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Summary record of the 3288th meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-seventh session

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3288th MEETING

Thursday, 6 August 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER VIII. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties (concluded)** (A/CN.4/L.861 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VIII of the draft report contained in document A/CN.4/L.861/Add.1.

C. **Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties provisionally adopted so far by the Commission (*concluded*)***

2. TEXT OF THE DRAFT CONCLUSION AND COMMENTARY THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SEVENTH SESSION (*concluded*)*

Commentary to draft conclusion 11 (Constituent instruments of international organizations) (*concluded*)*

Paragraph (3) (*concluded*)**

2. Mr. NOLTE (Special Rapporteur) proposed that the second sentence state: “The provisions which are contained in such a treaty are part of the constituent instrument.” The third sentence should be amended to read: “Article 20, paragraph 3, of the 1969 Vienna Convention requires the acceptance, by the competent organ of the organization, of reservations relating to its constituent instrument”, and it should be moved to the beginning of the footnote to the paragraph, where the reference to the twelfth report on reservations to treaties would be updated. The remainder of paragraph (3) should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (19) (*concluded*)**

3. Mr. NOLTE (Special Rapporteur) proposed the deletion of the final phrase in the footnote to the paragraph, beginning with the words “and thus of a constituent instrument”.

With that amendment to its footnote, paragraph (19) was adopted.

* Resumed from the 3285th meeting.

** Resumed from the 3284th meeting.

Paragraph (32) (*concluded*)*

4. Mr. NOLTE (Special Rapporteur) proposed that, in the third sentence, the phrase following the words “for the purposes of interpretation” be deleted. The fourth sentence, reformulated to incorporate language from article 31, paragraph 1, of the 1969 Vienna Convention, would read: “Writers largely agree, however, that the practice of an international organization, as such, will often also be relevant for clarifying the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” The fifth sentence, together with the footnote thereto, should be deleted.

5. A new paragraph would then be created, comprising the sixth and seventh sentences, with the seventh sentence to be modified to read: “These considerations are also relevant with regard to the practice of an international organization itself.”

Paragraph (32), as amended, was adopted.

Paragraph (33) (*concluded*)*

6. Mr. NOLTE (Special Rapporteur) proposed that the second sentence begin with the words, “Those rules permit, in particular, taking into account”, and that in the same sentence, the adjective “proper” should be deleted.

Paragraph (33), as amended, was adopted.

Paragraph (34) (*concluded*)*

7. Mr. NOLTE (Special Rapporteur) suggested that paragraph (34) be recast to read:

“Thus, article 5 of the 1969 Vienna Convention allows for the application of the rules of interpretation in articles 31 and 32 in a way which takes account of the practice of an international organization, in the interpretation of its constituent instrument, including taking into account its institutional character. Such elements may thereby also contribute to identifying whether, and if so how, the meaning of a provision of a constituent instrument of an international organization is capable of evolving over time.”

8. The first footnote to the paragraph should be supplemented with references to the works mentioned at a previous meeting by Mr. Forteau and Sir Michael Wood. The final portion of the footnote, beginning with the words “while such an approach”, should be deleted. The advisory opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* should be cited at the beginning of the following footnote, which would then continue, “See also draft conclusion 3”.

With those amendments, paragraph (34) was adopted.

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

Section C, as a whole, as amended, was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER V. *Protection of the atmosphere (concluded)* (A/CN.4/L.858 and Add.1)

9. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.858/Add.1.

C. **Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (concluded)**

2. TEXT OF THE DRAFT GUIDELINES TOGETHER WITH PREAMBULAR PARAGRAPHS, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SEVENTH SESSION (concluded)

Commentary to draft guideline 1 (Use of terms) (concluded)

Paragraph (9) (concluded)

10. Mr. MURASE (Special Rapporteur) proposed the insertion of new material, to be placed after the fifth sentence of the footnote to the paragraph, which cited the views of the Government of Austria concerning the possible negative aspects of radioactive emissions after a nuclear accident. The new text, which he had drafted with the help of Mr. Park and Mr. Murphy, would read: “This is without prejudice to the peaceful uses of nuclear energy, the positive aspect of which is a contribution to the mitigation of climate change.”

11. Mr. KAMTO, supported by Mr. CANDIOTI, said that the Special Rapporteur’s proposal touched on a very controversial issue on which the Commission should refrain from adopting a stance.

12. Mr. VÁZQUEZ-BERMÚDEZ said that the most appropriate solution would be for the Commission to confine itself to the general statement, “This is without prejudice to the peaceful uses of nuclear energy”.

13. Mr. FORTEAU said that he fully agreed with Mr. Kamto. Paragraph (9) of the commentary merely defined the term “energy” for the purposes of the draft guidelines, whereas the proposed amendment focused on the possible harmful effects of a specific form of energy.

14. Mr. MURPHY said that he was in favour of keeping the text of the footnote as neutral as possible. However, the last half of that footnote, on radioactive emissions, quoted various statements which were far from neutral and which ignored the fact that the peaceful use of nuclear energy was one way of avoiding climate change. If the proposed new text was not adopted, then the view of the Government of Austria quoted in the footnote should be deleted.

15. After a discussion in which Mr. PARK, Mr. ŠTURMA, Mr. SABOIA and Mr. PETRIČ took part, Mr. MURASE (Special Rapporteur) said that, in a spirit of compromise, he could agree to the deletion of the reference to the views of the Government of Austria and to the insertion of the words “This is without prejudice to the peaceful uses of nuclear energy in relation to climate change in particular” at the end of the footnote to the paragraph.

With those amendments to its footnote, paragraph (9) was adopted.

The commentary to draft guideline 1, as a whole, as amended, was adopted.

Commentary to draft guideline 2 (Scope of the guidelines) (concluded)

Paragraph (6) (concluded)

16. Mr. MURASE (Special Rapporteur) proposed the deletion of the word “applicable” in the first sentence and the deletion of the second sentence. In the third sentence, the initial phrase should be deleted, so that the sentence would begin with the words “The atmosphere and air-space are two entirely different concepts”. In the fourth sentence, the phrase “within its territories” should be inserted after the word “State”. In the last sentence, the words “to which State sovereignty cannot be extended” should be inserted after the words “The atmosphere is invisible, intangible and non-separable.”.

17. Sir Michael WOOD said that he was dubious about endorsing the statement contained in the amendment to the final sentence, since much more thought and reflection was needed on the matter of sovereignty over the air and space above a State’s territory. For that reason, either the last sentence should be deleted or it should end after the word “non-separable”.

18. Mr. MURASE (Special Rapporteur) said that he would agree to end the last sentence after the word “non-separable”.

Paragraph (6), as amended by Mr. Murase (Special Rapporteur), was adopted.

Commentary to draft guideline 5 (International cooperation) (concluded)

Paragraph (1) (concluded)

19. Mr. MURASE (Special Rapporteur) proposed that the phrases “the ‘arithmetic aggregate’ of” and “in the traditional ‘international society’” be deleted in the third sentence. The fourth sentence should read: “The third paragraph of the preamble to the present draft guidelines recognizes this in stating that the protection of the atmosphere from atmospheric pollution and degradation is a ‘pressing concern of the international community as a whole’.” A new paragraph should be created, beginning with the fifth sentence, and stating: “In this context, draft guideline 5, paragraph 1, provides the obligation of States to cooperate as appropriate.” The remainder of the sentence should be deleted, since the exchange of scientific information and joint monitoring were covered in paragraph (7).

20. Sir Michael WOOD proposed that the second and third sentences be replaced with the following sentence, which reproduced language from the commentary to article 8 of the draft articles on the protection of persons in the event of disasters: “The duty to cooperate is well established as a principle of international law and can be found in numerous international instruments.”³⁴⁵

21. Mr. MURASE (Special Rapporteur) said that he would prefer to retain the second and third sentences as they stood, since it was important in the context of the topic to highlight the significant change that had occurred in international law in the understanding of international cooperation.

³⁴⁵ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 71, paragraph (1) of the commentary to draft article 8 [5].

22. Mr. NOLTE said that he wondered what particular difficulties Sir Michael might have with those sentences, as they appeared uncontroversial.

23. Sir Michael WOOD said that the theoretical and academic nature of the language in which the sentences were couched made them unclear and inappropriate for the commentary.

24. Mr. TLADI said that, in his view, the amendments to the third sentence proposed by the Special Rapporteur adequately addressed the concerns raised by Sir Michael. He agreed with the Special Rapporteur about the importance of stressing the fact that international cooperation was built on the notion of the common interests of the international community as a whole.

25. Mr. SABOIA, supported by Mr. PETRIČ, concurred with the latter comment.

26. Mr. MURPHY said that it might be helpful to delete the reference to “bilateral collaborative relations” in order to focus on the key point, namely the idea that international cooperation was built on the common interests of the international community.

27. Mr. McRAE proposed, as a compromise solution, that the second and third sentences be merged to produce the following new sentence: “The concept of international cooperation has undergone a significant change in international law and today is to a large extent built on the notion of common interests of the international community as a whole.”

28. Mr. MURASE (Special Rapporteur), supported by Ms. ESCOBAR HERNÁNDEZ and Sir Michael WOOD, endorsed that proposal.

Paragraph (1), as amended by Mr. Murase (Special Rapporteur) and further amended by Mr. McRae, was adopted.

Paragraph (2)

29. Mr. NOLTE proposed that the second and third sentences of paragraph (12), which referred to the judgment of the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay*, be moved to paragraph (2), in view of the judgment’s particular relevance to the issue of international cooperation.

30. Mr. KAMTO said that, if the reference to the judgment in the *Pulp Mills on the River Uruguay* case were to be moved, it would have to be preceded by some introductory language. The introductory sentence of paragraph (2) currently mentioned only multilateral instruments relevant to the protection of the environment.

31. Mr. NOLTE suggested that the second and third sentences of paragraph (12) be placed after the second sentence of paragraph (2) and be preceded by the phrase “In addition, in the *Pulp Mills on the River Uruguay* case, ...”.

Paragraph (2) was adopted with that amendment.

Paragraph (3)

32. Mr. KAMTO suggested that a footnote be included, referring to the United Nations Convention on the Law of the Sea, which contained several provisions on the obligation to cooperate, including in the context of the protection of the environment.

33. Mr. FORTEAU said that it would perhaps be preferable if, in the commentaries, the Commission cited only those texts that related directly to the protection of the atmosphere.

34. Mr. MURASE (Special Rapporteur) said that, if the Commission so wished, he could draft a footnote to paragraph (3) detailing the provisions on international cooperation contained in the United Nations Convention on the Law of the Sea.

Paragraph (3) was adopted on that understanding.

Paragraph (4)

35. Mr. FORTEAU proposed the deletion of the paragraph because of its lack of relevance to the protection of the atmosphere.

36. Mr. NOLTE said that the Commission should not be too narrow in its approach and that the reference in the paragraph to the protection of an international watercourse was not too far removed from the topic of protection of the atmosphere.

37. Mr. FORTEAU said that the manner in which the obligation to cooperate was formulated in subparagraph (a) of draft guideline 5 seemed to be quite different from the formulation used in article 8 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which was cited in paragraph (4). However, in view of the limited time available, he would not insist on that point.

Paragraph (4) was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

38. Mr. MURPHY proposed that, in the interests of clarity, the second sentence be moved to the beginning of the paragraph. The current first sentence should then be recast to read: “Paragraph (b) of the draft guidelines stresses, in particular, the importance of enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation.”

Paragraph (7) was adopted with that amendment.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

39. Mr. MURPHY said that he would submit a number of minor editorial corrections to the Secretariat.

40. Mr. KAMTO said that, for the sake of readability, an introductory sentence should be added, indicating that the duty to cooperate involved, among other things, the exchange of information. He would submit a text to that effect to the Secretariat.

Paragraph (10) was adopted on the understanding that it would be corrected and supplemented by Mr. Murphy and Mr. Kamto, respectively.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

Paragraph (12) was adopted, subject to the relocation to paragraph (2) of the sentence referring to the Pulp Mills on the River Uruguay case.

The commentary to draft guideline 5, as a whole, as amended, was adopted.

Section C, as a whole, as amended, was adopted.

Chapter V of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER IV. The most-favoured-nation clause (A/CN.4/L.866)

41. The CHAIRPERSON invited the Commission to consider the chapter of its draft report on “The most-favoured-nation clause” as contained in document A/CN.4/L.866. The chapter would appear in the report of the Commission as chapter IV; all the other chapters of the report would be renumbered accordingly.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 9

Paragraphs 3 to 9 were adopted.

Paragraph 10

42. Mr. NOLTE recalled that the Commission had agreed that it would adopt certain conclusions or paragraphs of the report “as its own”. He proposed that, for the sake of transparency, there be explicit wording to that effect in the second sentence, and therefore that the phrase “adopts the following paragraphs of the report as its own” be inserted after “General Assembly”.

43. Mr. KAMTO said that if the expression “as its own” was included in the present chapter, then the Commission would have to include it in all the other chapters. In any case, when the Commission adopted the report, the entire report would become its own document.

44. Mr. NOLTE said that the reason for specifying that the Commission was adopting the conclusions “as its own”

was to distinguish such texts from others that it merely welcomed. If the Commission did not consider that insertion useful or necessary, he would not insist on it.

45. Mr. FORTEAU (Chairperson of the Drafting Committee) said that he recommended maintaining the wording of the paragraph as it currently stood.

Paragraph 10 was adopted.

Paragraphs 11 to 15

46. Mr. CANDIOTI said that paragraphs 11 to 15 captured the essence of the important and excellent work carried out by the Study Group on the most-favoured-nation clause. The paragraphs should accordingly be highlighted by the addition of some introductory language.

47. The CHAIRPERSON said that the Secretariat would insert a phrase before the paragraphs to indicate that the Commission had adopted them as summary conclusions.

On that understanding, paragraphs 11 to 15 were adopted.

Paragraph 16

Paragraph 16 was adopted.

Section B, as amended, was adopted.

C. Tribute to the Study Group and its Chairperson

Paragraph 17

Paragraph 17 was adopted.

Section C was adopted.

Chapter IV of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER VI. Identification of customary international law (A/CN.4/L.859)

48. The CHAIRPERSON invited the Commission to consider chapter VI of the draft report, as contained in document A/CN.4/L.859.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

49. Mr. PARK proposed that, in the third sentence of paragraph 5, the words “of the Chairperson of the Drafting Committee” be inserted after the word “report” and that the words “provisionally adopted by the Drafting Committee” be inserted after “draft conclusions”. Furthermore, he proposed the addition of a sentence to the end of the paragraph that would read: “The draft conclusions will be adopted with the commentaries in 2016.”

50. Sir Michael WOOD (Special Rapporteur) said that he endorsed Mr. Park's proposals, except the final one. The Commission could not with certainty make such a statement at the current stage, and it was unnecessary to do so, since in his third report (A/CN.4/682) he recommended that the draft conclusions be adopted on first reading in 2016.

The first two proposals by Mr. Park were adopted.

51. Sir Michael WOOD (Special Rapporteur) proposed that the draft conclusions that had been provisionally adopted by the Drafting Committee be placed in a single footnote, as had been done with other topics. The draft conclusions that had originally appeared in his third report, which were currently presented as a series of footnotes, should be combined into a single footnote.

52. Ms. JACOBSSON said that, for the presentation of the draft conclusions provisionally adopted by the Drafting Committee, the Commission should follow the formula that it had used in its previous reports to the General Assembly.

53. Mr. NOLTE said that he would not object, in the present case, to presenting the draft conclusions using the method just proposed by the Special Rapporteur, but he was not in favour of adopting it as a standard practice. There were serious reasons for not perpetuating that practice, and the matter should be examined by the Planning Group.

54. Mr. MURPHY said that a single footnote containing all the draft conclusions that had been proposed in the Special Rapporteur's report and another with the draft conclusions provisionally adopted by the Drafting Committee would make for two relatively voluminous footnotes. That way of proceeding might be regarded by delegations in the Sixth Committee as information overload, and it might be taking the Commission's policy of transparency too far. He agreed that it was important to revisit the matter in the Planning Group.

55. Mr. TLADI said that he fully agreed with the remarks made by Mr. Nolte and Mr. Murphy; however, if the Commission had taken a decision at a previous meeting to incorporate certain texts in the way just suggested by the Special Rapporteur, then that practice should be continued until further notice. Subsequently, the issue could be discussed in the Planning Group.

56. Mr. CANDIOTI said that he supported the Special Rapporteur's efforts to include as much up-to-date information as possible, which would facilitate discussion in the Sixth Committee.

57. The CHAIRPERSON suggested that the draft conclusions as originally proposed by the Special Rapporteur should appear as a footnote to paragraph 4, and those that had been provisionally adopted by the Drafting Committee should appear as a footnote to paragraph 5.

That suggestion was adopted.

58. Sir Michael WOOD (Special Rapporteur) said that he wished to invite the Commission to request the Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law.

59. The CHAIRPERSON said that he took it that the Commission wished to make the request to the Secretariat proposed by the Special Rapporteur. The text of the request for a memorandum would be included in a paragraph 5 bis, to be inserted following paragraph 5.

It was so decided.

Paragraphs 4, 5 and 5 bis, as amended during the discussion, were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE THIRD REPORT

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

60. Mr. PARK proposed that the word "third" should be inserted after "The" and before "report" in the first sentence.

61. Mr. FORTEAU (Chairperson of the Drafting Committee) said that, in the antepenultimate sentence, the words "and of the practice of non-State actors" [*et de la pratique des acteurs non étatiques*] should be inserted after "international organizations".

62. Sir Michael WOOD (Special Rapporteur) said that he agreed with those proposals.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 13

Paragraphs 8 to 13 were adopted.

Paragraph 14

63. Mr. NOLTE proposed that, in the second sentence, the word order be rearranged so that the sentence would read: "By judicial decisions, the report referred to both decisions of international courts and tribunals and decisions of national courts." If that was accepted, then, in the third sentence, the word "latter" would have to be replaced with "former".

64. Sir Michael WOOD (Special Rapporteur) said that he endorsed Mr. Nolte's proposals.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 17

Paragraphs 15 to 17 were adopted.

2. SUMMARY OF THE DEBATE

(a) General comments

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

65. Mr. TLADI recalled that during the exchange of views which was the subject of the paragraph, three different views had been expressed: they should all be duly reflected. He therefore proposed that, after the second sentence, a new sentence be added, to read: “According to this view, the change in the name of the topic was not intended to affect the focus of the topic.” Before the last sentence, another new sentence should be inserted, to read: “Another view was that, while the topic was focused on identification, this did not preclude the consideration of formation issues to the extent that they were relevant for identification.”

66. Sir Michael WOOD (Special Rapporteur) endorsed that proposal.

Paragraph 19, as amended, was adopted.

(b) Relationship between the two constituent elements

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Paragraph 22

67. Mr. NOLTE proposed that the word “causality” be replaced with the word “sequence”.

Paragraph 22, as amended, was adopted.

(c) Inaction as practice and/or evidence of acceptance as law

Paragraph 23

68. Mr. VÁZQUEZ-BERMÚDEZ proposed that the words “(*opinio juris*)” be inserted after the words “acceptance as law” in the title of subheading (c) and in the second sentence of paragraph 23.

Paragraph 23, as amended, was adopted.

Paragraph 24

69. Mr. VÁZQUEZ-BERMÚDEZ proposed that a sentence be added at the end of the paragraph, to read: “It was added that what is important is to establish if inaction, in a particular case, could be equated with *opinio juris*.”

Paragraph 24, as amended, was adopted.

(d) The role of treaties and resolutions

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

70. Sir Michael WOOD (Special Rapporteur) said that the expression “geographical repartition” should read “geographical distribution”.

Paragraph 26, as amended, was adopted.

Paragraph 27

71. Sir Michael WOOD (Special Rapporteur) proposed that, in the fourth sentence, the phrase “or the procedure

of adoption of the resolution or its object” be replaced with “or the voting and procedure used in adopting the resolution and the resolution’s object”.

72. Mr. MURPHY endorsed that proposal subject to the deletion of the word “or”.

Paragraph 27, as amended, was adopted.

Paragraph 28

73. Mr. TLADI proposed, for the sake of accuracy, that after the first sentence, a new sentence be added, to read: “A view was expressed that it may, in some cases, be possible for resolutions to constitute evidence of the existence of a customary rule.”

74. Mr. NOLTE, after expressing support for Mr. Tladi’s proposal, said that, in the first sentence, the expression “could alone not constitute sufficient evidence” should read “could not, in and of themselves, constitute sufficient evidence”.

Paragraph 28, as amended, was adopted.

(e) Judicial decisions and writings

Paragraph 29

75. Mr. NOLTE, referring to the third sentence, questioned the suitability of the expression “bear the same significance” in relation to judicial writings and decisions: they could be of greater or lesser significance, depending on the particular case concerned. He therefore proposed that the expression be replaced with “have the same character”.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

76. Sir Michael WOOD (Special Rapporteur), referring to the expression “should be qualified more explicitly” in the second sentence, said that the words “more explicitly” seemed unnecessary and should be deleted.

Paragraph 31, as amended, was adopted.

(f) The relevance of international organizations

77. Mr. NOLTE proposed that, for the sake of accuracy, the subheading’s title be amended to read: “The relevance of international organizations and non-State actors”.

It was so decided.

Paragraph 32

78. Mr. MURPHY, supported by Sir Michael WOOD (Special Rapporteur), proposed that a new sentence be added at the end of the paragraph, to read: “A view was expressed that the proposed draft conclusion as written failed to address key issues, such as whether inaction of international organizations counted as practice, whether both

practice and *opinio juris* of international organizations was required, and whether the rule to which the international organization contributes is binding only upon international organizations, only upon States, or upon both.”

Paragraph 32, as amended, was adopted.

Paragraph 33

79. Mr. FORTEAU questioned the appropriateness of the statement in the second sentence that “since some international organizations were composed by States” and proposed that the word “some” be replaced with “most”.

80. Mr. NOLTE said he agreed that, as currently worded, the sentence was difficult to understand.

81. Sir Michael WOOD (Special Rapporteur) proposed that, in order to meet the concerns of Mr. Nolte and Mr. Forteau, the sentence be amended to read: “The term ‘other non-State actors’ was not considered entirely clear since international organizations were composed of States.” That would be in line with the decision taken in the Drafting Committee based on the view that international organizations could be regarded as State actors and not non-State actors because their membership comprised States.

Paragraph 33, as amended, was adopted.

(g) Particular custom

Paragraph 34

82. Ms. ESCOBAR HERNÁNDEZ, referring to the second sentence, proposed that the phrase “a view was expressed” be replaced with “some members of the Commission expressed the view”.

83. Sir Michael WOOD (Special Rapporteur) proposed that, in the same sentence, the phrase “was to be excluded from” be replaced with “did not fall within”.

With those amendments, paragraph 34 was adopted.

Paragraph 35

84. Mr. MURPHY proposed that a new sentence be added at the end of the paragraph, to read: “A view was expressed that by envisaging the existence of a particular custom among a widely dispersed group of States having no geographical nexus, the proposed draft conclusion invited confusing claims as to the existence of such custom and risked fragmenting customary international law, without any basis in practice.” In the second sentence, the phrase “for particular customs rather than universal customs” should read “for particular customs than universal customs”.

85. Sir Michael WOOD (Special Rapporteur) said that he was in favour of Mr. Murphy’s first proposal. As to his second proposal, it should read “for particular custom than for general custom”, since the notion of universal custom was different from that of general custom.

86. Mr. FORTEAU recalled that during the debate on the subject, reference had been made to universal custom.

87. Sir Michael WOOD (Special Rapporteur) said that the phrase should then read “for particular custom than for general or universal custom”.

Paragraph 35, as amended by Mr. Murphy and further amended by Sir Michael Wood (Special Rapporteur), was adopted.

(h) Persistent objector

Paragraph 36

88. Mr. CAFLISCH, expressing concern about the reference to the persistent objector rule as being “largely accepted in the literature” in the second sentence, suggested that “partly accepted” would be more accurate.

89. Sir Michael WOOD (Special Rapporteur) said that his review of the relevant literature indicated that many writers, particularly those of textbooks, accepted the rule.

90. Mr. FORTEAU suggested that the insertion of the words “according to some members” [*d’après certains membres*] before the statement “was largely accepted in the literature” would resolve the problem.

Paragraph 36, as amended by Mr. Forteau, was adopted.

Paragraph 37

91. Mr. VÁZQUEZ-BERMÚDEZ said that, in order to reflect more accurately the views outlined in the second sentence, the statement that “it would be useful to examine the interplay of this rule with obligations *erga omnes* or rules having a peremptory character (*jus cogens*)” should be amended to read “in any case, even if such a rule existed, it could not be applicable to obligations *erga omnes* ...”.

Paragraph 37, as amended, was adopted.

(i) Future programme of work

Paragraphs 38 and 39

Paragraphs 38 and 39 were adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

92. Mr. NOLTE, referring to the statement in the penultimate sentence that “there could be occasions where, exceptionally, the same evidence might be used in order to ascertain the two elements”, suggested that the word “exceptionally” be replaced with “sometimes”. That would better reflect the fact that the Special Rapporteur had softened his position regarding the possibility of using the same evidence to ascertain the two elements.

93. Mr. TLADI said that although he, too, did not like the term “exceptionally”, that was the term the Special Rapporteur had actually used in his concluding remarks.

94. Sir Michael WOOD (Special Rapporteur) said that while he could agree to the deletion of the word “exceptionally”, there was no need to replace it with “sometimes”, since the notion was covered by the expression “there could be occasions where”. Furthermore, the statement in the third sentence that “the determination of a rule of customary law had to be ascertained separately for each element” should be amended to read “each element had to be separately ascertained in order to identify rules of customary international law”.

Paragraph 41, as amended by Mr. Nolte and further amended by Sir Michael Wood (Special Rapporteur), was adopted.

Paragraph 42

95. Mr. NOLTE, referring to the last sentence, which concerned the role of non-State actors in the formation and identification of rules of customary international law, proposed that after the expression “through prompting or recording State practice”, the words “and the practice of international organizations” be added.

96. Sir Michael WOOD (Special Rapporteur), referring to the first sentence, said that there was no need to add particular emphasis by using italics for the words “as such”. He was not satisfied with the wording of the second part of the sentence, “since it appeared clearly that the practice of international organizations in their relations among themselves, at least, could give rise to customary rules binding in such relations”, and proposed its deletion.

97. Mr. MURPHY said that it was important to retain the substance of that part of the sentence since it reflected the debate on the subject.

98. Mr. NOLTE said that the second part of the sentence would read better without the word “clearly” and proposed its deletion.

Paragraph 42, as amended by Mr. Nolte and with the editorial correction proposed by Sir Michael Wood (Special Rapporteur), was adopted.

Paragraphs 43 to 45

Paragraphs 43 to 45 were adopted.

Paragraph 46

99. Sir Michael WOOD (Special Rapporteur) said that some important details had been omitted from the paragraph, including comments that both he and others had made concerning the collective writings of the Commission. He therefore proposed that the paragraph be left in abeyance to allow him to submit additional text.

Paragraph 46 was left in abeyance.

Paragraphs 47 to 49

Paragraphs 47 to 49 were adopted.

The meeting rose at 1 p.m.

3289th MEETING

Thursday, 6 August 2015, at 3.05 p.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER VI. Identification of customary international law (concluded) (A/CN.4/L.859)

1. The CHAIRPERSON invited the Special Rapporteur to explain what had been decided following the consultations on paragraph 46, which had been left in abeyance, with the members concerned.

B. Consideration of the topic at the present session (concluded)

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR (concluded)

Paragraph 46 (concluded)

2. Sir Michael WOOD (Special Rapporteur) said that the question of the Commission’s role had been raised by a number of members during the discussion, but had not been mentioned in the summary of the debate. He therefore proposed that a new paragraph be inserted after paragraph 46, to read: “The Special Rapporteur noted that many colleagues had suggested that there should be a separate conclusion on work of the International Law Commission. He was not convinced of the need for a separate conclusion, as opposed to explaining the Commission’s role in the commentaries. He nevertheless hoped that the Drafting Committee would consider the matter.” The proposal replaced the one made at the previous meeting.

The proposal was adopted.

3. Mr. VÁZQUEZ-BERMÚDEZ said that, while he endorsed the proposal by the Special Rapporteur, the summary of the debate should reflect what a number of members had said about the work of the Commission. He therefore proposed the insertion, at the end of the section on judicial decisions and writings, of a new paragraph 31 *bis*, to read: “Several members affirmed that the work of the International Law Commission, which is a subsidiary organ of the General Assembly of the United Nations entrusted with the mandate to promote the progressive development of international law and its codification, could not be equated to ‘writings’ or teachings of publicists.”

The proposal was adopted.