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Summary record of the 3335th meeting

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

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after “in the best position” in the first sentence, placing a full stop after “its national response capacity”, and amending the second sentence to read: “Having said this, this assessment must be carried out in good faith”, in order to recognize that the assessment could not be purely objective but that, regardless of States’ room for manoeuvre in that area, the principle of good faith still applied.

79. Mr. NOLTE said that this principle was undoubtedly an objective standard and the assessment could therefore not be considered not to be objective since it must be carried out in good faith. The issue was to what extent the margin of appreciation of an affected State could be limited by an objective criterion such as the obligation of good faith.

Paragraph (8) was adopted with the amendments put forward by Mr. Forteau.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

80. Sir Michael WOOD proposed deleting the words “the Commission does not encourage” and replacing “to seek assistance” with “should not seek assistance” in the first sentence.

With that amendment, and with a minor drafting change to the English version, paragraph (10) was adopted.

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

The meeting rose at 6 p.m.

3335th MEETING

Thursday, 4 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. Protection of persons in the event of disasters (concluded) (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the Commission to pursue its consideration of chapter IV of the draft report

and to resume its discussion of the portion contained in document A/CN.4/L.882/Add.1.

E. Text of the draft articles on the protection of persons in the event of disasters (concluded)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)

Commentary to draft article 12 (Offers of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. FORTEAU proposed that, in the final sentence, the word “fundamental” [*fondamental*] be deleted, in order to better reflect the language of the preamble. Furthermore, the phrase “in accordance with draft article 13” [*comme l’indique le projet d’article 13*] should be replaced with the phrase “in accordance with the conditions set forth in draft article 13” [*dans les conditions énoncées dans le projet d’article 13*]. Lastly, the phrase, in the French text, *et sur lequel repose l’ensemble du projet d’articles* was not entirely accurate and it might therefore be preferable to delete it.

3. Mr. KAMTO said that he supported the drafting changes proposed by Mr. Forteau, with the exception of the deletion of the word “fundamental”. The principle of sovereignty was generally recognized as just that – fundamental – and there was no reason to delete the word.

4. Mr. SABOIA said that he supported the statement made by Mr. Kamto in favour of retaining the word “fundamental”. As for the proposed deletion, in the French text, of the phrase *et sur lequel repose l’ensemble du projet d’articles*, he suggested that the issue was a translation-related one, as there was no problem with the same phrase in the original English text, which read: “which informs the whole set of draft articles”.

5. Mr. EL-MURTADI SULEIMAN GOUIDER said that he, too, would prefer to retain the word “fundamental”, the addition of which was in no way contrary to the draft articles.

6. Sir Michael WOOD said that he supported all the amendments proposed by Mr. Forteau. In order to reflect the balanced language of the preamble, he proposed further amending the beginning of the final sentence to read: “In line with the principle of the sovereignty of States, stressed in the preamble, and the corresponding primary role of the affected State”. Assuming those amendments were acceptable to the Commission, the phrase “which informs the whole set of draft articles” could be retained, as both the principle of sovereignty and the primary role of the affected State would be understood as informing the whole set of draft articles.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no problem with Mr. Forteau’s proposal to add a reference in the final sentence to the conditions under which a State might or might not accept offers of assistance. He agreed with the amendments to the final sentence proposed by Sir Michael and with the retention of

the phrase “which informs the whole set of draft articles”. As for the deletion of the word “fundamental”, he found it puzzling that, after ten years of stressing the importance of the principle of sovereignty and its corollary of non-intervention, the Commission seemed prepared to strike it from paragraph (2). Nevertheless, he would not stand in the way of consensus and would accept the deletion of that word if the majority of members decided on that course of action.

8. Mr. FORTEAU said that he had proposed deleting the word “fundamental” with a view to better reflecting the language contained in the preamble and the Drafting Committee’s discussion of the matter. He supported the further amendments proposed by Sir Michael.

9. The CHAIRPERSON suggested that, based on the proposals made by Commission members, the fourth sentence of paragraph (2) should read: “In line with the principle of the sovereignty of States and the corresponding primary role of the affected State, stressed in the preamble and which inform the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with the conditions set forth in draft article 13.” In the French text, the corresponding sentence would read: *Conformément au principe de souveraineté des Etats et au rôle principal de l’Etat touché par une catastrophe, mis en relief dans le préambule et qui informent l’ensemble du projet d’articles, un Etat touché demeure libre d’accepter en totalité ou en partie, ou de ne pas accepter, les offres d’assistance émanant d’Etats ou d’acteurs non étatiques, dans les conditions énoncées dans le projet d’article 13.*

It was so decided.

10. Mr. MURPHY proposed deleting, in the English version of the amended final sentence, the word “corresponding”, which did not appear either in the preamble or in the French text of that sentence.

It was so decided.

11. Mr. KITTICHAISAREE proposed that the first three words of the English version of the amended final sentence, “In line with”, be replaced with the words “In conformity with”.

It was so decided.

12. Mr. FORTEAU suggested that, in the French text, the phrase *et qui informent l’ensemble du projet d’articles* be replaced with the phrase *et qui sous-tendent l’ensemble du projet d’articles*.

It was so decided.

13. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph (2), as amended.

Paragraph (2), as amended, was adopted.

14. Mr. SABOIA said that by striking out the word “fundamental” in the final sentence of paragraph (2) the

Commission should not be understood as implying that the principle of sovereignty was not fundamental.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

15. Sir Michael WOOD proposed that the first sentence of paragraph (5) be amended to read: “Non-governmental organizations or entities may be well placed, because of their nature, location and expertise, to provide assistance in response to a particular disaster.”

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

16. Mr. KAMTO proposed that, in the French text, the unusual word *myriade* contained in the second indent of paragraph (8) be replaced with a more readily understandable word such as *multiplicité*. In the third indent, the word *qualifiées* was unclear; timeliness could not be said to qualify an obligation; rather, it should reinforce the obligation. He therefore proposed replacing the word *qualifiées* with the words *renforcées*. The last sentence seemed incorrect: the word “due” should not be understood to refer to the substance of a request, but should instead refer to the effective, or careful, consideration of a request. He therefore proposed replacing the words *la teneur de la demande* with the words *l’effectivité de l’examen de la demande*. The sentence might be further clarified by a fifth sentence that would read: *Il signifie que le destinataire doit examiner la teneur de la demande avant d’y donner réponse.*

17. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he did not oppose the changes proposed by Mr. Kamto. However, he was not in favour of adding a fifth, explanatory sentence.

18. Mr. MURPHY, supporting the changes to the French text proposed by Mr. Kamto, suggested that, in the English version, the word “constellation”, in the first indent, be replaced with the word “various”; that the words “are qualified by”, in the second indent, be replaced with the word “contain”; and that the words “the substance of the request”, in the final sentence of the third indent, be replaced with the phrase “giving the request careful consideration”.

It was so decided.

19. Sir Michael WOOD proposed that the two indents under paragraph (8) become paragraphs (9) and (10), respectively.

With those amendments, paragraph (8) was adopted.

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

Commentary to draft article 13 (Consent of the affected State to external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. MURPHY, observing that there seemed to be a disconnect between the statement in draft article 13, paragraph 1, that the provision of external assistance required the consent of the affected State and certain parts of the commentary concerning situations in which there was no functioning Government, suggested that it might be prudent to add the following sentence at the end of paragraph (2): “In the exceptional circumstance of the collapse of the Government of the affected State, consent may not be possible and therefore not required.”

21. Mr. HMOUD said that the issue raised by Mr. Murphy was a very sensitive matter and that he could not agree with his suggestion. The issue was already sufficiently covered by paragraph (2) and draft article 18.

22. Mr. KITTICHAISAREE expressed support for Mr. Hmoud’s comments. The current situation in the Syrian Arab Republic gave some indication of the complexity and sensitivity of the issue.

23. Mr. NOLTE said that Mr. Murphy had raised a very important issue that the Commission should have debated thoroughly but it had not done so. It could not be resolved by the addition of a single sentence to the commentary during the adoption of the report and should not be taken up at that stage.

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

24. Mr. MURPHY suggested that, in the third sentence, the words “measures to ensure the enjoyment of this right” be changed to “measures to protect this right”, in line with the wording of the Human Rights Committee’s general comment No. 6⁴⁹⁷ referred to in the second footnote to the paragraph. He also suggested that, in the fourth sentence, the words “a violation of the right to life” be altered to “a violation of the State’s obligation not to arbitrarily deprive persons of life”.

25. Mr. NOLTE said that, while Mr. Murphy’s second suggestion reflected the wording of part of article 6 of the International Covenant on Civil and Political Rights, there was no need for the right to life always to be formulated as an obligation. In the present context, such wording would invite speculation as to the circumstances in which a State might be able to deprive persons of life if such deprivation was not portrayed as arbitrary. The Commission should not send the wrong signal.

26. Mr. SABOIA said that he shared some of Mr. Nolte’s concerns and that he was completely opposed to the second amendment proposed by Mr. Murphy, which would distort the meaning of the sentence in question.

27. Ms. ESCOBAR HERNÁNDEZ said that the paragraph did not refer to circumstances in which it would be considered that a State had the right to deprive a person of life non-arbitrarily, but to the general recognition of the right to life and protection thereof as a State responsibility in the context of natural disasters. Regardless of her views on the death penalty – which she opposed – she could not support Mr. Murphy’s second proposed amendment.

28. Mr. MURPHY said that his proposal had nothing to do with the death penalty. It was simply intended to bring the wording of the paragraph into line with that of the International Covenant on Civil and Political Rights. Another option would be to insert the words “the State’s obligation with respect to” between “violation of” and “the right to life”, which would avoid using the word “arbitrarily”.

29. Mr. NOLTE said that it was not always necessary to couch a right in terms of an obligation, even if that was the wording of the provision establishing the right. Referring to rights and the violation of those rights was normal and appropriate usage.

30. Mr. KITTICHAISAREE said that he was not satisfied with Mr. Murphy’s suggestions, which might be misunderstood. Instead, he proposed that paragraph 5 of the Human Rights Committee’s general comment No. 6, quoted in the second footnote to the paragraph, be moved in its entirety to the body of the text, leaving the footnote to provide just the reference, which would avoid any need for the Commission to interpret the Committee’s words. He therefore proposed that the third sentence of paragraph (4) be altered to read: “The Human Rights Committee has clarified in relation to the right to life, as embodied in article 6 of the International Covenant on Civil and Political Rights, that the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”

31. Mr. WAKO said that, if paragraph (4) were to be amended at all, it should be with a view to emphasizing the non-derogable nature of the right to life under the International Covenant on Civil and Political Rights, even in a state of emergency declared in relation to a disaster. The focus should be on strengthening the State’s duty to protect life.

32. Mr. McRAE, expressing support for Mr. Wako’s comments, said that Mr. Murphy’s proposal to alter the wording “a violation of the right to life” did not seem to enjoy support and was creating complications; however, his suggested amendment to the third sentence of paragraph (4) was acceptable.

33. The CHAIRPERSON asked whether the Commission agreed to amend the third sentence of paragraph (4) as suggested by Mr. Murphy but to leave the rest of the paragraph unchanged.

⁴⁹⁷ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V.*

34. Mr. MURPHY said that, while he could go along with that approach, he found some of the rationales adduced unfortunate.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

35. Mr. PARK said that he supported the substance of the paragraph, but wondered whether it might be more appropriately placed in the commentary to draft article 18.

36. Sir Michael WOOD suggested that the word “binding” be deleted from the first sentence of the paragraph because Security Council resolution 688 (1991) of 5 April 1991, referred to in the first footnote to the paragraph, had not in fact been a resolution under Chapter VII of the Charter of the United Nations; indeed, there had been much debate as to whether that resolution was binding. He considered the placement of the paragraph to be appropriate because the latter was connected to the question of consent; it served as a reminder that the Security Council could very occasionally take measures that overrode the need for consent.

37. Mr. HMOUD said that the deliberations of the Security Council on resolutions 2139 (2014) of 22 February 2014 and 2165 (2014) of 14 July 2014 had been guided by the work of the Commission on the issue of the arbitrary withholding of consent; as such, the paragraph was in the correct place.

Paragraph (6), as amended by Sir Michael Wood, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

38. Mr. FORTEAU suggested that reference should be made in the footnote to paragraph 145 of the judgment of the International Court of Justice of 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, which dealt specifically with the issue of the exercise of discretion and the obligation of good faith.

39. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed to that suggestion.

With that amendment to the footnote, paragraph (10) was adopted.

Paragraph (11)

40. Sir Michael WOOD suggested that paragraph (11) be moved to the commentary on draft article 17, which covered the termination of external assistance at any time.

41. Mr. FORTEAU said that draft article 13 covered consent and the arbitrary withholding thereof; draft article 17, on the other hand, did not include any provision

on withdrawing consent arbitrarily. It would therefore be better to retain the paragraph in its current location.

42. Sir Michael WOOD said that paragraph (11) included a specific example of a situation in which the words “at any time” were not intended to legitimize any arbitrary withdrawal of consent. It was therefore relevant to draft article 17.

43. The CHAIRPERSON suggested that the Commission should adopt the text of the paragraph on the understanding that it might subsequently be moved to the commentary to another draft article.

On that understanding, paragraph (11) was adopted.

Paragraph (12)

44. Sir Michael WOOD suggested that paragraph (12) be placed immediately after paragraph (8) and the remaining paragraphs in the commentary to draft article 13 renumbered accordingly.

It was so decided.

Paragraph (12) was adopted.

Paragraph (13)

45. Mr. KITTICHAISAREE suggested that, in the first sentence, the words “to give the maximum flexibility to affected States” be changed to read: “to give a certain degree of flexibility to affected States”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

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

Commentary to draft article 14 (Conditions on the provision of external assistance)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to draft article 14 was adopted.

Commentary to draft article 15 (Facilitation of external assistance)

Paragraph (1)

46. Sir Michael WOOD suggested that, for the sake of accuracy, the beginning of the second sentence, which currently read “Its purpose is to ensure that national law accommodates the provision ...”, be replaced with “This includes ensuring that national law accommodates the provision ...”

Paragraph (1), as amended, was adopted.

Paragraph (2)

47. Mr. NOLTE suggested that, in the fourth sentence, the term “non-legal” be changed to “non-prohibited”, so as to avoid it being interpreted as “illegal”.

48. Mr. ŠTURMA said that he shared Mr. Nolte's concern about the term "non-legal", but suggested that, in the current context, it would be more appropriate to replace it with "non-legislative".

49. Sir Michael WOOD suggested that the term "non-legal" might simply be deleted.

50. Mr. NOLTE said that the point of draft article 15 was to make clear that not every practical measure that might be efficient was permissible or recommended. If the context were removed, that point would be lost. He would defer to the opinion of the Special Rapporteur on that question.

51. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he agreed with Mr. Nolte's remarks. Practical measures must be taken within national laws, but some such measures were not necessarily either expressly reflected or prohibited in legislation or administrative rulings. Mr. Nolte's suggested amendment would embrace that concept while maintaining the emphasis on the need to comply with internal law.

52. Mr. SABOIA suggested that the words "to the extent that they are not explicitly prohibited" could be added at the end of the fourth sentence.

53. Sir Michael WOOD said that he supported Mr. Saboia's approach but was not in favour of using the word "explicitly". He suggested that the fourth sentence be reformulated to read: "It can also extend to practical measures designed to facilitate external assistance, provided that they are not prohibited by national law."

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

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

54. Sir Michael WOOD said that, in the second sentence, the word "accommodated" should be altered to "facilitated".

Paragraph (4), as amended, was adopted.

Paragraph (5)

55. Mr. KITTICHAISAREE proposed a minor editorial amendment to the English version of the text.

Paragraph (5), as amended, was adopted.

Paragraph (6)

56. Mr. KITTICHAISAREE suggested that the word "physically" should be deleted from the second sentence, as information was increasingly provided in electronic form. He further suggested that, in the same sentence, the words "including their translation into other languages" be inserted between "ease of access to such laws" and "without creating the burden on the affected State". That

would reflect the balance achieved in the Commission's previous debates on the need to provide translations of internal laws into English or French for use by international agencies.

57. Sir Michael WOOD said that it would indeed be a burden for a State to have to arrange for such translations, particularly when it was already affected by a disaster. He suggested including the words "where necessary" or "where appropriate" after "including" in order to allay that concern.

58. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed with Sir Michael. It was not his intention to add to the burden of an affected State by imposing the provision of translations as a condition of assistance.

Paragraph (6), as amended by Mr. Kittichaisaree and Sir Michael Wood, was adopted.

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

Commentary to draft article 16 (Protection of relief personnel, equipment and goods)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

59. Sir Michael WOOD said that the references in paragraphs (4) and (5) to an obligation of result and an obligation of conduct should be omitted, particularly as the Commission had decided not to include such language in its draft articles on the responsibility of States for internationally wrongful acts.⁴⁹⁸ The second sentence of paragraph (4) would need to be redrafted accordingly.

60. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed that the second sentence of paragraph (4) be modified to read: "In this case, the duty imposed on the affected State is not to cause harm to the personnel, equipment and goods involved in external assistance through acts carried out by its organs."

Paragraph (4), as amended, was adopted.

Paragraph (5)

61. Sir Michael WOOD said that, in general, the paragraph downplayed too much the obligation of the affected State to protect its population. He proposed deleting the second sentence, in which mention was made of an obligation of conduct. The fifth sentence should be strengthened; it should be recast to read: "It requires the State to act in a diligent manner in seeking to avoid the harmful events that may be caused by non-State actors."

Paragraph (5), as amended, was adopted.

⁴⁹⁸ The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

Paragraph (6)

62. Sir Michael WOOD said that, in the second sentence, which was very long, the word “situations” should be replaced with “situation”. At the beginning of the third sentence, the word “Likewise” should be replaced with “The same applies to”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

63. Sir Michael WOOD proposed that, in the last sentence, the words “are generally” be replaced with “may be”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

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

Commentary to draft article 17 (Termination of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

64. Sir Michael WOOD said that, in the last sentence, he would prefer to delete the words “and bringing to an end the legal regime under which the assistance was being provided”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

65. Mr. NOLTE proposed that, in the second sentence of paragraph 5, “parties” be replaced with “actors”, which was the word normally used by the Commission.

It was so decided.

66. Sir Michael WOOD proposed that paragraph (11) of the commentary to draft article 13, which the Commission had adopted on the understanding that it might be moved, be placed after paragraph (5). The subsequent paragraphs should be renumbered accordingly.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) was adopted.

The commentary to draft article 17, as a whole, as amended, was adopted.

Commentary to draft article 18 (Relationship to other rules of international law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

67. Mr. FORTEAU said that the first two sentences, in which reference was made, either implicitly or explicitly, to the *lex specialis* principle, were contradicted by the third sentence, which set aside that principle. As he understood it, draft article 18, paragraph 1, was not limited to the *lex specialis* principle, but was a “without prejudice” clause regarding all rules of international law applicable to disasters. If that was the case, the wording of paragraph 2 should be reviewed.

68. Mr. NOLTE said that he shared Mr. Forteau’s concern. The contradiction resulted from the fact that, on first reading, draft article 18 had referred to the *lex specialis* principle. Bearing in mind the subsequent changes to the draft article, remaining references to that principle should be removed from the commentary.

69. After a discussion in which Mr. NOLTE and Mr. VALENCIA-OSPINA (Special Rapporteur) took part, Mr. FORTEAU proposed that the first two sentences be merged into one, to read: “The reference to ‘other rules’ in the title aims at safeguarding the continued application of the dense web of existing obligations regarding matters covered by the present draft articles.”

70. Mr. ŠTURMA said that the formulation “other applicable rules of international law” was contained in paragraph 1 of draft article 18, not paragraph 2, as stated in the final sentence. That sentence should be amended accordingly.

71. Sir Michael WOOD proposed deleting the words “of the dense web”.

Paragraph (2) was adopted with those amendments.

Paragraph (3)

72. Mr. FORTEAU proposed that the words “in particular”, set off by commas, be inserted after “include” at the start of the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

73. Mr. NOLTE proposed that, in the last sentence, the phrase “as a reflection of the *lex specialis* principle” be deleted.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

74. Mr. KITTICHAISAREE said that he wished to propose amending paragraph (9) to read:

“In such situations, the rules of international humanitarian law shall be given precedence over those contained in the present draft articles, which would continue to apply ‘to the extent’ that legal issues raised by a disaster would not be covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling possible legal gaps in the protection of persons affected by disasters occurring during an armed conflict while still maintaining, for situations regulated by both the draft articles and international humanitarian law, the precedence of international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international, even when occurring concomitantly with disasters), their humanitarian activities in a principled manner in accordance with the mandate assigned to them by international humanitarian law.”

75. Sir Michael WOOD said that the expressions “shall be given precedence over”, in the first sentence, and “the precedence of international humanitarian law”, in the second sentence, did not strike him as common legal expressions. In the first sentence, he proposed replacing the words “would not be covered by” with “are not covered by”. The parentheses in the last sentence should be closed after the word “non-international”. It was not clear what was meant by the words “in a principled manner” in the final sentence; he therefore suggested that they should be deleted.

76. Ms. JACOBSSON said that she endorsed the comments made by Sir Michael. Given that some principles of international humanitarian law, such as the principle of humanity or the Martens clause, did not give any guidance on what to do in specific situations, the expression “shall be given precedence” might not be the most appropriate; perhaps a better alternative could be found. She supported the deletion of the phrase “in a principled manner”.

77. Mr. PETRIČ proposed deleting the word “possible” before the words “legal gaps” in the second sentence, as it introduced an unnecessary hypothetical element.

78. Mr. KITTICHAISAREE said that the wording referred to by Sir Michael and Ms. Jacobsson in fact appeared in the original text. He suggested that the expression “shall be given precedence over” might be replaced with “shall be applied as *lex specialis*”.

79. Mr. HMOUD said that, although he could go along with the wording proposed by Mr. Kittichaisaree, he suggested that the phrase “shall be given precedence” could be replaced with “shall prevail”. He agreed with others that the words “in a principled manner” should be deleted.

80. Mr. SABOIA said that he was also in favour of deleting the word “possible” from the second sentence, the words “in a principled manner” from the last sentence and the reference to “precedence over”. It would be acceptable to state that both the draft articles and international humanitarian law applied, as it was understood that in an armed conflict the latter would apply without prejudice to the application of the law on disaster situations

and that *lex specialis* did not override the other parts of international law entirely. He was not in favour of replacing “shall be given precedence over” with “shall prevail”, as it suggested absolute precedence and did not properly reflect the intended meaning.

81. Mr. VALENCIA-OSPINA (Special Rapporteur) said that Mr. Kittichaisaree’s proposal to introduce a reference to *lex specialis* in paragraph (9) would undermine what had just been agreed with respect to paragraph (2). An effort should be made to find an alternative formulation.

82. Mr. NOLTE recalled that there had originally been a reference to *lex specialis* in the text of draft article 18, paragraph 1, that had been adopted on first reading, but that it had subsequently been removed. The objections to referring to *lex specialis* applied only to the commentary to draft article 18, paragraph 1, and not necessarily to paragraph 2, with respect to which it was appropriate to refer to *lex specialis*.

83. Mr. FORTEAU said that he supported Mr. Nolte’s position. The formulation “to the extent that” in draft article 18, paragraph 2, had been drawn from article 55 of the 2001 draft articles on the responsibility of States for internationally wrongful acts, which dealt with the principle of *lex specialis*. The use of that expression in paragraph 2 thus covered the principle of *lex specialis*.

84. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Sir Michael that, in the first sentence, the words “would not be covered by” should be replaced with “are not covered by”.

85. Mr. KITTICHAISAREE said that, taking into account the comments made by other members, the proposed text would read:

“In such situations, the rules of international humanitarian law shall be applied as *lex specialis*, whereas the other rules contained in the present draft articles would continue to apply ‘to the extent’ that legal issues raised by a disaster are not covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict, while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international), even when occurring concomitantly with disasters, their humanitarian activities in accordance with the mandate assigned to them by international humanitarian law.”

86. Mr. HMOUD proposed deleting the word “other” before “rules” in the first sentence.

Paragraph (9), as amended, was adopted.

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

Section E, as amended, was adopted.

87. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of the report contained in document A/CN.4/L.882, with specific regard to paragraphs 9 and 10, whose adoption had been left in abeyance.

C. Recommendation of the Commission (concluded)*

Paragraph 9 (concluded)*

88. Mr. LLEWELLYN (Secretary to the Commission) said that the suggested recommendation, which had been circulated to the members, read: “At its 3335th meeting, on 4 August 2016, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters.”

Paragraph 9 was adopted.

Section C was adopted.

D. Tribute to the Special Rapporteur (concluded)*

Paragraph 10 (concluded)*

Paragraph 10 was adopted by acclamation.

Section D was adopted.

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

89. Mr. VALENCIA-OSPINA (Special Rapporteur) thanked the members of the Commission for their generous tribute and the support they had extended to him over the course of his work on the topic. Through the collective efforts of all the members, the Commission had succeeded in producing a final outcome of which it could legitimately feel proud, on a topic of the utmost contemporary relevance. The Commission had now completed its work and it was for the General Assembly to take the decision it deemed appropriate based on the Commission’s recommendation. It had been an honour and a source of great satisfaction to have been entrusted with the task of serving as Special Rapporteur, a task he could not have accomplished without the cooperation of current and previous members of the Commission and the secretariat, as well as the many students from around the world who had volunteered their time to contribute to the project. It was gratifying to see that the topic had aroused a great deal of interest in international academic circles.

90. Mr. WAKO said that he wished to express his appreciation for the work of the Special Rapporteur, whose experience, diplomacy and drafting skills had ensured the success of the project. He was confident that, in years to come, protection of persons in the event of disasters would be remembered as one of the most important topics dealt with by the Commission.

CHAPTER VI. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.884 and Add. 1–2)

91. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph,

chapter VI of the draft report, beginning with the text contained in document A/CN.4/L.884.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

92. Mr. MURPHY said that the footnotes should be reviewed by the Secretariat in order to ensure consistency. At the end of the second sentence, he proposed adding the word “the” before the last instance of “subsequent agreements”.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

93. Mr. MURPHY said that, in the first sentence, the word “treaty” should be inserted before “bodies”. In the final sentence, the word “proposing” should perhaps be replaced with “proposed”.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraphs 9 to 11

94. The CHAIRPERSON suggested that the adoption of paragraphs 9 to 11 be deferred.

It was so decided.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading

1. TEXT OF THE DRAFT CONCLUSIONS

Paragraph 12

Paragraph 12 was adopted.

95. The CHAIRPERSON invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.884/Add.1.

96. Mr. NOLTE (Special Rapporteur) recalled that he had circulated a note intended to facilitate preparations for the adoption of chapter VI of the report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Document A/CN.4/L.884/Add.1 consisted almost entirely of the text of the commentaries which the Commission had already adopted in 2013, 2014 and 2015. The note drew attention to all the proposed substantive changes from the

* Resumed from the 3332nd meeting.

texts which the Commission had already adopted. The first main change was the insertion of subheadings, relating to a particular paragraph or sentence within a paragraph, in order to improve the readability of the text. The second set of changes concerned references to decisions of domestic courts. Following proposals made during the debate on the fourth report (A/CN.4/694) and the withdrawal of the proposal to have a separate draft conclusion on the use of subsequent agreements and subsequent practice by domestic courts, he had added a few new paragraphs and footnotes, specific details of which were provided in the note he had circulated, with references to decisions of domestic courts. Document A/CN.4/L.884/Add.2 contained the draft conclusions adopted at the current session together with the commentaries that had not yet been considered.

The meeting rose at 1 p.m.

3336th MEETING

Thursday, 4 August 2016, at 3 p.m.

Chairperson: Mr. Gilberto Vergne SABOIA
(Vice-Chairperson)

Present: Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Singh, 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-eighth session (continued)

CHAPTER VI. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued)* (A/CN.4/L.884 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document A/CN.4/L.884/Add.1, paragraph by paragraph.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (continued)

2. TEXT OF THE DRAFT CONCLUSIONS WITH COMMENTARIES THERETO

Paragraph 1

Paragraph 1 was adopted.

INTRODUCTION

Paragraph (1)

2. Mr. MURPHY asked whether the introductory paragraph would be inserted before the text of draft

conclusion 2 [1] or whether it was rather a general introduction to the draft conclusions that would appear before draft conclusion 1, which was currently in document A/CN.4/L.884/Add.2. He also wondered whether it was really necessary.

3. Mr. NOLTE (Special Rapporteur) said that paragraph (1) would in principle precede draft conclusion 1. The second sentence was an important one, but the idea expressed in it could be found elsewhere in the draft commentaries. He would not insist on retaining the paragraph if there were compelling reasons for its deletion.

4. Mr. MURPHY said that one compelling reason might be that it would be difficult to justify having an introductory paragraph, most of which was reproduced in the commentary to draft conclusion 1, appear before a draft conclusion that itself was introductory in nature.

5. Mr. TLADI said that the idea expressed in the second sentence of the paragraph could be found in paragraph (4) of the commentary to draft conclusion 2 as well as to some extent in paragraph (1) of that conclusion. He therefore agreed that paragraph (1) should be deleted.

Paragraph (1) was deleted.

Commentary to draft conclusion 2 [1] (General rule and means of treaty interpretation)

Paragraph (1)

Paragraph (1) was adopted.

6. Mr. MURPHY noted that the Special Rapporteur had inserted subheadings among the paragraphs of the commentary that subdivided it based on the sentences, paragraphs or subparagraphs of the draft conclusions. Those subheadings, beginning with the first one, seemed questionable and should be reviewed.

7. Sir Michael WOOD, supported by Mr. KAMTO and Mr. PARK, said that it might be sufficient simply to indicate the number of the sentence, paragraph or subparagraph to which the commentary referred and to delete the subheadings.

8. Mr. NOLTE (Special Rapporteur) said that, while he would not be opposed to the deletion of the letters preceding the subheadings, he would prefer the Commission to review the text of the subheadings themselves, which he believed made the text more readable.

9. Mr. ŠTURMA said that, given the complexity of the topic, the subheadings seemed useful.

10. The CHAIRPERSON suggested that the Commission should consider each subheading before considering the paragraphs themselves.

It was so decided.

Paragraph 1, first sentence—general rule of interpretation and interrelationship between articles 31 and 32

11. Mr. MURPHY said that the first part of the subheading should be deleted; the second part should be retained,