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Provisional summary record of the 3340th meeting
Held at the Palais des Nations, Geneva, on Monday, 8 August 2016, at 3 p.m.

Contents

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1614013

Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Ms. Jacobsson
	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 3 p.m.

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

Chapter V. Identification of customary international law (*continued*) (A/CN.4/L.883 and Add.1)

The Chairman invited the Commission to resume its consideration, paragraph by paragraph, of the portion of chapter V of the draft report contained in document A/CN.4/L.883/Add.1. He proposed beginning with footnote 78 in the commentary to draft conclusion 11, the adoption of which had been left in abeyance.

Commentary to draft conclusion 11 (Treaties)

Sir Michael Wood (Special Rapporteur) said that, upon verification, the judgment rendered by the Special Court for Sierra Leone in *Prosecutor v. Sam Hinga Norman*, which was cited in footnote 78, confirmed that the proposals made by Mr. Murphy at the previous meeting were well founded. The footnote should therefore be amended by replacing the reference to paragraphs 18 to 20 with a reference to paragraphs 17 to 20 and, in the text in brackets, by inserting the word "relevant" before "provisions" and by replacing the words "have come" with "had come".

Mr. Saboia asked about the status of ratification of the Convention on the Rights of the Child and whether the judgment in question indicated explicitly that the "relevant" provisions of the Convention reflected customary international law.

Sir Michael Wood (Special Rapporteur) said that, in the judgment in question, which it had rendered in 1996, the Special Court indicated that the Convention on the Rights of the Child had at that time been ratified by 193 States. The Court went on to note that the Convention was the most widely accepted of all international conventions and concluded that its provisions had become rules of customary international law almost from the moment of its entry into force. Since it was clear from the judgment, when read as a whole, that the Convention had been considered only from the perspective of the obligation not to recruit children into the armed forces, which was set out in article 38 of the Convention, an article cited explicitly by the Special Court, it would be going too far to say that the conclusion reached by the Special Court applied to all the provisions of the Convention, hence the inclusion of the adjective "relevant" before the word "provisions".

Mr. Saboia said that he would not object to the proposed amendments, although his reading of the judgment in question differed from the Special Rapporteur's, which, in his view, was overly restrictive.

Footnote 78, as amended by the Special Rapporteur, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

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

Commentary to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte proposed deleting, in the first sentence, the words "States within", because it was not States but rather international organizations, as subjects of international law, which adopted the resolutions, decisions and other acts referred to in paragraph (2).

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Murphy proposed that, in the final sentence, the words "along with general statements and explanations of positions", set off by commas, should be inserted after the word "consensus".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Murphy said that the statement in footnote 97 that the formulation "*Affirm[ed]* that genocide is a crime under international law" in General Assembly resolution 96 (I) "suggests that the paragraph is declaratory of existing customary international law" went too far; he proposed nuancing it by replacing the word "suggests" with "may suggest".

Mr. Kittichaisaree said that General Assembly resolution 96 (I) recognized genocide as a crime under international law and reflected the will to develop a convention to prevent and suppress genocide. He thus saw no reason to amend the footnote in the manner proposed by Mr. Murphy.

Sir Michael Wood (Special Rapporteur), concurring with Mr. Kittichaisaree, said that the word "suggests" was already very weak and that he would have preferred a more assertive verb such as "indicates". Consequently, he considered that the current formulation should constitute a compromise acceptable to Mr. Murphy.

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Murphy said that, whereas draft conclusion 12, paragraph 3, stressed that a provision in a resolution adopted by an international organization could reflect a rule of customary international law, paragraph (8) of the commentary, which was supposed to explain that provision, referred to the resolution as a whole. That inconsistency should be remedied.

Sir Michael Wood (Special Rapporteur) agreed with Mr. Murphy that the commentary should be brought into line with draft conclusion 12, paragraph 3, and, to that end, proposed that the words "provisions of" should be inserted before "resolutions" in the first sentence and that the final sentence should begin with the words "A provision of a resolution" instead of "A resolution".

Paragraph (8), as amended, was adopted.

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

Commentary to draft conclusion 13 (Decisions of courts and tribunals)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Nolte said that the structure of the first sentence should be clarified, as the word "those" could refer to "decisions", "courts and tribunals" or "questions". In addition, the words "and other courts" should be inserted at the end of the second sentence, as the value of decisions on issues of international law depended not only on the reaction of States, but also on the reaction of courts other than those that had rendered them.

Sir Michael Wood (Special Rapporteur) said that the word "those" in the first sentence referred to "decisions" and that the word "decisions" should perhaps be repeated in order to avoid confusion. He endorsed Mr. Nolte's proposed addition to the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Forteau said that it was strange that the definition of the term "decisions" in the first sentence did not contain a reference to judgments; he therefore proposed that the word "judgments" should be inserted at the beginning of the list of examples.

Sir Michael Wood (Special Rapporteur) endorsed the proposal. The sentence would thus read: "… the term 'decisions' includes judgments and advisory opinions, as well as orders …"

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Forteau said that the words "and are less likely to reflect a particular national interest" in the third sentence gave the impression that the independence of national courts was being questioned and that those words should be deleted.

Mr. Nolte said that he did not interpret that phrase in the same way as Mr. Forteau; in his view, there was no reason for it to be deleted.

Ms. Escobar Hernández said that an option might be to replace the word "interest" with "perspective".

Mr. Forteau said that he would not insist on the deletion of the phrase, although he was not sure that he understood what a national "perspective" would be.

Mr. Saboia said that, unlike the word "interest", which had strong connotations, the word "perspective", proposed by Ms. Escobar Hernández, did not suggest that the Commission was questioning the independence of national courts and was thus a good solution.

Mr. McRae said that replacing the word "interest" with "perspective" would change the meaning of the sentence; it was for the Special Rapporteur to decide which was the more apposite word.

Sir Michael Wood (Special Rapporteur) said that the word "perspective" conveyed the idea that he was seeking to express more clearly than the word "interest", as it was true that, when a national court had to decide on a rule of international law, it should not take national interests into account in the sense that it should not be biased, but nothing prevented it from adopting a national perspective. He therefore agreed with the proposal to replace the word "interest" with "perspective".

Paragraph (7), as amended, was adopted.

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

Commentary to draft conclusion 14 (Teachings)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nolte, noting that the function of teachings was not limited to compiling State practice, proposed replacing the words "in systematically compiling State practice" with "in collecting and assessing State practice" and deleting the words "and synthesizing it".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nolte proposed the deletion, in the first sentence, of the word "markedly", which was unnecessary, since it was noted later in the paragraph that teachings could differ "greatly" in quality.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Nolte said that, while it was certainly important to consult sources that were as representative as possible, care should be taken not to discourage the use of teachings as a subsidiary means for the determination of rules of customary international law by suggesting that teachings could be invoked only if they were representative of all regions of the world because it would be simply impossible to satisfy such a condition. He thus proposed deleting the last sentence.

Mr. Tladi, supported by **Messrs. Vázquez-Bermúdez**, **Saboia**, **Hmoud** and **Wako**, said that Mr. Nolte's concern was groundless because the last sentence did not set out a requirement to take into account the writings of all regions, as was shown by the words "so far as possible". He was therefore opposed to the proposed deletion.

Mr. Nolte said that his proposal was intended only to ensure that the use of teachings was not discouraged, but, as several Commission members seemed convinced that the sentence in question posed no risk in that regard, he would not insist on its deletion.

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez said that, as the second introductory paragraph of Part Five already set out in detail the reasons why the Commission's work carried particular weight, paragraph 6 was superfluous and should therefore be deleted.

Paragraph (6) was deleted.

Part Six

Persistent objector

Introductory text

Mr. Nolte proposed replacing, in the first sentence, the words "may be exempt" with "is exempt", since that sentence reflected the persistent objector rule as set out in draft conclusion 15 (1), which stated that a rule of customary international law to which a State had persistently objected while that rule was in the process of formation "was not opposable to the State concerned".

Mr. Park said that he had concerns about the term "rule", as used in the expression "persistent objector rule". He considered that the Commission should adopt a more measured approach and that it would be preferable to speak simply of "persistent objector", for three reasons: first, because Part Six was entitled simply "Persistent objector"; secondly, because, for some jurists, it was not a rule, but rather a doctrine; and, lastly, because Commission members held divergent views on the matter. If it was decided that the term

"rule" should be retained, he would like it to be noted in the summary record that he deemed it preferable to speak of "persistent objector".

Mr. Petrič said that he shared Mr. Park's view and that that he too would like his position to be noted in the summary record.

Mr. Saboia said that he endorsed Mr. Park's proposal on the very controversial issue under consideration. It would indeed be better to delete the introductory text in its entirety.

Mr. Murase said that he had reservations regarding the second sentence of the introductory text. The "persistent objector rule" was not a question of the identification of customary international law, but a question of its application, a fact that should be made clear.

Mr. Šturma said that he shared the concerns expressed by Messrs. Park and Petrič and proposed replacing the word "rule" with "doctrine" or "concept".

Ms. Jacobsson said that she shared the views expressed by Messrs. Park and Saboia, among others. She had serious concerns about the introductory text, which should be deleted.

Mr. Kittichaisaree proposed that the first sentence should be reformulated to read: "Part Six comprises a single draft conclusion, which concerns the situation in which a State has persistently opposed an emerging rule of customary international law."

Mr. McRae said that he endorsed the proposals made by Messrs. Kittichaisaree and Šturma. He proposed replacing, in the first sentence, the word "rule" with the word "concept" and deleting the words that followed.

Sir Michael Wood (Special Rapporteur) said that he agreed that it was not necessary to include so much detail in the introductory text, but believed that, for the sake of consistency, there should be an introductory text. He proposed that the first sentence should be reformulated to read: "Part Six comprises a single draft conclusion, on the persistent objector." The rest of the paragraph should be deleted.

The introductory text, as amended, was adopted.

Commentary to draft conclusion 15 (Persistent objector)

Paragraph (1)

Mr. Murase said that, in the penultimate sentence, the words "will not be bound by it" should be replaced with "will not be applicable to it". In addition, he proposed inserting a sentence that would read: "This is not a question of identification of customary international law, but of its application; nonetheless, the Commission considered it appropriate to refer to the concept."

Mr. Vázquez-Bermúdez said that, like Mr. Murase, he considered that the word "bound" did not belong in the draft conclusion. He proposed replacing the words "will not be bound by it" with "that rule is not opposable to it" to reflect the language used in draft conclusion 15 (1).

Mr. Petrič said that he agreed with Mr. Vázquez-Bermúdez. In addition, he proposed deleting the last sentence of the paragraph.

The Chairman said that the last sentence was a synthesis of the whole paragraph.

Mr. Saboia proposed that either the last sentence should be deleted or the word "rule" should be replaced with "concept". Furthermore, consideration should be given to Mr. Murase's proposal to insert a sentence explaining that it was not a question of the identification of customary international law.

Mr. Nolte said that the meaning of the word "opposable" should be explained to the reader. If a rule was not opposable to a State, that of course meant that it was not applicable to that State, but that did not preclude the rule from actually existing. It was thus a question of the scope of application *ratione personae*. Regarding the term "rule", persistent

objection did not stop being a rule simply because the Commission did not describe it as one. Draft conclusion 15 clearly set out a rule. He thus had no objection to retaining the current wording of the paragraph. It could be reformulated to some extent in the light of the various proposals that had been made, but there was no reason to reopen a substantive debate on the matter.

The Chairman said that he shared Mr. Nolte's view.

Mr. Park recalled that it had been decided to delete, in the introductory text, the term "rule"; the same should be done in the last sentence of paragraph (1).

Mr. Murphy said that he had no objection to leaving the text as it currently stood. However, he noted that, if the proposal by Mr. Vázquez-Bermúdez were implemented, it would be necessary to reformulate the second sentence of the paragraph by replacing the words "a State that" with "when a State". With regard to Mr. Murase's comments, he agreed that persistent objection was not strictly a matter of the identification of customary international law. While he was not convinced that it was necessary to include a statement to that effect, he was not opposed to the idea. As for the last sentence, if it was decided that it should be retained, the word "commonly" should be replaced with "sometimes", the word "rule" should be placed within quotation marks and the words "or 'doctrine'" should be inserted after that word.

Mr. Nolte said that persistent objection was clearly a question of the identification of customary international law, as it involved the identification of the scope of application of rules. He was not convinced that the addition proposed by Mr. Murase should be included.

Mr. Tladi said that, like Mr. Nolte, he considered that, as it was worded, draft conclusion 15 set out a rule. The debate on the question indicated that there had been no agreement in the plenary as to whether that rule was well grounded in practice; he noted that it was not indicated in the commentary, as was often done on first reading, that the issue gave rise to differences of opinion among Commission members.

Sir Michael Wood (Special Rapporteur) said that he endorsed the proposal by Mr. Vázquez-Bermúdez to reformulate the second sentence of paragraph (1) to speak of non-opposability, provided that the additions proposed by Mr. Murphy were also included. With regard to the last sentence, he would prefer to replace the word "commonly" with "often" rather than with "sometimes", but he was not opposed to that last term. He also endorsed Mr. Murphy's proposal to refer to a "'rule' or 'doctrine'". The point raised by Mr. Murase was relevant, but he considered that persistent objection was certainly part of the identification of customary international law, insofar as it was linked to the identification of the scope of application of the rules of customary international law. For that reason, he would prefer that the sentence should be amended to read: "This is not just a question of identification of rules of customary international law, but relates in particular to their scope *ratione personae*."

Mr. McRae proposed inserting a sentence at the end of the paragraph that would read: "This is commonly referred to as the persistent objector 'rule' or 'doctrine' and not infrequently arises in connection with the identification of rules of customary international law."

Mr. Nolte noted that the placement within quotation marks of the word "rule", rather than the entire expression "persistent objector rule", would suggest that it was not a rule.

Mr. Petrič said that, if the last sentence of the paragraph had a pedagogical function, a footnote should be inserted in which two or three jurists who characterized persistent objection as a rule were cited.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Murphy's reformulation of the last sentence and that he endorsed Mr. McRae's proposal. He considered that it was better to place only the term "rule" in quotation marks so as to take account of differences of opinion on the matter.

Paragraph (1), as amended by Mr. Murphy, Mr. McRae and Mr. Vázquez-Bermúdez, was adopted.

Paragraph (2)

Mr. Kittichaisaree proposed that, in the second sentence, the words "and may facilitate the development of customary international law" should be deleted; however, footnote 108 should be retained.

Mr. Murphy said that the intention was to express the idea that the existence of such a concept allowed for an interaction among States that could help develop a rule of law, so as to prevent a situation where some States might decide to opt out of such a rule. With regard to footnote 108, the word "possibility" should be replaced with "ability".

Mr. Vázquez-Bermúdez said that it would be better to delete the second sentence. The question of the nature of customary international law was not part of the present topic and would require more in-depth analysis. Moreover, footnote 108 did not support the second part of the sentence, to which it was attached, and risked causing confusion.

Mr. Park proposed replacing, in the first and second sentences, the word "rule" with "'rule' or 'doctrine'".

Mr. Saboia said that he agreed with Mr. Vázquez-Bermúdez that it would be preferable to delete the entire sentence.

Sir Michael Wood (Special Rapporteur) proposed replacing, in the first sentence, the words "the persistent objector rule" with "the persistent objector". He had no objection to the deletion of the second sentence, but it would be useful to retain the content of footnote 108, which could be inserted at the end of footnote 109. The word "possibility" would be replaced with "ability", as Mr. Murphy had proposed, and the rest of the wording, including the word "rule", would be retained as it appeared in the sentence.

Mr. Murphy said that, if the second sentence were deleted, it would be possible to merge the two remaining sentences into one by inserting a comma followed by the conjunction "and" and deleting the expression "in any event".

It was so decided.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were adopted.

Paragraph (10)

Mr. Vázquez-Bermúdez proposed adding the words "or obligations *erga omnes*" after "of *jus cogens*", as it had been decided to exclude obligations *erga omnes* from the scope of the draft conclusions.

Mr. Nolte said that he was not sure that it had been decided to exclude all aspects of *erga omnes* obligations from the scope of the draft conclusions. A significant number of rules of customary international law could in fact give rise to *erga omnes* obligations, and it would desirable to take those obligations into account.

Mr. Vázquez-Bermúdez said that the issue of *erga omnes* obligations would be dealt with in the context of the topic "*Jus cogens*" and that there was no reason to examine it as part of the present topic.

Mr. Tladi said that the exclusion of *erga omnes* obligations was mentioned in paragraph (5) of the commentary to draft conclusion 1. Like Mr. Nolte, he believed that *erga omnes* obligations should not be excluded from the scope of the draft conclusion, but it had been decided otherwise.

Mr. Murphy said that he saw no reason to repeat what had already been stated in paragraph (5) of the commentary to draft conclusion 1. Paragraph (10) should therefore be deleted.

Mr. Tladi said that he opposed the deletion of the paragraph.

Mr. Saboia said that the paragraph clearly belonged in the draft, since it would be very serious if a *jus cogens* rule could be put in jeopardy because of the opposition of a few persistent objectors.

Mr. Hmoud said that he questioned the appropriateness of mentioning *erga omnes* obligations in the paragraph, since, although they constituted an aspect of *jus cogens*, they were distinct from it in that they principally concerned the effects of those obligations on States.

Mr. Šturma proposed that, to address the concerns expressed by some Commission members, a full stop should be inserted after the words "*jus cogens*" and that the rest of the sentence should be deleted.

The Chairman said that he took it that the Commission endorsed that proposal.

Paragraph (10), as amended, was adopted.

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

Part Seven

Particular customary international law

Introductory text

Mr. Vázquez-Bermúdez said that, following a proposal made by Mr. Murase at a previous meeting, he had drafted a sentence that he proposed for insertion after the first sentence, and he had amended the second sentence, such that the whole text would read: "While (general) customary international law is binding on all States, particular customary international law applies among a limited number of States. Even though rules of particular customary international law are not all that frequently encountered …".

Mr. Murphy said that he endorsed the proposal, but he did not see the need to place the word "general" in brackets, as he seemed to recall that the Commission had already used the expression "general customary international law" in the past.

Sir Michael Wood (Special Rapporteur) said that he, too, endorsed the proposal by Mr. Vázquez-Bermúdez, but he proposed that it should be slightly modified by the addition of the words "rules of" before the words "customary international law". He doubted that the Commission had already used the expression "general customary international law", unlike the International Law Association, which placed the word "general" in brackets. In any event, the idea of generality was already expressed in the sentence, since it was noted that customary international law was binding on all States.

Mr. Hmoud said that the word "general" was redundant in the sentence and could be deleted.

Mr. Vázquez-Bermúdez said that he agreed that the word was not essential and he had no objection to its deletion.

Mr. McRae proposed deleting the words "all that", which seemed unnecessary, before the word "frequently".

Sir Michael Wood (Special Rapporteur) noted that, later in the document, in paragraph (3) of the commentary to draft conclusion 16, a distinction was made between general customary international law and particular customary international law. He thus saw no reason to remove the word "general" from the introductory text and considered that it should be retained, although without brackets. He noted further that the words "are binding on all States" should be read in the light of the previous draft conclusions and recalled that there could be exceptions to that rule. To ensure that it was clear to Commission members which amendments had been accepted, he would read Mr. Vázquez-Bermúdez's proposal, as amended orally: "While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered …"

The introductory text, as amended, was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

Mr. Murphy proposed that, in the penultimate sentence, the word "alone" should be added after the word "them" to reflect more clearly that the acceptance of the rule as law held true only for the States concerned.

Following an exchange of views in which **Messrs. Vázquez-Bermúdez**, **Nolte** and **Murphy** took part, **Sir Michael Wood** (Special Rapporteur) proposed replacing "them" with "themselves".

Paragraph (7), as amended, was adopted.

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

The Chairman invited the Commission to return to paragraph (1) of the section entitled "Identification of customary international law — General commentary", concerning which a proposed amendment had been drawn up by the Special Rapporteur (document without a symbol, circulated at the meeting, in English only).

General commentary

Paragraph (1)

Sir Michael Wood (Special Rapporteur) said that the amendment consisted of the insertion at the end of the first sentence of a footnote that would read: "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries."

Paragraph (1), as amended, was adopted.

The portion of chapter V contained in document A/CN.4/L.883/Add.1 as a whole, as amended, was adopted.

Document A/CN.4/L.883

The Chairman invited the Commission to adopt paragraphs (10) to (12), which were yet to be completed, and proposed that the first sentence of each paragraph should begin: "At its 3340th meeting, on 8 August 2016, the Commission …". If he heard no objection, he would take it that the Commission wished to adopt the paragraphs with those amendments.

It was so decided.

The portion of chapter V contained in document A/CN.4/L.883 as a whole, as amended, was adopted.

Chapter V of the draft report of the Commission, as contained in documents A/CN.4/L.883 and Add.1, as a whole, as amended, was adopted.

The Chairman congratulated the Special Rapporteur on his excellent work and thanked all the Commission members for their contributions to the debates.

Sir Michael Wood (Special Rapporteur) said that he was particularly pleased with the very cooperative way in which Commission members had worked on the topic; the establishment of a working group had been very useful and had helped him to improve the quality of the draft commentaries.

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

The Chairman invited the Commission to adopt the proposed amendments (document without a symbol, circulated at the meeting, in English only) to the headings contained in documents A/CN.4/L.884/Add.1 and A/CN.4/L.884/Add.2. The document, which he would read out, also contained, for the sake of clarity and completeness, the amendments adopted at the 3336th meeting, as well as the headings whose titles remained unchanged.

Document A/CN.4/L.884/Add.1

Conclusion 2 [1]

Commentary

Paragraph 1, first sentence — relationship between articles 31 and 32

Paragraph 1, second sentence — the Vienna Convention rules on interpretation and customary international law

Paragraph 2 — article 31, paragraph 1

Paragraph 3 — article 31, paragraph 3

Paragraph 4 — other subsequent practice under article 32

Paragraph 5 — "a single combined operation"

Conclusion 3 [2]

Commentary

All the headings were deleted.

Conclusion 4

Commentary

General aspects

Paragraph 1 — definition of "subsequent agreement" under article 31, paragraph 3 (a)

Paragraph 2 — definition of subsequent practice under article 31, paragraph 3 (b)

Paragraph 3 — "other" subsequent practice

Conclusion 5

Commentary

Paragraph 1 — conduct constituting subsequent practice

A new heading was inserted before paragraph 9: "Paragraph 2 — conduct non constituting subsequent practice"

Conclusion 6

Commentary

Paragraph 1, first sentence — the term "regarding the interpretation"

Paragraph 1, second sentence — temporary non-application of a treaty or modus vivendi

Paragraph 2 — variety of forms

Paragraph 3 — identification of subsequent practice under article 32

Conclusion 7

Commentary

Paragraph 1, first sentence — clarification of the meaning of a treaty

Paragraph 1, second sentence — narrowing or widening or otherwise determining the range of possible interpretation

Paragraph 2 — other subsequent practice under article 32

Paragraph 3 — interpretation versus modification or amendment

Conclusion 8 [3]

Commentary

All the headings were deleted.

Conclusion 9 [8]

Commentary

Paragraph 1 — weight: clarity, specificity and other factors

Paragraph 2 — weight: repetition of a practice

Paragraph 3 — weight of other subsequent practice under article 32

Conclusion 10 [9]

Commentary

Paragraph 1, first sentence — "common understanding"

Paragraph 1, second sentence — possible legal effects of agreement under article 31, paragraph 3 (a) and (b)

Paragraph 2 — forms of participation in subsequent practice

Conclusion 11 [10]

Commentary

Paragraph 1 — definition of Conferences of States Parties

Paragraph 2, first sentence — legal effect of decisions

Paragraph 2, second sentence — decisions as possibly embodying a subsequent agreement or subsequent practice

Paragraph 2, third sentence — decisions as possibly providing a range of practical options

Paragraph 2 as a whole

Paragraph 3 — an agreement regarding the interpretation of the treaty

Conclusion 12 [11]

Commentary

General aspects

Paragraph 1 — applicability of articles 31 and 32

The heading "Paragraph 1, second sentence — relevance of subsequent agreements and subsequent practice as means for the interpretation of constituent instruments of international organizations" was deleted.

Paragraph 2 — subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of member States

The practice of an international organization itself

Paragraph 4 — without prejudice to the "rules of the organization"

Document A/CN.4/L.884/Add.2

Conclusion 13 [12]

Commentary

Paragraph 1 — definition of the term "expert treaty body"

Paragraph 2 — primacy of the rules of the treaty

Paragraph 3, first sentence — "may give rise to, or refer to, a subsequent agreement or a subsequent practice"

Paragraph 3, second sentence — presumption against silence as constituting acceptance

Paragraph 4 — without prejudice to other contribution

The headings read out by the Chairman were adopted.

Document A/CN.4/L.884/Add.2 (*continued*)

The Chairman invited the Commission to resume its consideration of the paragraphs of document A/CN.4/L.884/Add.2 whose adoption had been left in abeyance.

Commentary to draft conclusion 1 [1a] (Introduction)

Paragraph (1)

Mr. Nolte (Special Rapporteur) proposed inserting, at the end of the first sentence, the same footnote as that added by Sir Michael Wood to document A/CN.4/L.883/Add.1, which the Commission had just adopted, namely: "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries."

Paragraph (1), as amended, was adopted.

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

Paragraph (20)

Mr. Nolte (Special Rapporteur) said that, in consultation with Mr. Forteau, he had expanded the quotation in brackets in footnote 54 to read: "States parties cannot simply ignore them [individual communications], but have to consider them in good faith (*bona fide*) … not to react at all … would appear to amount to a violation."

Paragraph (20), as amended, was adopted.

Mr. Nolte (Special Rapporteur) recalled that the draft commentaries had been adopted up to paragraph (23) and that, in paragraph (24) and subsequent paragraphs, he had tried to reflect faithfully the divergent opinions that had been expressed with regard to whether the pronouncements of expert treaty bodies constituted subsequent practice. He was not prepared to accept the deletion of that last part of the draft, which seemed to be the wish of some Commission members, but he was prepared to shorten the text and, to that end, to delete some paragraphs and to group others together. In particular, paragraphs (23) and (26) could be merged into a single paragraph, as Mr. Murphy had proposed at a previous meeting, since they dealt with the case law of regional and domestic courts. He thus invited members first to consider those two paragraphs, then paragraphs (24) and (25), which could also be merged into a single paragraph.

Mr. Hmoud said that the Commission should consider the text proposed by the Special Rapporteur in its overall context and should not focus on and adopt each point individually. The consideration of certain aspects that were not part of the topic, in particular the issue of reservations, posed a problem, as Mr. Forteau and other Commission members had already noted. He would thus like the Special Rapporteur to explain clearly how he intended to arrange the paragraphs as a whole.

Mr. Nolte (Special Rapporteur) said that the only reason for proposing to merge paragraphs (24) and (25) was that they related to the Commission, whereas paragraphs (23) and (26) both dealt with courts.

Mr. Saboia said that he had no objection to the Special Rapporteur's proposal concerning paragraphs (23) and (26).

The Chairman, recalling that paragraph (23) had already been adopted, invited the Commission to consider paragraph (26).

Sir Michael Wood said that the second sentence, which suggested, as a result of footnote 61, that the House of Lords considered in general that the pronouncements of treaty bodies had no value, did not seem necessary and should be deleted.

Mr. Saboia said that he endorsed Sir Michael Wood's proposal.

Paragraph (26), as amended, was adopted and inserted into paragraph (23).

Paragraphs (24) and (25)

Mr. Nolte (Special Rapporteur) proposed shortening and merging paragraphs (24) and (25) so as to respond to the concern expressed by Mr. Forteau, for whom the quotations from the Guide to Practice on Reservations to Treaties concerned the validity of reservations. He thus proposed inserting the words "commentary to the" before "guide" in the first sentence of paragraph (24), replacing the full stop in the first sentence with a comma and deleting all the text from the second sentence of paragraph (24) up to "which is what is evoked by the expression 'shall give consideration' in the first part of the guideline" in the first sentence of paragraph (25). Paragraphs (24) and (25), as amended, would constitute a new paragraph (24), which would come after the new paragraph (23), as adopted.

Mr. Murphy said that, if Commission members wished to retain the quotations in paragraphs (24) and (25), it would perhaps be wiser to rework those paragraphs, keeping only the first sentence of paragraph (24) and moving the rest, namely the quotation from guideline 3.2.3 and the commentary thereto, to a footnote. That first sentence could be

added at the end of the new paragraph (23), which would then mention regional human rights courts, domestic courts and the Guide to Practice on Reservations to Treaties.

Mr. Nolte (Special Rapporteur) said that he endorsed Mr. Murphy's proposal, which seemed to him a good compromise. He proposed not reproducing in the new footnote 58 the entirety of the guideline and the commentary thereto, but only the passage beginning "Of course".

Paragraphs (24) and (25), as amended and merged into a single paragraph, were adopted.

Paragraphs (27) and (28)

Paragraphs (27) and (28) were deleted.

Paragraphs (29) to (35)

Mr. Nolte (Special Rapporteur) said that paragraphs (29) to (35), which were closely linked, were essential, since they explained how the Commission had come to draft a "without prejudice" clause. He proposed adopting them as they stood, since they had already been cut, but said that he was prepared, if Commission members so wished, to delete the sentence beginning "As a form of practice" in paragraph (30) as well as the first sentence of paragraph (31) and to merge those two paragraphs into one. There would then be a first paragraph setting out the position of Commission members who thought that the pronouncements of expert treaty bodies were part of the topic, a second paragraph putting forward the opposite position and three further paragraphs setting out the Commission's conclusions on that point.

Sir Michael Wood, noting that international and domestic courts were criticized rather unfairly in paragraph (29), said that he would prefer it if the Commission limited itself to noting that there were divergent views on the question.

Mr. Murphy said that he agreed with Sir Michael Wood's point of view. The paragraphs under consideration gave the impression that the Commission was seeking to set out the various points of view of its members and that the question, left open, would be resolved only on second reading, once the reactions of States were known. Yet the "without prejudice" clause was not intended to leave open the question for a subsequent decision, but to indicate that the pronouncements of expert treaty bodies were relevant in some contexts, even if they did not constitute subsequent agreements and practice under article 31 (3) of the Vienna Convention.

Mr. Saboia said that he, too, agreed with Sir Michael Wood's point of view. He proposed replacing the expression "have not clearly explained the relevance of pronouncements" with "have not determined in a definitive manner the relevance of pronouncements". He also proposed moving the last sentence of paragraph (29), which concerned the Commission, to the beginning of paragraph (30).

Mr. Nolte (Special Rapporteur) said that, on first reading, it was appropriate to describe the various points of view and to leave States to react to them as they saw fit. He invited Commission members to adopt the rest of the text with that in mind.

Mr. Hmoud said that he would like the paragraphs under consideration to be formulated so as to reflect the fact that the practice that was accepted was practice under article 32 of the Vienna Convention.

The meeting rose at 6.10 p.m.