

Provisional

For participants only

10 October 2014

Original: English

International Law Commission

Sixty-sixth session (second part)

Provisional summary record of the 3239th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 6 August 2014, at 10 a.m.

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Present:

Chairman: Mr. Gevorgian
Members: Mr. Al-Marri
Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
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. Saboia
Mr. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Korontzis Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Draft report of the Commission on the work of its sixty-sixth session *(continued)*

Chapter V. Protection of persons in the event of disasters (continued)
(A/CN.4/L.838/Add.1)

The Chairman invited the Commission to pursue its consideration of chapter V of the draft report and to resume its discussion of the portion contained in document A/CN.4/L.838/Add.1.

Commentary to draft article 11 [16] (Duty to reduce the risk of disasters)

Paragraphs (20) to (22)

Paragraphs (20) to (22) were adopted.

Paragraph (23)

In response to a question by **Sir Michael Wood, Mr. Valencia-Ospina** (Special Rapporteur) said that paragraph (11) of the commentary related to paragraph 1 of the draft article. The reference to paragraph 2 should therefore be deleted.

Paragraph (23), as amended, was adopted.

The commentary to draft article 11 as a whole, as amended, was adopted.

Commentary to draft article 12 [9] (Role of the affected State)

Paragraph (1)

Mr. Murphy proposed the addition of the word “to” before “provide” and of the words “and assistance” after “disaster relief” in order to be consistent with the text of draft article 12.

Mr. Forteau proposed the deletion of the phrase “as a whole” in the fourth sentence, of the phrase.

Paragraph (1), as amended by Mr. Murphy and Mr. Forteau, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

The commentary to draft article 12 as a whole, as amended, was adopted.

Commentary to draft article 13 [10] (Duty of the affected State to seek external assistance)

Paragraph (1)

Mr. Nolte proposed the deletion of the final sentence, as its contents were reflected in paragraph (3). He also proposed the inversion of paragraphs (2) and (3), so that paragraph (3) became the logical extension of the final sentence of paragraph (1).

Mr. Tladi (Rapporteur) said that, in order to make the commentary more concise, he proposed the deletion of paragraph (3) and the inclusion, at the end of the final sentence in paragraph (1), of the phrase “since in the view of these members, international law as it currently stands does not recognize such a duty”. The phrase was taken from paragraph (3) and sufficed to indicate that members of the Commission disagreed about the existence of a duty to seek assistance.

Mr. Wisnumurti said that he opposed Mr. Nolte's proposal to delete the final sentence of paragraph (1). The statement made in that sentence was important and it should be retained as it stood.

Mr. Valencia-Ospina (Special Rapporteur) said that he had not been in favour of the inclusion of the final sentence in paragraph (1) and of paragraph (3) in the first place. He could nevertheless agree to Mr. Tladi's suggestion to add a phrase to the final sentence and to delete paragraph (3).

Paragraph (1), as amended by Mr. Tladi, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was deleted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Nolte proposed the addition of the word "also" before "derives" to make it plain that State sovereignty was another source of the duty to protect.

Mr. Valencia-Ospina (Special Rapporteur) agreed to the amendment, since it would emphasize the two sources of that duty, a State's sovereignty and its obligations.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Nolte suggested the insertion, in the second line of the second section of the paragraph, of the words "members of" before "the international community".

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were adopted.

The commentary to draft article 13 as a whole, as amended, was adopted.

Commentary to draft article 14 [11] (Consent of the affected State to external assistance)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi (Rapporteur) said that in order to properly reflect the views of all the members, the third sentence should be revised to read: "On the other hand, some members of the Commission were of the view that the duty not to arbitrarily withhold consent was not recognized in international law." The final sentence should be deleted.

Mr. Valencia-Ospina (Special Rapporteur) said that, although the Commission had taken the position that the draft article should be couched in mandatory language so that it

was the potential basis for a binding international instrument, Mr. Tladi's suggestion had the merit of covering the positions expressed by past and present members of the Commission.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

The commentary to draft article 14 as a whole, as amended, was adopted.

Commentary to draft article 15 [13] (Conditions on the provision of external assistance)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood proposed the replacement of the phrase "previous and subsequent" in the sixth line with the word "the".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood suggested that the second sentence should be recast to read: "It does not, however, imply the prior existence of national law addressing the specific conditions imposed by an affected State in the event of a disaster."

Mr. Nolte proposed the insertion of the words "internal law" in brackets after the words "national law" in the first sentence. That would make it clear that, although the Vienna Convention on the Law of Treaties and the articles on State responsibility referred to internal law, in the context of the topic under consideration, the Commission had decided that it was better to refer to national law.

Paragraph (4), as amended by Sir Michael Wood and Mr. Nolte, was adopted.

Paragraph (5)

Mr. Murphy proposed the addition, at the end of the first sentence, of the phrase "of the affected State".

Sir Michael Wood suggested that, in the fourth sentence, the word "assertion" should be replaced with "affirmation".

Paragraph (5), as amended by Mr. Murphy and Sir Michael Wood, was adopted.

Paragraphs (6) to (11)

Paragraphs (6) to (11) were adopted.

The commentary to draft article 15 as a whole, as amended, was adopted.

Commentary to draft article 16 [12] (Offers of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte proposed the deletion of the last sentence of paragraph (2). It cited a different draft article than the one to which it related and raised questions about how a State making an offer of external assistance could know whether it would be unacceptable to the affected State.

Mr. Valencia-Ospina (Special Rapporteur) said that the sentence had been intended to maintain the fragile equilibrium achieved throughout the commentary. Essentially, States should not make offers that were subject to conditions that, *prima facie*, would be deemed unacceptable by receiving States. In particular, such offers should be non-discriminatory: for example, an offer that specifically denied assistance to the inhabitants of an area under the control of an insurrectionist movement might rightly be refused.

Mr. Saboia welcomed the clarification provided by the Special Rapporteur. The sentence reflected a corollary of the principle of neutrality and should be retained.

Mr. Murphy, acknowledging Mr. Nolte's point that the sentence included text from a draft article other than that to which it related, suggested that it should be replaced with the following: "Among other things, such offers shall be made consistent with the principles set forth in draft article 7."

Mr. Valencia-Ospina (Special Rapporteur) said that referring only to draft article 7 would exclude other relevant principles.

Mr. Tladi, supported by **Mr. Forteau**, echoed Mr. Murphy's comments. The sentence referred specifically to offers of assistance, which States were at liberty to refuse.

Mr. Park expressed support for the views of the Special Rapporteur and Mr. Saboia.

Mr. Nolte, endorsing the points made by Mr. Murphy, Mr. Tladi and others, said that the sentence must at least be redrafted to avoid conflating the issues of conditional offers and conditional acceptance.

Mr. Valencia-Ospina (Special Rapporteur) agreed with the amendment proposed by Mr. Murphy.

Mr. Saboia said that, in the light of the Special Rapporteur's statement, he could agree to amend the sentence; however, in order to avoid referring exclusively to draft article 7, he suggested that it should read: "Among other things, such offers shall be made consistent with the principles set forth in these draft articles, in particular draft article 7."

Paragraph (2), as amended by Mr. Murphy and Mr. Saboia, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The commentary to draft article 16 [12] as a whole, as amended, was adopted.

Commentary to draft article 17 [14] (Facilitation of external assistance)

The commentary to draft article 17 [14] was adopted.

*Commentary to draft article 18 (Protection of relief personnel, equipment and goods)**Paragraphs (1) to (8)*

Paragraphs (1) to (8) were adopted.

Paragraph (9)

Sir Michael Wood, supported by **Mr. Valencia-Ospina** (Special Rapporteur), said that mandatory language should be avoided in the commentary to the draft articles. The phrase “shall be considered” in the last sentence of paragraph (9) should accordingly be amended to read “should be considered”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

The commentary to draft article 18 as a whole, as amended, was adopted.

Commentary to draft article 19 [15] (Termination of external assistance)

The commentary to draft article 19 [15] was adopted.

*Commentary to draft article 20 (Relationship to special or other rules of international law)**Paragraph (1)*

Mr. Murphy suggested that “a)” and “b)” should be replaced with “either” and “or”, respectively.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy suggested that, in the first sentence, the words “(‘special’ rules)” should be inserted after “first part of the provision”, to contrast with the reference to “other rules” in paragraph (5) of the commentary to the same draft article.

Sir Michael Wood said that it might be clearer to amend the first part of the sentence to read: “The rationale behind the reference to ‘special’ rules is ...”. If so, a corresponding change should be made in paragraph (5).

Mr. Valencia-Ospina (Special Rapporteur) expressed support for Sir Michael Wood’s suggestion.

Paragraph (2), as amended by Sir Michael Wood, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

The Chairman suggested that, as previously proposed by Sir Michael Wood, the beginning of the paragraph should be amended to read: “The reference to ‘other rules’ deals with ...”.

Mr. Nolte, agreeing with the Chairman’s suggestion, proposed that the entire section of text in parentheses should be recast as a separate sentence, to begin: “Examples would be provisions concerning the law of treaties ...”.

Sir Michael Wood further suggested that, in the new sentence proposed by Mr. Nolte, the word “the” should be deleted before “supervening impossibility of performance” and “fundamental change of circumstances”, while the word “both” should be deleted before “States and international organizations”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Tladi suggested that, in the third sentence, “customary international rules” should be changed to “rules of customary international law”.

Sir Michael Wood suggested that the beginning of the paragraph should be altered to read: “The ‘without prejudice’ clause in draft article 20...”

Mr. Nolte said that, in order to make the paragraph more general, the words “In this respect”, should be deleted from the beginning of the fourth sentence.

Mr. Murphy, agreeing to all the suggestions made, proposed that the word “also” should be inserted between “draft article 20” and “applies” in the first sentence.

With those amendments, paragraph (6) was adopted.

Paragraph (7)

Sir Michael Wood said that, as in paragraph (6), the phrase “the preservation mechanism enshrined in draft article 20” should be altered to “the ‘without prejudice’ clause in draft article 20”.

Mr. Kittichaisaree suggested that, in the second sentence, “the rules of international law” should be changed to “all rules of international law”, so as to encompass more than just the customary international law and treaty law mentioned in paragraphs (6) and (7) of the commentary and to mirror the language used later in the sentence.

Mr. Nolte, referring to the last sentence of the paragraph, suggested that the words “could be applied” should be changed to “applies”.

Mr. Valencia-Ospina (Special Rapporteur) agreed to those suggestions.

Paragraph (7), as thus amended, was adopted.

The commentary to draft article 20 as a whole, as amended, was adopted.

Commentary to draft article 21 [4] (Relationship to international humanitarian law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Sir Michael Wood, referring to the first sentence of paragraph (2), said that, in the phrase “the applicability of the draft articles over armed conflict”, the word “over” should be altered for stylistic reasons; however, in view of the subtlety of the paragraph, exactly how to amend it should be discussed.

Mr. Valencia-Ospina (Special Rapporteur), acknowledging that concern, said that there was always a risk of a text being misinterpreted, but that the intention of the paragraph was clear: the potential applicability of the draft articles to situations of armed conflict was not excluded. He suggested changing “over” to “in a situation of”.

Mr. Hmoud suggested “during” as an alternative.

Sir Michael Wood, emphasizing the importance of the paragraph, said that the text of the draft article but had been the product of long deliberation. The commentary should be as clear as possible.

Mr. Valencia-Ospina (Special Rapporteur), supported by **Mr. Saboia**, recalled that the draft article had been adopted early in the Commission's work on the topic but had been moved to the end of the text, immediately after a new draft article on the relationship of the draft articles to special or other rules of international law. For the purposes of the Commission's first reading of the text, he suggested that "over" be changed to "in situations of", on the understanding that the Commission would consider the matter again on second reading, paying particular attention to the links between draft articles 20 and 21.

Paragraph (3), as amended by the Special Rapporteur, was adopted.

The commentary to draft article 21 as a whole, as amended, was adopted.

The commentaries to the draft articles on protection of persons in the event of a disaster, as a whole, as amended, were adopted.

Chapter VII. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.840 and Add.1 to 3)

The Chairman invited the Commission to consider chapter VII of its draft report, beginning with the text contained in document A/CN.4/L.840.

A. *Introduction*

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

B. *Consideration of the topic at the present session*

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

C. *Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session*

1. *Text of the draft conclusions*

Paragraph 10

Paragraph 10 was adopted.

2. *Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its sixty-sixth session*

Paragraph (11)

Paragraph (11) was adopted.

The Chairman invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.840/Add.1.

2. *Text of the draft conclusions with commentaries thereto provisionally adopted by the Commission at its sixty-sixth session*

Paragraph 1

Paragraph 1 was adopted.

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Murphy proposed that, in the first sentence, the phrase “every application of a treaty presupposes an interpretation” should be replaced with “application of a treaty almost inevitably involves some element of interpretation”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Murphy proposed that, in the second sentence, the word “are”, between the words “which” and “attributable”, should be replaced with “is”, as that was the verb form that agreed with “conduct by non-State actors”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Forteau proposed that, in the first sentence, the phrase “which takes place regardless of a treaty obligation” [*sans rapport avec une obligation conventionnelle*] should be replaced with “which is not motivated by the treaty” [*qui n'est pas motivée par le traité*], wording that mirrored a dissenting opinion of Judge Holtzmann of the Iran-United States Claims Tribunal cited in paragraph (13) of the commentary.

Mr. Murphy supported Mr. Forteau’s proposal, and at the end of the first sentence, he proposed to add the phrase “within the meaning of article 31, paragraph 3”.

Mr. Nolte (Special Rapporteur) said he had no objection to Mr. Murphy’s proposal and that he could agree to Mr. Forteau’s proposal, but that the English version of the proposal should read: “that is not motivated by a treaty obligation”.

It was so decided.

Paragraph (7) was adopted with those amendments.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

Mr. Tladi (Rapporteur) proposed that the final sentence should be reformulated to read: “This point can be illustrated by examples from judicial and State practice”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Mr. Tladi (Rapporteur) proposed that, in the second sentence, the word “has” should be inserted between the words “Court” and “also”, to emphasize the distinction between what followed them and what had been asserted in the preceding sentence.

Mr. Murphy proposed that, in the first sentence, the words “of two States” should be inserted between the words “Joint Ministerial Communiqué” and “to”.

Paragraph (12) was adopted with those amendments.

Paragraph (13)

Mr. Murphy and **Mr. Tladi** (Rapporteur) put forward some amendments to the formatting of the paragraph.

Paragraph (13) was adopted with those amendments.

Paragraphs (14) to (19)

Paragraphs (14) to (19) were adopted.

Paragraph (20)

Mr. Murphy said that, in the first sentence, the word “also” should be replaced with “instead”, as the idea was to contrast two different possibilities rather than to indicate a cumulative set of possibilities.

Paragraph (20), as amended, was adopted.

Paragraph (21)

Mr. Tladi (Rapporteur) proposed that, in the penultimate sentence, the word “modified” should be replaced with “interpreted in a particular way”.

Paragraph (21), as amended, was adopted.

Paragraph (22)

Mr. Forteau said that paragraph (22) was intended to explain draft conclusion 6, paragraph 1, which referred to agreements under article 31, paragraph 3, of the 1969 Vienna Convention. However, the example given in paragraph (22) concerned article 32 of the Convention, as it dealt with a subsequent agreement between certain parties only and not among all parties. It might be more appropriate to place that example after paragraph (25) of the commentary.

Mr. Nolte (Special Rapporteur) said that he agreed with Mr. Forteau’s proposal and that the commentaries would need to be renumbered accordingly.

Paragraph (22), as amended, was adopted.

Paragraph (23)

Mr. Murphy said that, in the penultimate sentence, the word “practices” should be replaced with “conduct” and the word “are”, between the words “which” and “attributable”, should be replaced with “is”. There appeared to be an error in footnote 43, which referred to “draft conclusion 5, para. 3”: draft conclusion 5 did not have a third paragraph. Also in footnote 43, he proposed to insert the phrase “see also” before “*Maritime Dispute (Peru v. Chile)*”.

Mr. Nolte (Special Rapporteur) said that, in footnote 43, the reference should be to “draft conclusion 5, paragraph 1”. He concurred with all the amendments proposed by Mr. Murphy.

In the Commission’s debates on the topic of the identification of customary international law, it had agreed that, under certain circumstances, inaction might constitute practice. The interpretation of treaties and the identification of customary international law were in a *mutatis mutandis* relationship and were not so different from each other that they should define a concept as basic as practice in a widely divergent manner. He therefore proposed that, in the second sentence, the formulation used in the topic on the identification of customary international law should be reproduced, by inserting the words “including under certain circumstances, inaction” between the words “treaty” and “which”.

Paragraph (23), as amended and with the correction to footnote 43, was adopted.

Paragraph (24)

Paragraph (24) was adopted.

Paragraph (25)

Mr. Murphy proposed that, in the second sentence, the words “want to” should be deleted and that the words “into question”, at the end of the sentence, should be transposed to come between the words “call” and “the”.

Paragraph (25), as amended, was adopted.

The commentary to draft conclusion 6 as a whole, as amended, was adopted.

The Chairman invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.840/Add.2.

2. *Text of the draft conclusion with commentaries thereto provisionally adopted by the Commission at its sixty-sixth session (continued)*

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy proposed that, in the penultimate sentence, the words “contribute to” should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Murphy said that the entire text following the words “poison or poisonous weapons” constituted a direct quote and should be clearly reflected as such.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Mr. Murphy proposed that, in the first sentence, the words “of a treaty” should be deleted and the colon at the end of the final sentence replaced with a full stop.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Mr. Murphy proposed to insert the words “or widening” between the words “narrowing” and “the range”, in order to mirror the language used in draft conclusion 7, paragraph 1.

Sir Michael Wood said that, if it was decided to mirror that language, then the phrase “or otherwise determining the range of possible interpretations” should be added after “widening”.

Mr. Nolte (Special Rapporteur) said that, since paragraphs (10) and (12) made similar points, and since the example contained in paragraph (13) should follow directly after that contained in paragraph (11), paragraphs (10) and (12) should be merged. That could be accomplished by combining the beginning of paragraph (10), which read “State practice other than judicial or quasi-judicial contexts confirms that subsequent agreements and subsequent practice”, with the portion of paragraph (12) that began “may not only contribute to specifying the meaning of a term”. That would make for better readability and might address Sir Michael Wood’s point.

Mr. Forteau said that he supported the Special Rapporteur’s proposal. With regard to footnote 72, which would need to be adapted to the new wording of paragraph (10), the initial part of the first sentence contradicted draft conclusion 7, paragraph 1. The latter indicated that subsequent agreements could result in narrowing or widening the range of possible interpretations, whereas footnote 72 said that it was not possible for there to be different possible interpretations. He therefore proposed that the initial part of the first sentence in the footnote should be reformulated to read: “This means that the treaty may accord the parties the possibility to choose from a spectrum of different permitted acts” [*Ceci signifie que le traité peut accorder aux parties la possibilité de choisir parmi une gamme de différents actes autorisés*].

Mr. Tladi said that he supported Mr. Nolte’s proposal, but within it, he proposed to replace the word “may” with “does”.

Mr. Murphy proposed to delete both instances of the word “may” in Mr. Nolte’s proposal.

Sir Michael Wood said that he agreed with the deletion of the first instance of “may” but that the second should be retained.

Mr. Nolte (Special Rapporteur) said he supported the proposal just made by Sir Michael Wood, which addressed both Mr. Murphy’s and Mr. Tladi’s concerns. As to footnote 72, he wondered whether, in the initial part of the first sentence, the insertion of the word “ultimately” between the words “may” and “exist” might address Mr. Forteau’s concerns. That sentence referred to the process of interpretation and the role that different elements of interpretation played in arriving at the correct interpretation of a treaty; it did not contradict what was said in the draft conclusion and the commentary.

Mr. Forteau said that he persisted in thinking that Mr. Nolte's proposal did not resolve the contradiction between footnote 72 and draft conclusion 7, paragraph 1.

Mr. Nolte (Special Rapporteur) proposed to leave paragraph (10) in abeyance so as to allow time for consultations in order to find suitable wording.

Paragraph (10) was left in abeyance.

Paragraph (11)

Mr. Tladi proposed, in the first line, to insert the phrase "ordinary meaning of the" between the words "whereas the" and "terms".

Mr. Murphy proposed, in the final sentence, to replace the word "specified" with "clarified".

Mr. Nolte (Special Rapporteur) said that the Commission had used the word "specified" on a number of occasions in the commentaries to indicate a narrowing down of meaning, whereas it used the word "clarified" to mean an expansion of it. For that reason, he preferred to retain the word "specified".

Paragraph (11), as amended by Mr. Tladi, was adopted.

Paragraph (12)

Paragraph (12) was left in abeyance.

Paragraphs (13) and (14)

Sir Michael Wood said that paragraphs (13) and (14) related to an example of the use of the Red Cross, Red Crescent or Red Lion and Sun protective emblems. They indicated that States had a margin of discretion with regard to the use of the protective emblem and were not obligated to use it in all circumstances. He was not sure that that conclusion could be drawn from the example provided, however, and he was uncertain about suggesting a relaxation of the requirement to use the protective emblem on medical personnel and transports. Perhaps the Special Rapporteur would consider deleting paragraphs (13) and (14).

Mr. Nolte (Special Rapporteur) said that he had attempted to address Sir Michael Wood's concern, which the latter had expressed on another occasion, with the inclusion in paragraph (14) of the formulation "does not contain an obligation to use the emblem under any circumstances". He could further propose to replace the word "any" in that phrase with "such", which would have the effect of narrowing its meaning somewhat, but the Commission could not simply ignore those examples, since they were clearly justified in the situations cited.

Mr. Forteau said that the part of the commentary in which paragraph (13) was included concerned article 31 of the 1969 Vienna Convention and the subsequent agreement of all parties to a treaty. Yet, the fourth sentence of paragraph (13) referred to the fact that "States have in certain situations refrained from marking such convoys". He was not convinced that that was an example of an agreement between all the parties to a treaty.

Mr. Nolte (Special Rapporteur) said that future draft conclusions would address practice that was engaged in by some but accepted by all parties to a treaty, as well as the broad area typically corresponding to multilateral treaties concerning practice that was followed by some parties and not contested by the others. The question was whether such practice, at least potentially, met the criteria for being considered a subsequent agreement. He did not believe any State would dispute the fact that, in the circumstances described in

the example, it was not obligatory to use the protective emblem; he would therefore prefer to retain it.

Mr. Murphy said that the issue raised by Sir Michael Wood was extremely important. If the example was retained, he proposed that, in the first sentence of paragraph (13), the word “One” should be replaced with “Another”, since paragraph (12) would be merged with paragraph (10) and the Red Cross example would become a second example.

Given the problematic wording of paragraph (14), he proposed to reformulate it to read: “Such apparently uncontested practice by States confirms an interpretation of article 12 according to which the general obligation to use the protective emblem under exceptional circumstances allows a margin of discretion for the parties.” That was a more cautious statement that might address Sir Michael Wood’s concerns.

Mr. Forteau had raised a very good point – it was not clear from the wording of paragraphs (13) and (14) that the practice described in the Red Cross example was one that was followed by all the parties in question. If, elsewhere in the commentary, the Commission referred to article 32, the example could be placed there; failing that, the Commission might envisage including a sentence to the effect that the Red Cross example was an illustration of article 32.

Mr. Saboia said that he had been inclined to support Sir Michael Wood’s proposal to delete paragraphs (13) and (14); however, since the object of the emblems was to protect human life, there might be exceptional circumstances in which it was justified not to display them, and Mr. Murphy’s proposal, in part, addressed such cases.

The Chairman suggested that paragraphs (13) and (14) should be left in abeyance until the next plenary meeting of the Commission.

It was so decided.

The meeting rose at 1 p.m.