

Provisional

**For participants only**

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**International Law Commission**  
**Sixty-eighth session (second part)**

**Provisional summary record of the 3337th meeting**

Held at the Palais des Nations, Geneva, on Friday, 5 August 2016, at 10 a.m.

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***Present:***

*Chairman:* Mr. Comissário Afonso

*Members:* Mr. Caflisch  
Mr. Candiotti  
Mr. El-Murtadi  
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

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

*The meeting was called to order at 10 a.m.*

**Protection of the environment in relation to armed conflict** (agenda item 7) (*continued*)

*Report of the Drafting Committee (A/CN.4/L.870/Rev.1)*

**Mr. Šturma** (Chairman of the Drafting Committee), introducing the seventh report of the Drafting Committee, which concerned the topic “Protection of the environment in relation to armed conflicts,” drew attention to document A/CN.4/L.870/Rev.1, which reproduced the text of the draft introductory provisions and draft principles provisionally adopted by the Commission in 2015 and further technically revised by the Drafting Committee at the current session.

He wished to pay a tribute to the Special Rapporteur, Ms. Jacobsson, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee, and to thank the members of the Drafting Committee, for their valuable contributions to a successful outcome, and the secretariat, for its invaluable assistance.

Since the Drafting Committee had provisionally adopted draft principle 6 on protection of the environment of indigenous peoples, draft principles 8, 9, 10, 11 and 12 were to be renumbered 9, 10, 11, 12 and 13.

The main issue addressed by the Drafting Committee in performing the technical revision of the texts had pertained to the use of brackets around the word “natural” in several of the draft principles. The brackets had been included in order to indicate that the Drafting Committee had yet to decide whether the term “environment” or “natural environment” should be used throughout the text, or whether “natural environment” should be used only when the principle related to the “natural environment” during armed conflict, the term that was used in the law of armed conflict. Further information on the discussion of the issue could be found in the statement made by the Chairman of the Drafting Committee in 2015 (A/CN.4/SR.3281).

The Drafting Committee had decided to remove the brackets in the text and to indicate in a footnote that the issue of terminology, which had substantive implications, would have to be revisited in the future. The footnote read: “Whether the term ‘environment’ or ‘natural environment’ is preferable for all or some of these draft principles will be revisited at a later stage.”

Furthermore, having noticed some inconsistencies in the text, the Drafting Committee had decided to delete the word “draft” in the heading of Part Two and to insert the word “natural” before “environment” in the title of draft principle 9. The latter adjustment was not intended to prejudice future discussions on which term would ultimately be used in the draft principles.

The Drafting Committee had also observed that the title of Part One had originally been “Preventive measures,” and therefore did not correspond to the content of the section, which would now include not only draft principles dealing with preventive measures but also those having a broader temporal scope. The Drafting Committee had therefore found it appropriate to change the title of Part One from “Preventive measures” to “General principles”. For reasons of consistency, it had decided to entitle the first two introductory provisions “Scope” and “Purpose”.

The Drafting Committee had also completed the consideration of the other draft principles referred to it at the current session; they would be presented at a later meeting. He hoped that the Commission will be able to adopt the draft principles on the protection of the environment as contained in document A/CN.4/L.870/Rev.1.

**The Chairman** invited the members of the Commission to adopt the text of the draft principles provisionally adopted by the Commission in 2015, as technically revised and renumbered by the Drafting Committee.

*Introduction*

*Draft principles 1 and 2*

*Draft principles 1 and 2 were adopted.*

*Part One*

*General principles*

*Draft principle 5*

*Draft principle 5 was adopted.*

*Part Two*

*Principles applicable during armed conflict*

*Draft principles 8 to 10*

*Draft principles 8 to 10 were adopted.*

*Draft principle 11*

**Mr. Murphy** said that draft principle 11 had given rise to some degree of disagreement. Some members had thought it should be worded to indicate that attacks against the natural environment by way of reprisals “should be”, not “are”, prohibited. The reason was that many States had not joined Additional Protocol I to the 1949 Geneva Conventions or had filed a reservation or declaration thereon. In his own view, it was doubtful that a prohibition against reprisals existed under customary international law.

**Mr. Park** and **Sir Michael Wood** supported the statement made by Mr. Murphy.

**Mr. Saboia** said that the prohibition of reprisals in relation to the natural environment was in line with the fact that reprisals in general were subject to a number of restrictions and rules under international law.

**Mr. Hmoud** endorsed that viewpoint. The prohibition of reprisals was part of existing international law and was consonant with the overall objective served by the draft principles, particularly draft principle 4, which called on States to take active measures to protect the environment.

**Mr. Kittichaisaree** said that he agreed with Mr. Murphy’s comments and hoped that, in the commentary to the draft principle, it would be made clear that, while the overall objective of the draft principles was to encourage States to prohibit attacks against the natural environment using reprisals, the main reason for the diverging opinions was that the prohibition of reprisals should not be applicable to non-international armed conflict.

**Mr. Vásquez-Bermúdez** said that he agreed with Mr. Saboia and Mr. Hmoud that the draft principle correctly reflected the current state of international law.

**Mr. Kamto** supported the position outlined by Mr. Saboia and others: reprisals were not permissible under contemporary international law. Whereas self-defence was part of

normal military operations during armed conflict, reprisals were deemed to be an outdated institution that predated the prohibition of the use of force.

**Ms. Escobar Hernández** and **Mr. Forteau** said that they fully supported the position taken by Mr. Saboia and others.

**Ms. Jacobsson** (Special Rapporteur) said that in the commentary, she intended to refer to the diverging views on reprisals. She recalled that 174 States had become parties to Additional Protocol I, with only one State having entered a reservation.

*With those comments, draft principle 11 was adopted.*

*Draft principle 12*

*Draft principle 12 was adopted.*

*The text of the draft principles, as technically revised and renumbered by the Drafting Committee and as contained in document A/CN.4/L.870/Rev.1, was adopted.*

**The Chairman** warmly congratulated the Special Rapporteur on the excellent outcome of the Commission's collective work on the topic.

#### **Draft report of the 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/Add.1)

**The Chairman** invited the members of the Commission to return to their consideration of the portion of Chapter VI contained in document A/CN.4/L.884/Add.1.

**Mr. Nolte** (Special Rapporteur) said that he had worked with Mr. Murphy to develop some amendments to ensure that the subtitles properly summarized the content of each subsection.

**Mr. Kamto** said that since the Commission had little time to deal with such non-substantive matters, they should be left to the Secretariat.

**Sir Michael Wood**, supported by **Mr. McRae**, said that trying to summarize the content of each subsection would be difficult, and it would be better to defer any consideration of the matter until a written proposal could be prepared.

*It was so decided.*

*Commentary to draft conclusion 11 (Decisions adopted within the framework of a Conference of States Parties)* (continued)

*Paragraph (26)* (continued)

**Mr. Nolte** (Special Rapporteur) said that, in consultation with Mr. Murphy, he had drafted the following amendment to the fourth sentence: the phrase "they may produce a legal effect" should read "they may also produce an effect", the words "which then puts the parties" should be deleted, and the words in quotation marks, "under an obligation to give due regard", should be replaced with "and the parties thus should give due regard".

*Paragraph (26), as amended, was adopted.*

**The Chairman** invited the members of the Commission to consider the portion of Chapter VI contained in document A/CN.4/L.884/Add.2.

*Commentary to draft conclusion 1 [1a] (Introduction)**Paragraphs (2) and (3)*

**Mr. Nolte** (Special Rapporteur) said that, after consulting a number of colleagues, he proposed that the final two sentences in paragraph (3) should be moved to paragraph (2), because they related to a matter that was the subject of paragraph (2). They would then read, “The draft conclusions also do not address the interpretation of rules adopted by an international organization, the identification of customary international law or general principles of law. This is without prejudice to the other means of interpretation under article 31, including paragraph 3 (c), according to which the interpretation of a treaty shall take into account any relevant rules of international law applicable in the relations between the parties”. The reformulated version met Mr. Forteau’s concern that the reference should not be to article 31 (3) (c) alone, but should encompass all other means of interpretation. It also made it clearer that, although the draft conclusions did not address the identification of customary international law and other sources of law, those sources should be taken into account for the purpose of interpreting treaties within the context of article 31 (3) (c).

*Paragraphs (2) and (3), as amended, were adopted.*

*Draft conclusion 13 [12] (Pronouncements of expert treaty bodies)**Paragraph 3*

**Mr. Murphy** recalled that, during the debate the previous day, it had been agreed that in the first sentence of draft conclusion 13, paragraph 3, the words “subsequent agreement and subsequent practice” should be amended to read “subsequent agreement or subsequent practice”.

**Mr. Nolte** (Special Rapporteur) said that he was prepared to accept, on an exceptional basis, the amendment of the wording of draft conclusion 13, paragraph 3, as proposed by Mr. Murphy.

*The amendment to draft conclusion 13, paragraph 3, was adopted.*

*Commentary to draft conclusion 13 [12] (Pronouncements of expert treaty bodies)**Paragraph (1)*

**Mr. Nolte** (Special Rapporteur) recalled that Sir Michael Wood had proposed the inclusion of a reference to the Committee on the Rights of Persons with Disabilities in the list of committees established under human rights treaties. He therefore proposed to insert it after the reference to the Committee on the Elimination of All Forms of Discrimination against Women and to add a footnote indicating the relevant article of the convention providing for the establishment of that committee.

**Mr. Murphy** said that as he understood it, the word “important” would be deleted in the second sentence. It might be more appropriate to place footnote 7 at the end of the first sentence, where it would become footnote 3. The footnotes would then require renumbering.

**Mr. Kamto** said that in the French version of the text, the phrase “*sont chargés de surveiller ou de favoriser*” should read, “*sont chargés de veiller ou de contribuer*”.

**Ms. Escobar Hernández** said that the text would be improved by the inclusion of a reference to the Committee on the Rights of the Child in view of the General Assembly’s recognition of the increasingly important role being played by that committee.

**Mr. Nolte** (Special Rapporteur) agreed to the inclusion of the aforementioned reference, the deletion of the words “important” and the renumbering of the footnotes. He further suggested the deletion of the word “significant” in the third sentence.

*Paragraph (1), as thus amended, was adopted.*

*Paragraphs (2) and (3)*

*Paragraphs (2) and (3) were adopted.*

*Paragraph (4)*

**Mr. Forteau** queried the explanation in the third sentence of why the organs of international organizations had been excluded from the scope of draft conclusion 13. He suggested that a more convincing reason should be given than the fact that “the present draft articles are focused on elucidating the rules of interpretation of the Vienna Convention”.

**Mr. Murphy**, referring to the fourth sentence, said he was worried that the inference to be drawn might be that, in some situations, the draft conclusions would apply to the pronouncements of expert bodies that were organs of international organizations. He would prefer to delete the sentence.

**Mr. Park** endorsed that remark.

**Sir Michael Wood** proposed the deletion of the bracketed words in the second sentence “the members of which may or may not be free from governmental instruction”. He was in favour of retaining the fourth sentence, subject to the replacement of “draft conclusions” with “draft conclusion”. The phrase “in substance and *mutatis mutandis*” could be deleted.

**Mr. Saboia** said that he regretted that some important organs of international organizations comprising independent experts, such as the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization, had not been mentioned at that point. He therefore strongly backed Sir Michael Wood’s proposal.

**Mr. Vázquez-Bermúdez** said that the fourth sentence of paragraph (4) was useful. While it did not belabour the issue, it made it clear that draft conclusion 13 could apply to the pronouncements of expert bodies that were organs of international organizations. He supported the deletion of “*mutatis mutandis*”.

**Mr. Nolte** (Special Rapporteur) said that he accepted Sir Michael’s proposal to delete the text in brackets in the second sentence, to replace the words “draft conclusions” with “draft conclusion” in the fourth sentence and to delete the phrase “in substance and *mutatis mutandis*”. He would prefer to retain the remainder of the fourth sentence for the reasons given by Mr. Saboia and Mr. Vázquez-Bermúdez. In response to Mr. Forteau, he proposed two solutions: the first would consist in deleting the final part of the third sentence, as from the word “since”; the other possibility would be to complete the sentence with the phrase “since the present draft conclusions are not focused on the relevance of international organizations for the interpretation of treaties”.

**Mr. Forteau** suggested that an alternative solution might consist in combining the third and fourth sentences to read: “The decision to limit the scope of draft conclusion 13 to expert treaty monitoring organs was taken because they are competent in respect of a particular treaty and the primary purpose of this draft conclusion is to clarify the rules applicable to the interpretation of treaties” [*La décision de limiter le champ d’application du projet de conclusion 13 aux organes conventionnels d’experts a été prise car ceux-ci*

*sont compétents à l'égard d'un traité particulier et car la présent projet de conclusion vise avant tout à clarifier les règles applicables à l'interprétation des traitées].*

**Mr. Nolte** (Special Rapporteur) said that the wording proposed by Mr. Forteau presupposed a decision which had not been taken and it was not the moment to define the scope of the draft conclusions.

**Mr. Murphy** said that, if the fourth sentence were retained, the Commission should make it quite clear throughout the paragraph that it was talking about expert treaty bodies which were organs of international organizations, and that it thought that an expert body such as the Air Navigation Commission of the International Civil Aviation Organization could *mutatis mutandis* fall within the scope of draft conclusion 13. The conclusion had been crafted with a particular type of body in mind. He was therefore bothered that the Commission was implying that the whole set of draft conclusions could apply to the organs of all international organizations.

**Mr. Kamto** said that the simplest answer would be to delete the third sentence, since any attempt to reformulate it would reopen the debate which the Special Rapporteur wished to avoid. Neither Mr. Forteau's proposal nor that of the Special Rapporteur solved the problem. If the sentence was truncated in the manner proposed by the Special Rapporteur, the reader would still not understand the formal reasons. If the sentence were deleted, however, the paragraph would read well.

**Mr. Nolte** (Special Rapporteur) said that he accepted Mr. Kamto's proposal. Paragraph (4) was the only place in the commentary where the term "expert body" had been used to distinguish between the Committee of Experts on the Application of Conventions and Recommendations and human rights treaty bodies.

**Mr. Hmoud** said that he was in favour of deleting the fourth sentence and of retaining the reference to "draft conclusions" in the previous sentence.

**Sir Michael Wood** said that it might be best to recast the first sentence, through the insertion of the word "similar", so that it read: "Draft conclusion 13 also does not apply to similar bodies that are organs of an international organization". That would make it clear that the paragraph referred to bodies that were similar to treaty bodies but were not organs of an international organization. The fourth sentence could be made clearer by the replacement of the phrase "the present draft conclusion may apply, in substance and *mutatis mutandis*, to pronouncements of expert bodies" with "the substance of the present draft conclusion may apply *mutatis mutandis* to pronouncements of expert bodies".

**Mr. Saboia** concurred with Sir Michael Wood's proposals. He suggested the insertion of the adjective "independent" before "expert bodies" in the fourth sentence.

**Mr. Vázquez-Bermúdez** supported the idea of talking about "similar" bodies that were part of an international organization. Experts might serve in their personal capacity, but an expert body itself was nonetheless an organ of an international organization.

**The Chairman** said that he took it that the Commission wished to request the Special Rapporteur to recast the paragraph and to resubmit it to the Commission later in the meeting.

*It was so decided.*

*Paragraph (5)*

**Sir Michael Wood** suggested that, in the second sentence, the phrase "there are also certain borderline cases" should read "there may also be borderline cases".

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Mr. Kamto** suggested the removal of the brackets in the first sentence.

*Paragraph (6) was adopted with that editorial correction.*

*Paragraph (7)*

**Sir Michael Wood** noted that no mention was made, in the second sentence, of article 33 of the Vienna Convention, although articles 31 and 32 were cited. In order to remedy that omission, he suggested that the phrase “rules on treaty interpretation according to articles 31 and 32 of the Vienna Convention” could be amended to read “rules on treaty interpretation set forth in the Vienna Convention”.

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

*Paragraph (8)*

*Paragraph (8) was adopted.*

*Paragraph (9)*

**Mr. Kamto**, supported by **Mr. Murphy**, said that for the sake of clarity, a new third sentence should be added, because the quotation at the end of the paragraph did not confirm the thesis contained in the first sentence, but rather set out the position of the Human Rights Committee. The new sentence could read, “The proposition of the Human Rights Committee was:”.

**Mr. Hmoud** suggested the deletion of the phrase “in and of itself” in the first sentence, because it created doubts as to whether, in some circumstances, the pronouncement of an expert treaty body might indeed constitute subsequent practice under article 31 (3) (b). In the same sentence, he proposed the insertion of the words “of the parties” between the words “subsequent practice” and “that establishes the agreement”.

**Mr. Nolte** (Special Rapporteur) agreed to insert the sentence “The proposition of the Human Rights Committee was:” before the quotation, as proposed by Mr. Kamto and Mr. Murphy. The purpose of the phrase “in and of itself” was to distinguish the pronouncement itself and its possible legal effect from the legal effect that a pronouncement might produce together with, and in interaction with, the subsequent practice of the parties. It could be replaced with “as such”. He could likewise agree to Mr. Hmoud’s proposal to insert the words “of the parties” after “subsequent agreement” in the first sentence.

*Paragraph (9), as amended, was adopted.*

*Paragraphs (10) and (11)*

**Mr. Forteau** said that paragraphs 11 and 13 of general comment No. 33 of the Human Rights Committee, cited in paragraph (10), contained strong assertions. Given the uncertainty of the extent to which those assertions had been accepted by the international community, it might be wiser to delete them and retain only the first sentence of paragraph (10).

**Mr. Saboia** said that the International Court of Justice had referred to the general comments of treaty bodies as containing elements of an authoritative expression of how certain provisions of human rights treaties were to be understood. Citing the two paragraphs of general comment No. 33 helped to shed light on the matter, and he was in favour of retaining both in the commentary.

**Sir Michael Wood** suggested that it might be appropriate to cite only paragraph 11 of the general comment, which contained the essence of the Human Rights Committee's reasoning on the reversal of its original proposition.

**Mr. Nolte** (Special Rapporteur) said that he was willing to accept Sir Michael Wood's proposal in order to achieve consensus.

**Mr. Kamto** said that, by including the quotations, the Commission was not taking a position, it was merely citing a document that already existed. In his view, the Commission's only options were to cite both paragraphs or not to cite either of them.

**Mr. Forteau** said that the purpose of paragraphs (9) to (11) of the commentary was to explain that the Human Rights Committee had initially stated in draft general comment No. 33 that its own "general body of jurisprudence" constituted subsequent practice, but that it had ultimately withdrawn that statement in the final version of the general comment. Seen from that perspective, both quotations that appeared in paragraph (10) were irrelevant. In particular, by retaining the quotation of paragraph 13 of the general comment, the Commission appeared to be endorsing the Human Rights Committee's position, which could be seen as contradicting the Commission's later reference to the International Court of Justice and the slightly different weight the Court gave to the Committee's jurisprudence.

**Mr. Kamto** said that he supported the deletion of the two quotations, but not because the Commission disagreed with the Human Rights Committee's position that its Views represented an authoritative determination. That statement appeared in the final version of draft comment No. 33, and had received the approval of States parties to the International Covenant on Civil and Political Rights.

**Mr. Saboia** said he agreed with Mr. Kamto's arguments on the substance and with the various speakers who favoured the deletion of the two quotations in paragraph (10).

**Mr. Nolte** (Special Rapporteur) said he could accept Mr. Forteau's proposal to delete the two quotations but suggested that they should be included instead in footnote 31.

*It was so decided.*

**Mr. Murphy** suggested that it might be useful to combine paragraphs (10) and (11), which were related, rather than to have two one-sentence paragraphs.

**Mr. Hmoud** proposed, in paragraph (11), to replace the phrase "in and of themselves" with "as such".

**Mr. Nolte** (Special Rapporteur) agreed with Mr. Hmoud's proposal.

*That proposal was adopted.*

**Mr. Kamto**, supported by **Mr. Saboia**, proposed that, in paragraph (11), the word "incident" should be replaced with "example".

**Mr. Nolte** (Special Rapporteur) suggested that the word "incident" should simply be deleted.

*It was so decided.*

**Mr. Nolte** (Special Rapporteur) proposed that the merger of paragraphs (10) and (11) should read: "When this proposition was criticized by some States,<sup>30</sup> the Committee did not pursue its proposal and adopted its general comment No. 33 without a reference to article 31, paragraph 3 (b).<sup>31</sup> This confirms that pronouncements of expert treaty bodies cannot, as such, constitute subsequent practice under article 31, paragraph 3 (b)."

*Paragraphs (10) and (11), as thus amended, were adopted.*

*Paragraph (12)*

**Sir Michael Wood** suggested that, in the second sentence, the word “many” before “authors” should be replaced by “a number of”, as he doubted that there were many authors who had recognized the possibility referred to in paragraph (12).

**Mr. Kamto** proposed that, in the second sentence, the words “by the Commission” should be transposed with the words “by States” and that the words “but also” [*mais aussi*] should be inserted before the words “by the International Law Association”.

**Mr. Nolte** (Special Rapporteur) said he agreed with the idea of making a distinction between the Commission and States on the one hand and the International Law Association and the authors on the other, and also with the proposal to list States first; however, he rejected the proposal for the insertion of the words “but also”, suggesting instead the insertion of the words “and also”. He could not agree with Sir Michael Wood’s proposal, as he was absolutely certain that a majority of authors supported the possibility referred to in the second sentence.

Following a discussion in which **Sir Michael Wood, Mr. Saboia, Mr. Murphy, Mr. Candiotti** and **Mr. McRae** took part, **Mr. Nolte** (Special Rapporteur) suggested the replacement of the word “many” with “a significant number”.

*It was so decided.*

**Mr. Forteau** suggested that, in footnote 33, the words “for example” should be inserted after “See”.

**Mr. Nolte** (Special Rapporteur) said that he supported that proposal and that the second sentence of paragraph (12) should be reformulated to read: “This possibility has been recognized by States, by the Commission and also by the International Law Association and by a significant number of authors.”

*It was so decided.*

*Paragraph (12), as amended and with the amendment to footnote 33, was adopted.*

*Paragraph (13)*

**Mr. Kamto** proposed that, in the first sentence of the French version, the word “*envisageable*” should be replaced with “*atteignable*”.

*Paragraph (13) was adopted with that amendment to the French text.*

*Paragraph (14)*

**Mr. Forteau** proposed that, in the first sentence, the expression “in connection with” [*en relation avec*] should be replaced with the words “which is reflected in” [*telle que reflétée*], so as to maintain consistency with the use of the word “reflect” in the final sentence.

**Mr. Park** pointed out that in the final sentence, a logical contradiction was introduced in the clause beginning “and hence would reflect ...”. That clause referred back to General Assembly resolutions, whereas the footnote to the sentence referred to the conferences of States Parties that were covered in draft conclusion 11. Paragraph 1 of draft conclusion 11 stated: “A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.” The last clause of paragraph 1 thus contradicted the assertion made in the final sentence of paragraph (14).

**Mr. Nolte** (Special Rapporteur) said that, in its work on the topic of the identification of customary international law, the Commission had considered the resolutions of international organizations not only as acts by the organs of an international organization but also as reflecting the views of States. The same could apply in the current topic.

**Mr. Park** said that he had doubts as to whether the two topics could be assimilated in that manner, and his concerns about the final sentence were not allayed.

**Mr. Nolte** (Special Rapporteur) explained that he had referred to the topic of identification of customary international law to illustrate a more general point, namely that, in the General Assembly, States acted as members of an organ of an international organization but they also acted in their own capacity as States when making certain statements or expressing their views.

**Mr. Murphy** proposed that, in the final sentence, which was somewhat ambiguous, the words “in substance of” should be replaced with “by” and the words “of the interpretation that is contained in the pronouncement” should be added after the word “parties”. The clause would then read: “if the consensus constituted the acceptance by all the parties of the interpretation that is contained in the pronouncement”.

**Mr. Nolte** (Special Rapporteur) said that he could accept the proposals made by Mr. Forteau and Mr. Murphy.

*Paragraph (14), as amended by Mr. Forteau and Mr. Murphy, was adopted.*

*Paragraph (15)*

**Mr. Murphy** suggested that, in the first sentence, the word “human” should be inserted before the word “right”. In the second sentence, the phrase “the right to water” should be replaced with “the human right to safe drinking water”. In the final sentence, the words “actually implies” should be replaced with “constituted”.

**Mr. Kamto**, referring to the final sentence, said that when a consensus was reached on a resolution, that might simply mean that certain States had abstained from taking a contrary position in order to facilitate the consensus, not necessarily that all parties had acquiesced to the language contained in the resolution.

**Sir Michael Wood** said that Mr. Kamto’s point might stem from a problem of translation, since the word used in the English version was “acceptance”, while that used in French was “*acquiescement*”, the closest equivalent of which in English was “acquiescence”.

**The Chairman** suggested that the Special Rapporteur should confer with Mr. Kamto in order to find a solution to the problem.

*Paragraph (15) was adopted, subject to the requisite editorial adjustments by the Special Rapporteur.*

*Paragraphs (16) to (19)*

*Paragraphs (16) to (19) were adopted.*

*Paragraph (20)*

**Mr. Forteau** said that footnote 54 did not appear to be relevant to paragraph (20).

**Mr. Nolte** (Special Rapporteur) said that he would check the content of the material quoted in the footnote.

*Paragraph (20) was left in abeyance.*

*Paragraph (21)*

*Paragraph (21) was adopted.*

*Paragraphs (22) to (36)*

**Mr. Murphy** said that, in his view, the section of the commentary relating to paragraph 4 of draft conclusion 13 — a “without prejudice” clause providing that the draft conclusion was without prejudice to the contribution that a pronouncement of an expert treaty body might make to the interpretation of a treaty — was excessively long. While it was appropriate to briefly explain that clause, it was not necessary to go into depth about the contributions of expert treaty bodies. There had been a rather extensive debate in the plenary, in which differing views had been expressed about the significance of treaty body pronouncements in relation to the topic, and the extremely lengthy commentary on that point might not necessarily be agreeable to all members. He wondered whether it might be possible simply to keep paragraph (21) as a basic explanation of the “without prejudice” clause and to delete paragraphs (22) to (36). Those interested in further analysis could always consult the Special Rapporteur’s report.

**Mr. Nolte** (Special Rapporteur) said that he disagreed with Mr. Murphy about the content of the plenary debate. The debate had been about whether or not the pronouncements of expert treaty bodies came under the scope of the topic, and it had been decided to adopt a “without prejudice” clause in order to leave the question open. It had been a compromise on his part not to insist on dealing with that aspect as being unquestionably part of the topic. The commentary served to explain the two main views expressed, which should be made known to States and, if need be, addressed on second reading.

**Mr. Forteau** said that, bearing in mind the position he had adopted in the plenary debate, he tended to agree with Mr. Murphy’s somewhat radical proposal. He recalled that it had been made clear in the statement of the chairman of the Drafting Committee that, in draft conclusion 13, paragraph 4, the Commission was not taking a position on the independent effect that the pronouncements of treaty bodies could have. However, it seemed that several of pages of commentary had been devoted to describing the possible effects of such pronouncements. It might be possible to find some middle ground, perhaps by deleting paragraphs (24) to (28), which went into too much detail on the doctrinal debates on the value of pronouncements of treaty bodies, while maintaining paragraphs (21) to (23), which recalled in general terms the weight that the pronouncements of treaty bodies could have, and paragraphs (29) onwards, which were useful in that they explained the debate in the Commission.

**Sir Michael Wood** said that he shared Mr. Forteau’s concern that the commentary was disproportionately long for a “without prejudice” clause. It was reasonable to explain that the Commission had discussed whether the issue of treaty body pronouncements fell within scope of topic. However, it was not necessary to discuss the substance of the issue at length. In his view, something along the lines of Mr. Forteau’s proposal would accurately reflect the decision that had been taken to have a “without prejudice” clause.

**Mr. Saboia** said that he supported the Special Rapporteur’s position: the “without prejudice” clause represented an agreement not to take a definitive decision on the issue, as noted in paragraph (35) of the commentary, which stated that, ultimately, the Commission had decided to limit itself, for the time being, to formulating a “without prejudice” clause in paragraph 4 of draft conclusion 13. He agreed with others that perhaps only a selection of

the paragraphs needed to be retained, but such a selection would have to be made in agreement with the Special Rapporteur.

**Mr. Park** said that he agreed with the Special Rapporteur's reasoning, as paragraphs (21) to (36) provided an in-depth account of the debate in the plenary. He would therefore be in favour of keeping the commentary as it was, but would not object to shortening it somewhat, within reason.

**Mr. Šturma** said that he supported the views of Mr. Saboia and Mr. Park. If the commentary were to be shortened, it should be for the Special Rapporteur to make the relevant proposal to the Commission; it was not appropriate to make such decisions on the spot.

**The Chairman** said that, in his view, the proposed methodology of simply cutting out parts of the commentary was somewhat disturbing, but the Commission should allow itself to be guided by the Special Rapporteur on how best to proceed.

**Mr. Nolte** (Special Rapporteur) said that, if given some time, he would be prepared to look at the commentary to paragraph 4 with a view to identifying possible cuts.

**Mr. Murphy** said that he would be happy to go along with the Special Rapporteur's proposal to try to find some middle ground. In preparing a revised draft, however, the Special Rapporteur must address the problem that in paragraph (36), a clear position was taken as to the weight that should be given to the pronouncements of treaty bodies, which was precisely what the Commission had decided not to do.

*Paragraphs (22) and (23)*

*Paragraphs (22) and (23) were adopted.*

*Paragraphs (24) and (25)*

**Mr. Forteau** said that paragraphs (24) and (25) addressed an issue, namely the permissibility of reservations, which was unrelated to that covered in paragraph 4 of draft conclusion 13. He therefore believed that paragraphs (24) and (25) should be deleted.

**Mr. Nolte** (Special Rapporteur) said that he did not agree with Mr. Forteau's reasoning; however, he would not insist on keeping the two paragraphs in the commentary.

**Mr. Murphy** said that, in his view, the reason for deleting them was that they were simply not germane to the topic. It was disproportionate to allocate so much commentary to an extensive analysis of something that was not actually addressed in the conclusion itself.

**Mr. Saboia** said that he supported the Special Rapporteur's position.

After a discussion in which **Mr. Forteau**, **Mr. Hmoud**, **Mr. Murphy**, **Mr. Nolte** and **Mr. Tladi** took part, **the Chairman** suggested that the remaining paragraphs should be held in abeyance while the Special Rapporteur drafted a revised version of paragraphs (24) to (36) of the commentary, taking into account the points made by several members.

*It was so decided.*

**Mr. Forteau** stressed that it was not a question of merely rearranging the paragraphs of the commentary; the issue was that, as the paragraphs were currently drafted, the Commission was taking a position on the effects of the pronouncements of treaty bodies. It was thus a substantive problem.

**Mr. Nolte** (Special Rapporteur) said that he would endeavour to take account of the views expressed, but that the Commission should not try to go back on its previous decision on the reasons for adopting a "without prejudice" clause.

**The Chairman** said that the Commission would be able to discuss all of the substantive issues involved once it had a new draft of paragraphs (24) to (36) of the commentary.

*The meeting rose at 1 p.m.*