved to the end of the sentence.

It was so decided.

104. Mr. MURPHY said that in discussions held in the Drafting Committee, members had been of the view that persons who had been displaced across borders and were therefore aliens were also covered by the draft articles. He proposed that such displaced aliens should be included in the list of persons who enjoyed special protection under international law.

105. Mr. KAMTO (Special Rapporteur) said that he did not recall that the issue of whether to include such displaced persons in that list had been raised in the Drafting Committee.

106. Mr. HMOUD (Chairperson of the Drafting Committee) said that Mr. Murphy had raised that point, but that there had been no agreement either to include it or not to include it.

107. Mr. ŠTURMA said that the current wording made it clear that the list of persons who enjoyed special protection under international law was not exhaustive.

108. Mr. MURPHY said that every year, there were hundreds of thousands, and sometimes millions, of displaced aliens living outside their countries of origin. It was important for the Commission to decide whether it intended the draft articles to cover such persons or not. His understanding was that the Commission had concluded that they were not excluded from the scope of the draft articles. If that was the case, then they should be mentioned explicitly in the categories of aliens listed in the first sentence.

109. Mr. GÓMEZ ROBLEDO said that the point raised by Mr. Murphy deserved further consideration. He therefore suggested that discussion of paragraph (5) should be deferred until the next plenary meeting in order to give members sufficient time to reflect on it.

110. Mr. KAMTO (Special Rapporteur) said that the adoption of the commentaries should not be seen as an opportunity for individual members to reiterate comments they had made in a plenary meeting or in the Drafting Committee but which had not been endorsed. The Bureau should remind members that that was not in line with the Commission’s procedures. All of the points regarding which a formal request had been made—whether in the Drafting Committee or in the plenary meeting—for inclusion in the commentaries had been reflected. He could not agree to suspend consideration of paragraphs of the commentary in order to find agreement on an opinion expressed by one Commission member that he himself had not been formally asked to include in the commentaries.

111. As to the matter at issue, he recalled that it was at Mr. Murphy’s insistence that he himself had agreed to reconsider the wording of draft article 2, after it had already been provisionally adopted by the Commission, in order to include the phrase “or the non-admission of an alien”. Aliens who crossed borders for a short period of

time in massive numbers could not be included in the scope of the draft articles. The phenomenon of displaced aliens referred to by Mr. Murphy would more appropriately fall under the law of refugees.

The meeting rose at 1 p.m.

3153rd MEETING

Monday, 30 July 2012, at 3 p.m.

Chairperson: Mr. Lucius CAFLISCH

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

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

Chapter IV. *Expulsion of aliens (continued)* (A/CN.4/L.802 and Add.1)

1. The CHAIRPERSON invited the Commission to continue its consideration of document A/CN.4/L.802/Add.1, which contained the text of the draft articles on expulsion of aliens and commentaries thereto adopted by the Commission on first reading at its sixty-fourth session.

C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading (continued)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued) (A/CN.4/L.802/Add.1)

Commentary to draft article 1 (Scope) (continued)

Paragraph (5) (continued)

2. Mr. GÓMEZ ROBLEDO recalled that at the last meeting Mr. Murphy had raised the issue of displaced persons, whose status was regulated by no binding instrument; as far as he knew, the only relevant document was a set of texts compiled by the representative of the Secretary-General submitted pursuant to resolution 1997/39 of the Commission on Human Rights,³⁵⁰ which had no more legal force than did that Commission’s resolutions. The categories of persons listed in paragraph (5) of the commentary (refugees, stateless persons and migrant workers and their family members) had a specific status under international law, unlike displaced persons, to whom no reference should accordingly be made in the draft articles. The displaced persons in question were understood to be persons displaced across borders, although any reference to internally displaced persons would also be inadvisable.

³⁵⁰ Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex).