

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2011

Volume I

*Summary records
of the meetings
of the sixty-third session
26 April–3 June and
4 July–12 August 2011*

UNITED NATIONS



YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2011

Volume I

*Summary records
of the meetings
of the sixty-third session
26 April–3 June and
4 July–12 August 2011*



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2011*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

*

* *

This volume contains the summary records of the meetings of the sixty-third session of the Commission (A/CN.4/SR.3080–A/CN.4/SR.3127), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2011

UNITED NATIONS PUBLICATION
<i>Sales No.</i> E.16.V.1 ISBN 978-92-1-133842-3 e-ISBN 978-92-1-057703-8
ISSN 0082-8289

CONTENTS

	<i>Page</i>		<i>Page</i>
Note	ii	3085th meeting	
Members of the Commission	xiii	<i>Friday, 6 May 2011, at 10 a.m.</i>	
Officers	xiii	Organization of the work of the session (<i>continued</i>)	32
Agenda	xiv	Responsibility of international organizations (<i>continued</i>) ...	32
Abbreviations	xv	Eighth report of the Special Rapporteur (<i>concluded</i>)	32
Note concerning quotations	xvi	3086th meeting	
Cases cited in the present volume	xvii	<i>Tuesday, 10 May 2011, at 10 a.m.</i>	
Multilateral instruments cited in the present volume	xxi	Immunity of State officials from foreign criminal jurisdiction.....	37
Checklist of documents of the sixty-third session	xxv	Second report of the Special Rapporteur	37
SUMMARY RECORDS OF THE 3080th TO 3127th MEETINGS			
<i>Summary records of the first part of the sixty-third session, held at Geneva from 26 April to 3 June 2011</i>			
3080th meeting		3087th meeting	
<i>Tuesday, 26 April 2011, at 10.05 a.m.</i>		<i>Thursday, 12 May 2011, at 10 a.m.</i>	
Opening of the session	1	Immunity of State officials from foreign criminal jurisdiction (<i>continued</i>)	46
Tribute to the memory of Ms. Paula Escarameia, former member of the Commission	1	Second report of the Special Rapporteur (<i>continued</i>)	46
Statement by the Outgoing Chairperson	1	3088th meeting	
Election of officers	2	<i>Friday, 13 May 2011, at 10 a.m.</i>	
Adoption of the agenda	2	Immunity of State officials from foreign criminal jurisdiction (<i>continued</i>)	59
Reservations to treaties.....	2	Second report of the Special Rapporteur (<i>continued</i>)	59
Organization of the work of the session	3	3089th meeting	
Responsibility of international organizations.....	3	<i>Tuesday, 17 May 2011, at 10 a.m.</i>	
Eighth report of the Special Rapporteur	3	Filling of a casual vacancy in the Commission (article 11 of the statute) (<i>concluded</i>)	73
Organization of the work of the session (<i>continued</i>)	7	Effects of armed conflicts on treaties	73
		Report of the Drafting Committee	73
3081st meeting		Organization of the work of the session (<i>continued</i>)	82
<i>Wednesday, 27 April 2011, at 10.05 a.m.</i>		3090th meeting	
Tribute to the memory of Ms. Paula Escarameia, former member of the Commission (<i>continued</i>)	7	<i>Friday, 20 May 2011, at 10.05 a.m.</i>	
Responsibility of international organizations (<i>continued</i>) ...	8	Reservations to treaties (<i>continued</i>)	82
Eighth report of the Special Rapporteur (<i>continued</i>)	8	Report of the Working Group on reservations to treaties...	82
Organization of the work of the session (<i>continued</i>)	15	Organization of the work of the session (<i>continued</i>)	86
3082nd meeting		3091st meeting	
<i>Thursday, 28 April 2011, at 10 a.m.</i>		<i>Tuesday, 24 May 2011, at 10.05 a.m.</i>	
Filling of a casual vacancy in the Commission (article 11 of the statute)	15	Expulsion of aliens	86
Responsibility of international organizations (<i>continued</i>) ...	15	Sixth report of the Special Rapporteur	86
Eighth report of the Special Rapporteur (<i>continued</i>)	15	Tribute to the memory of Ms. Paula Escarameia, former member of the Commission (<i>concluded</i>)	90
3083rd meeting		3092nd meeting	
<i>Tuesday, 3 May 2011, at 10 a.m.</i>		<i>Wednesday, 25 May 2011, at 10.05 a.m.</i>	
Responsibility of international organizations (<i>continued</i>) ...	24	Expulsion of aliens (<i>continued</i>)	90
Eighth report of the Special Rapporteur (<i>continued</i>)	24	Sixth report of the Special Rapporteur (<i>continued</i>)	90
3084th meeting		Organization of the work of the session (<i>continued</i>)	95
<i>Thursday, 5 May 2011, at 10.05 a.m.</i>		Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel	95
Filling of a casual vacancy in the Commission (article 11 of the statute) (<i>continued</i>)	26	3093rd meeting	
Responsibility of international organizations (<i>continued</i>) ...	26	<i>Thursday, 26 May 2011, at 10.05 a.m.</i>	
Eighth report of the Special Rapporteur (<i>continued</i>)	26	Expulsion of aliens (<i>continued</i>)	105
		Sixth report of the Special Rapporteur (<i>continued</i>)	105

	Page
3094th meeting	
<i>Friday, 27 May 2011, at 10 a.m.</i>	
Expulsion of aliens (<i>continued</i>).....	110
Sixth report of the Special Rapporteur (<i>concluded</i>).....	110
Organization of the work of the session (<i>continued</i>)	122
3095th meeting	
<i>Tuesday, 31 May 2011, at 10 a.m.</i>	
Other business	123
Peaceful settlement of disputes	123
Organization of the work of the session (<i>continued</i>)	129
3096th meeting	
<i>Wednesday, 1 June 2011, at 10 a.m.</i>	
Other business (<i>concluded</i>).....	130
Peaceful settlement of disputes (<i>concluded</i>).....	130
3097th meeting	
<i>Friday, 3 June 2011, at 10 a.m.</i>	
Responsibility of international organizations (<i>concluded</i>)...	134
Report of the Drafting Committee	134
Organization of the work of the session (<i>continued</i>)	151
<i>Summary records of the second part of the sixty-third session, held at Geneva from 4 July to 12 August 2011</i>	
3098th meeting	
<i>Monday, 4 July 2011, at 3 p.m.</i>	
Tribute to the memory of Mr. Constantin Economides, former member of the Commission	153
Tribute to the memory of Mr. Francis Mahon Hayes, former member of the Commission.....	153
Expulsion of aliens (<i>continued</i>).....	153
Seventh report of the Special Rapporteur	153
3099th meeting	
<i>Wednesday, 6 July 2011, at 10 a.m.</i>	
Reservations to treaties (<i>continued</i>)	155
Seventeenth report of the Special Rapporteur.....	155
3100th meeting	
<i>Thursday, 7 July 2011, at 10 a.m.</i>	
Cooperation with other bodies	158
Statement by the President of the International Court of Justice	158
3101st meeting	
<i>Friday, 8 July 2011, at 10 a.m.</i>	
Cooperation with other bodies (<i>continued</i>).....	165
Statement by the Chairperson of the Committee of Legal Advisers on Public International Law	165
Statement by the Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult.....	166
Draft report of the International Law Commission on the work of its sixty-third session	169
Chapter IV. Reservations to treaties	169
F. Text of the Guide to Practice on reser- vations to treaties, adopted by the Commission at its sixty-third session	169
1. Definitions.....	169
1.1 Definition of reservations.....	169
1.1.1 Statements purporting to limit the obligations of their author....	171
3102nd meeting	
<i>Monday, 11 July 2011, at 3 p.m.</i>	
Protection of persons in the event of disasters	172
Report of the Drafting Committee	172
Fourth report of the Special Rapporteur	172

	Page
3103rd meeting	
<i>Tuesday, 12 July 2011, at 10 a.m.</i>	
Protection of persons in the event of disasters (<i>continued</i>)	182
Fourth report of the Special Rapporteur (<i>continued</i>)	182
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>)	189
Chapter IV. Reservations to treaties (<i>continued</i>).....	189
F. Text of the Guide to Practice on reser- vations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	189
1.1.1 Statements purporting to limit the obligations of their author (<i>concluded</i>)	189
1.1.2 Statements purporting to discharge an obligation by equivalent means.....	190
1.1.3 Reservations relating to the ter- ritorial application of a treaty.....	190
1.1.4 Reservations formulated when extending the territorial applica- tion of a treaty	191
3104th meeting	
<i>Wednesday, 13 July 2011, at 10 a.m.</i>	
Protection of persons in the event of disasters (<i>continued</i>)	191
Fourth report of the Special Rapporteur (<i>continued</i>)	191
Reservations to treaties (<i>continued</i>).....	196
Seventeenth report of the Special Rapporteur (<i>con- tinued</i>).....	196
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>)	198
Chapter IV. Reservations to treaties (<i>continued</i>).....	198
F. Text of the Guide to Practice on reser- vations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>)	198
1.1.5 Reservations formulated jointly... ..	199
1.1.6 Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provi- sions of the treaty	199
1.2 Definition of interpretative dec- larations.....	199
3105th meeting	
<i>Thursday, 14 July 2011, at 10 a.m.</i>	
Protection of persons in the event of disasters (<i>continued</i>)	201
Fourth report of the Special Rapporteur (<i>continued</i>)	201
Organization of the work of the session (<i>continued</i>)	209
3106th meeting	
<i>Friday, 15 July 2011, at 10 a.m.</i>	
Reservations to treaties (<i>continued</i>).....	209
Seventeenth report of the Special Rapporteur (<i>con- cluded</i>)	209
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>)	214
Chapter IV. Reservations to treaties (<i>continued</i>).....	214
F. Text of the Guide to Practice on reser- vations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	215
1.2.1 Interpretative declarations formu- lated jointly.....	215
1.3 Distinction between reservations and interpretative declarations.....	215
1.3.1 Method of determining the dis- tinction between reservations and interpretative declarations.....	215
1.3.2 Phrasing and name	216

	<i>Page</i>		<i>Page</i>
1.3.3	216	2.1.7	230
1.4	216	2.2	230
3107th meeting		2.2.1	230
<i>Monday, 18 July 2011, at 3 p.m.</i>		2.2.2	230
Tribute to the memory of Mr. Francisco Villagrán Kramer, former member of the Commission.....	217	2.2.3	230
Protection of persons in the event of disasters (<i>continued</i>)....	218	2.2.4	230
Fourth report of the Special Rapporteur (<i>concluded</i>)	218	2.3	230
Organization of the work of the session (<i>concluded</i>).....	220	2.3.1	231
3108th meeting		2.3.2	231
<i>Wednesday, 20 July 2011, at 10 a.m.</i>		2.3.3	232
Cooperation with other bodies (<i>continued</i>).....	220	3110th meeting	
Statement by the representative of the Inter-American Juridical Committee	220	<i>Friday, 22 July 2011, at 10 a.m.</i>	
3109th meeting		Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>)	
<i>Thursday, 21 July 2011, at 10 a.m.</i>		223	
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>)	223	Chapter IV. Reservations to treaties (<i>continued</i>).....	
Chapter IV. Reservations to treaties (<i>continued</i>).....	223	232	
F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	223	Chapter IV. Reservations to treaties (<i>continued</i>).....	
1.4 Conditional interpretative declarations (<i>concluded</i>).....	223	232	
1.5 Unilateral statements other than reservations and interpretative declarations	223	F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	
1.5.1 Statements of non-recognition...	224	232	
1.5.2 Statements concerning modalities of implementation of a treaty at the internal level	224	2.3.3 Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations (<i>continued</i>).....	
1.5.3 Unilateral statements made under a clause providing for options	224	232	
1.6 Unilateral statements in respect of bilateral treaties.....	225	2.3.4 Widening of the scope of a reservation.....	
1.6.1 "Reservations" to bilateral treaties	225	232	
1.6.2 Interpretative declarations in respect of bilateral treaties	225	2.4 Procedure for interpretative declarations.....	
1.6.3 Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party	225	233	
1.7 Alternatives to reservations and interpretative declarations.....	226	2.4.1 Form of interpretative declarations.....	
1.7.1 Alternatives to reservations.....	226	233	
1.7.2 Alternatives to interpretative declarations	227	2.4.2 Representation for the purpose of formulating interpretative declarations	
1.8 Scope of definitions.....	227	233	
2. Procedure	227	2.4.3 Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations	
2.1 Form and notification of reservations	227	233	
2.1.1 Form of reservations	227	2.4.4 Time at which an interpretative declaration may be formulated...	
2.1.2 Statement of reasons for reservations	227	233	
2.1.3 Representation for the purpose of formulating a reservation at the international level.....	228	2.4.5 Communication of interpretative declarations	
2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations	228	234	
2.1.5 Communication of reservations...	229	2.4.6 Non-requirement of confirmation of interpretative declarations formulated when signing a treaty	
2.1.6 Procedure for communication of reservations	229	234	
		2.4.7 Late formulation of an interpretative declaration.....	
		234	
		2.4.8 Modification of an interpretative declaration.....	
		234	
		2.5 Withdrawal and modification of reservations and interpretative declarations	
		235	
		2.5.1 Withdrawal of reservations	
		235	
		2.5.2 Form of withdrawal.....	
		235	
		2.5.3 Periodic review of the usefulness of reservations	
		235	
		2.5.4 Representation for the purpose of withdrawing a reservation at the international level.....	
		235	

	Page		Page
Fourth report of the Special Rapporteur (<i>continued</i>).....	263	Chapter VI. Effects of armed conflicts on treaties	
Immunity of State officials from foreign criminal jurisdiction (<i>continued</i>).....	266	(<i>continued</i>).....	298
Third report of the Special Rapporteur (<i>continued</i>).....	266	E. Text of the draft articles on the effects of armed conflicts on treaties (<i>concluded</i>) ..	298
3114th meeting		2. Text of the draft articles with commentaries thereto (<i>concluded</i>).....	298
<i>Thursday, 28 July 2011, at 10 a.m.</i>		Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension (<i>concluded</i>).....	298
Immunity of State officials from foreign criminal jurisdiction (<i>continued</i>).....	272	Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation (<i>concluded</i>).....	299
Third report of the Special Rapporteur (<i>continued</i>).....	272	Article 10. Obligations imposed by international law independently of a treaty.....	299
Reservations to treaties (<i>concluded</i>).....	281	Article 11. Separability of treaty provisions.....	299
Report of the Working Group on reservations to treaties (<i>concluded</i>).....	281	Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation.....	299
Immunity of State officials from foreign criminal jurisdiction (<i>continued</i>).....	282	Article 13. Revival or resumption of treaty relations subsequent to an armed conflict.....	299
Third report of the Special Rapporteur (<i>continued</i>).....	282	Part Three. Miscellaneous.....	299
3115th meeting		Article 14. Effect of the exercise of the right to self-defence on a treaty.....	299
<i>Friday, 29 July 2011, at 10 a.m.</i>		Article 15. Prohibition of benefit to an aggressor State.....	300
Immunity of State officials from foreign criminal jurisdiction (<i>concluded</i>).....	285	Article 16. Decisions of the Security Council.....	300
Third report of the Special Rapporteur (<i>concluded</i>).....	285	Article 17. Rights and duties arising from the laws of neutrality.....	300
3116th meeting		Article 18. Other cases of termination, withdrawal or suspension.....	301
<i>Tuesday, 2 August 2011, at 10 a.m.</i>		Annex. Indicative list of treaties referred to in draft article 7.....	301
The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>) (<i>concluded</i>).....	290	C. Recommendation of the Commission (<i>continued</i>).....	304
Fourth report of the Special Rapporteur (<i>concluded</i>).....	290		
Protection of persons in the event of disasters (<i>concluded</i>) ..	292	3118th meeting	
Report of the Drafting Committee (<i>concluded</i>).....	292	<i>Friday, 5 August 2011, at 10 a.m.</i>	
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	294	Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	305
Chapter VI. Effects of armed conflicts on treaties.....	294	Chapter VI. Effects of armed conflicts on treaties (<i>concluded</i>).....	305
A. Introduction.....	294	C. Recommendation of the Commission (<i>concluded</i>).....	305
B. Consideration of the topic at the present session.....	294	Chapter V. Responsibility of international organizations.....	305
C. Recommendation of the Commission....	294	A. Introduction.....	305
D. Tribute to the Special Rapporteur.....	294	B. Consideration of the topic at the present session.....	305
E. Text of the draft articles on the effects of armed conflicts on treaties.....	294	C. Recommendation of the Commission....	305
1. Text of the draft articles.....	294	D. Tribute to the Special Rapporteur.....	305
2. Text of the draft articles with commentaries thereto.....	295	E. Text of the draft articles on the responsibility of international organizations ..	305
Part One. Scope and definitions.....	295	1. Text of the draft articles.....	305
Article 1. Scope.....	295	2. Text of the draft articles and the commentaries thereto.....	305
Article 2. Definitions.....	295	Part One. Introduction.....	306
Part Two. Principles.....	295	Article 1. Scope of the present draft articles.....	306
Chapter I. Operation of treaties in the event of armed conflicts.....	295	Article 2. Use of terms.....	306
Article 3. General principle.....	296	Part Two. The internationally wrongful act of an international organization.....	307
Article 4. Provisions on the operation of treaties.....	297	Chapter I. General principles.....	307
Article 5. Application of rules on treaty interpretation.....	297	Article 3. Responsibility of an international organization for its internationally wrongful acts.....	307
Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension.....	297	Article 4. Elements of an internationally wrongful act of an international organization.....	307
Article 7. Continued operation of treaties resulting from their subject matter.....	297		
Chapter II. Other provisions relevant to the operation of treaties.....	297		
Article 8. Conclusion of treaties during armed conflict.....	297		
Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation.....	298		
3117th meeting			
<i>Thursday, 4 August 2011, at 10 a.m.</i>			
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	298		

	Page		Page
<i>Article 5. Characterization of an act of an international organization as internationally wrongful</i>	307	<i>Article 33. Scope of international obligations set out in this Part</i>	311
Chapter II. Attribution of conduct to an international organization.....	307	Chapter II. Reparation for injury.....	311
<i>Article 6. Conduct of organs or agents of an international organization</i>	307	<i>Article 34. Forms of reparation</i>	311
<i>Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization</i>	308	<i>Article 35. Restitution</i>	311
<i>Article 8. Excess of authority or contravention of instructions</i>	308	<i>Article 36. Compensation</i>	311
<i>Article 9. Conduct acknowledged and adopted by an international organization as its own</i>	308	<i>Article 37. Satisfaction</i>	311
Chapter III. Breach of an international obligation.....	309	<i>Article 38. Interest</i>	311
<i>Article 10. Existence of a breach of an international obligation</i>	309	<i>Article 39. Contribution to the injury</i> ...	311
<i>Article 11. International obligation in force for an international organization</i>	309	<i>Article 40. Ensuring the fulfilment of the obligation to make reparation</i>	311
<i>Article 12. Extension in time of the breach of an international obligation</i>	309	Chapter III. Serious breaches of obligations under peremptory norms of general international law.....	311
<i>Article 13. Breach consisting of a composite act</i>	309	<i>Article 41. Application of this Chapter</i> ...	311
Chapter IV. Responsibility of an international organization in connection with the act of a State or another international organization.....	309	<i>Article 42. Particular consequences of a serious breach of an obligation under this Chapter</i>	311
<i>Article 14. Aid or assistance in the commission of an internationally wrongful act</i>	309	Part Four. The implementation of the international responsibility of an international organization.....	311
<i>Article 15. Direction and control exercised over the commission of an internationally wrongful act</i>	309	Chapter I. Invocation of the responsibility of an international organization.....	311
<i>Article 16. Coercion of a State or another international organization</i>	309	<i>Article 43. Invocation of responsibility by an injured State or international organization</i>	311
<i>Article 17. Circumvention of an international obligation through decisions and authorizations addressed to members</i>	309	<i>Article 44. Notice of claim by an injured State or international organization</i>	312
<i>Article 18. Responsibility of an international organization member of another international organization</i> ..	309	<i>Article 45. Admissibility of claims</i>	312
<i>Article 19. Effect of this Chapter</i>	309	<i>Article 46. Loss of the right to invoke responsibility</i>	312
Chapter V. Circumstances precluding wrongfulness.....	310	<i>Article 47. Plurality of injured States or international organizations</i>	312
<i>Article 20. Consent</i>	310	<i>Article 48. Responsibility of an international organization and one or more States or international organizations</i>	312
<i>Article 21. Self-defence</i>	310	<i>Article 49. Invocation of responsibility by a State or an international organization other than an injured State or international organization</i>	312
<i>Article 22. Countermeasures</i>	310	<i>Article 50. Scope of this Chapter</i>	312
<i>Article 23. Force majeure</i>	310	Chapter II. Countermeasures.....	312
<i>Article 24. Distress</i>	310	<i>Article 51. Object and limits of countermeasures</i>	312
<i>Article 25. Necessity</i>	310	<i>Article 52. Conditions for taking countermeasures by members of an international organization</i>	312
<i>Article 26. Compliance with peremptory norms</i>	310	<i>Article 53. Obligations not affected by countermeasures</i>	312
<i>Article 27. Consequences of invoking a circumstance precluding wrongfulness</i>	310	<i>Article 54. Proportionality of countermeasures</i>	312
Part Three. Content of the international responsibility of an international organization.....	310	<i>Article 55. Conditions relating to resort to countermeasures</i>	312
Chapter I. General principles.....	310	<i>Article 56. Termination of countermeasures</i>	312
<i>Article 28. Legal consequences of an internationally wrongful act</i>	310	<i>Article 57. Measures taken by States or international organizations other than an injured State or international organization</i>	313
<i>Article 29. Continued duty of performance</i>	310	Part Five. Responsibility of a State in connection with the conduct of an international organization.....	313
<i>Article 30. Cessation and non-repetition</i>	310	<i>Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization</i>	313
<i>Article 31. Reparation</i>	311	<i>Article 59. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization</i>	313
<i>Article 32. Relevance of the rules of the organization</i>	311	<i>Article 60. Coercion of an international organization by a State</i>	313

	<i>Page</i>		<i>Page</i>
<i>Article 61. Circumvention of international obligations of a State member of an international organization.....</i>	313	F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	326
<i>Article 62. Responsibility of a State member of an international organization for an internationally wrongful act of that organization.....</i>	313	3.1.5.1 Determination of the object and purpose of the treaty.....	326
<i>Article 63. Effect of this Part.....</i>	313	3.1.5.2 Vague or general reservations....	326
Part Six. General provisions.....	313	3.1.5.3 Reservations to a provision reflecting a customary rule.....	327
<i>Article 64. Lex specialis.....</i>	313	3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances.....	327
<i>Article 65. Questions of international responsibility not regulated by these articles.....</i>	313	3.1.5.5 Reservations relating to internal law.....	327
<i>Article 66. Individual responsibility....</i>	313	3.1.5.6 Reservations to treaties containing numerous interdependent rights and obligations.....	328
<i>Article 67. Charter of the United Nations.....</i>	313	3.1.5.7 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty.....	328
3119th meeting		3.2 Assessment of the permissibility of a reservation.....	328
<i>Monday, 8 August 2011, at 10 a.m.</i>		3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations.....	329
Treaties over time.....	314	3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations.....	329
Report by the Study Group.....	314	3.2.3 Consideration of the assessments of treaty monitoring bodies.....	329
The most-favoured-nation clause.....	316	3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body.....	330
Report by the Study Group.....	316	3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations.....	330
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	318	3.3 Consequences of the non-permissibility of a reservation....	330
Chapter V. Responsibility of international organizations (<i>concluded</i>).....	318	3.3.1 Irrelevance of distinction among the grounds for non-permissibility.....	330
C. Recommendation of the Commission (<i>concluded</i>).....	318	3.3.2 Non-permissibility of reservations and international responsibility.....	330
		3.3.3 Absence of effect of individual acceptance of a reservation on the permissibility of the reservation.....	330
3120th meeting		3.4 Permissibility of reactions to reservations.....	331
<i>Monday, 8 August 2011, at 3 p.m.</i>		3.4.1 Permissibility of the acceptance of a reservation.....	331
Programme, procedures and working methods of the Commission and its documentation.....	319	3.4.2 Permissibility of an objection to a reservation.....	331
Report of the Planning Group.....	319	3.5 Permissibility of an interpretative declaration.....	332
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	321	3.5.1 Permissibility of an interpretative declaration which is in fact a reservation.....	332
Chapter IV. Reservations to treaties (<i>continued</i>).....	321	3.6 Permissibility of reactions to interpretative declarations.....	332
F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	321	4. Legal effects of reservations and interpretative declarations.....	332
2.1.5 Communication of reservations (<i>concluded</i>).....	321	4.1 Establishment of a reservation with regard to another State or international organization.....	332
2.3 Late formulation of reservations (<i>concluded</i>).....	321	4.1.1 Establishment of a reservation expressly authorized by a treaty...	333
2.3.3 Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations (<i>concluded</i>)....	321		
2.8.1 Forms of acceptance of reservations (<i>concluded</i>).....	322		
3. Permissibility of reservations and interpretative declarations... ..	322		
3.1 Permissible reservations.....	323		
3.1.1 Reservations prohibited by the treaty.....	324		
3.1.2 Definition of specified reservations.....	324		
3.1.3 Permissibility of reservations not prohibited by the treaty.....	324		
3.1.4 Permissibility of specified reservations.....	325		
3.1.5 Incompatibility of a reservation with the object and purpose of the treaty.....	325		
3121st meeting			
<i>Tuesday, 9 August 2011, at 10 a.m.</i>			
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	326		
Chapter IV. Reservations to treaties (<i>continued</i>).....	326		

	Page		Page
3122nd meeting			
<i>Tuesday, 9 August 2011, at 3 p.m.</i>			
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	334		
Chapter IX. Protection of persons in the event of disasters	334		
A. Introduction.....	334		
B. Consideration of the topic at the present session.....	334		
C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted by the Commission at its sixty-third session.....	336		
Article 6. <i>Humanitarian principles in disaster response</i>	336		
Article 7. <i>Human dignity</i>	336		
Article 8. <i>Human rights</i>	336		
Article 9. <i>Role of the affected State</i>	336		
Article 10. <i>Duty of the affected State to seek assistance</i>	336		
Article 11. <i>Consent of the affected State to external assistance</i>	337		
Chapter IV. Reservations to treaties (<i>continued</i>).....	337		
F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	337		
4.1.2 Establishment of a reservation to a treaty which has to be applied in its entirety	337		
4.1.3 Establishment of a reservation to a constituent instrument of an international organization	338		
4.2 Effects of an established reservation.....	338		
4.2.1 Status of the author of an established reservation	338		
4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty	338		
4.2.3 Effect of the establishment of a reservation on the status of the author as a party to the treaty.....	338		
4.2.4 Effect of an established reservation on treaty relations	338		
4.2.5 Non-reciprocal application of obligations to which a reservation relates.....	339		
4.2.6 Interpretation of reservations	339		
3.4.2 Permissibility of an objection to a reservation (<i>concluded</i>).....	340		
3123rd meeting			
<i>Wednesday, 10 August 2011, at 10 a.m.</i>			
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	340		
Chapter IV. Reservations to treaties (<i>continued</i>).....	340		
F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	340		
4.3 Effect of an objection to a valid reservation.....	340		
4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation	340		
4.3.2 Effect of an objection to a reservation that is formulated late.....	341		
4.3.3 Entry into force of the treaty between the author of a reservation and the author of an objection....	341		
4.3.4 Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required	341		
4.3.5 Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect ..	341		
4.3.6 Effect of an objection on treaty relations.....	341		
4.3.7 Effect of an objection on provisions other than those to which the reservation relates	342		
4.3.8 Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation.....	342		
4.4 Effect of a reservation on rights and obligations independent of the treaty.....	343		
4.4.1 Absence of effect on rights and obligations under other treaties..	343		
4.4.2 Absence of effect on rights and obligations under customary international law.....	343		
4.4.3 Absence of effect on a peremptory norm of general international law (<i>jus cogens</i>).....	343		
4.5 Consequences of an invalid reservation	343		
4.5.1 Nullity of an invalid reservation	344		
4.5.2 Reactions to a reservation considered invalid.....	346		
4.5.3 Status of the author of an invalid reservation in relation to the treaty	346		
3124th meeting			
<i>Wednesday, 10 August 2011, at 3 p.m.</i>			
Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	349		
Chapter IV. Reservations to treaties (<i>continued</i>).....	349		
F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>)	349		
4.5.3 Status of the author of an invalid reservation in relation to the treaty (<i>continued</i>).....	350		
4.6 Absence of effect of a reservation on the relations between the other parties to the treaty.....	351		
4.7 Effect of an interpretative declaration	351		
4.7.1 Clarification of the terms of the treaty by an interpretative declaration.....	351		
4.7.2 Effect of the modification or the withdrawal of an interpretative declaration.....	352		
4.7.3 Effect of an interpretative declaration approved by all the contracting States and contracting organizations	352		
5. Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States.....	353		
5.1 Reservations in cases of succession of States	353		
5.1.1 Newly independent States.....	353		
5.1.2 Uniting or separation of States...	353		
5.1.3 Irrelevance of certain reservations in cases involving a uniting of States.....	353		

	<i>Page</i>		<i>Page</i>
5.1.4	353	4.5.3	358
5.1.5	353	5.1.1	359
5.1.6	353	Additional amendments to the Guide to Practice.....	360
5.1.7	354	A. Introduction.....	361
5.1.8	354	B. Consideration of the topic at the present session.....	361
5.2	354	C. Recommendation of the Commission concerning the Guide to Practice on reservations to treaties.....	361
5.2.1	354	D. Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties.....	361
5.2.2	354	E. Tribute to the Special Rapporteur.....	361
5.2.3	354	F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>concluded</i>).....	361
5.2.4	354		
5.2.5	354		
5.2.6	354		
5.3	354		
5.3.1	354		
5.3.2	355		
5.3.3	355		
5.4	355		
5.5	355		
5.5.1	355		
Annex.	355		
		3126th meeting	
		<i>Thursday, 11 August 2011, at 3 p.m.</i>	
		Expulsion of aliens (<i>concluded</i>).....	362
		Report of the Drafting Committee.....	362
		Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	363
		Chapter VIII. Expulsion of aliens.....	363
		A. Introduction.....	363
		B. Consideration of the topic at the present session.....	363
		Chapter X. The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>).....	363
		A. Introduction.....	363
		B. Consideration of the topic at the present session.....	363
		Chapter VII. Immunity of State officials from foreign criminal jurisdiction.....	364
		A. Introduction.....	364
		B. Consideration of the topic at the present session.....	364
		Chapter XII. The most-favoured-nation clause.....	364
		A. Introduction.....	364
		B. Consideration of the topic at the present session.....	364
		Chapter XI. Treaties over time.....	365
		A. Introduction.....	365
		B. Consideration of the topic at the present session.....	365
		Chapter IX. Protection of persons in the event of disasters (<i>concluded</i>).....	365
		C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted by the Commission at its sixty-third session (<i>concluded</i>).....	365
		Article 10. <i>Duty of the affected State to seek assistance</i> (<i>concluded</i>).....	365
		Article 11. <i>Consent of the affected State to external assistance</i> (<i>concluded</i>).....	366
		Chapter VII. Immunity of State officials from foreign criminal jurisdiction (<i>concluded</i>).....	366
		B. Consideration of the topic at the present session (<i>concluded</i>).....	366
		Chapter X. The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>) (<i>concluded</i>).....	366
		B. Consideration of the topic at the present session (<i>concluded</i>).....	366
		Chapter II. Summary of the work of the Commission at its sixty-third session.....	367
		Chapter III. Specific issues on which comments would be of particular interest to the Commission.....	367

3125th meeting

Thursday, 11 August 2011, at 10 a.m.

Draft report of the International Law Commission on the work of its sixty-third session (<i>continued</i>).....	357
Chapter IV. Reservations to treaties (<i>concluded</i>).....	357
F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (<i>continued</i>).....	357
4.2.4 Effect of an established reservation on treaty relations (<i>concluded</i>).....	358

	<i>Page</i>		<i>Page</i>
A. Immunity of State officials from foreign criminal jurisdiction	367	Chapter I. Organization of the work of the session...	369
B. Expulsion of aliens	367	A. Membership	369
C. Protection of persons in the event of disasters	368	B. Casual vacancies	369
3127th meeting		C. Officers and the Enlarged Bureau	369
<i>Friday, 12 August 2011, at 10 a.m.</i>		D. Drafting Committee	370
Draft report of the International Law Commission on the work of its sixty-third session (<i>concluded</i>)	368	E. Working Groups and Study Groups	370
Chapter III. Specific issues on which comments would be of particular interest to the Commission (<i>concluded</i>)	368	F. Secretariat	370
D. The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>)	368	G. Agenda	370
E. Treaties over time	369	Chapter XIII. Other decisions and conclusions of the Commission	370
F. The most-favoured-nation clause	369	A. Programme, procedures and working methods of the Commission and its documentation	370
G. New topics	369	B. Date and place of the sixty-fourth session of the Commission	371
Chapter XI. Treaties over time (<i>concluded</i>)	369	C. Peaceful settlement of disputes	371
B. Consideration of the topic at the present session (<i>concluded</i>)	369	D. Cooperation with other bodies	371
		E. Representation at the sixty-sixth session of the General Assembly	371
		F. Gilberto Amado Memorial Lecture	371
		G. International Law Seminar	371
		Chairperson's concluding remarks	372
		Closure of the session	372

MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Mr. Mohammed Bello ADOKE	Nigeria	Mr. Teodor Viorel MELESCANU	Romania
Mr. Ali Mohsen Fetais AL-MARRI	Qatar	Mr. Shinya MURASE	Japan
Mr. Lucius CAFLISCH	Switzerland	Mr. Bernd H. NIEHAUS	Costa Rica
Mr. Enrique J. A. CANDIOTI	Argentina	Mr. Georg NOLTE	Germany
Mr. Pedro COMISSÁRIO AFONSO	Mozambique	Mr. Alain PELLET	France
Mr. Christopher John Robert DUGARD	South Africa	Mr. A. Rohan PERERA	Sri Lanka
Ms. Concepción ESCOBAR HERNÁNDEZ	Spain	Mr. Ernest PETRIČ	Slovenia
Mr. Salifou FOMBA	Mali	Mr. Gilberto Vergne SABOIA	Brazil
Mr. Giorgio GAJA	Italy	Mr. Narinder SINGH	India
Mr. Zdzislaw GALICKI	Poland	Mr. Eduardo VALENCIA-OSPINA	Colombia
Mr. Hussein A. HASSOUNA	Egypt	Mr. Edmundo VARGAS CARREÑO	Chile
Mr. Mahmoud D. HMOUD	Jordan	Mr. Stephen C. VASCIANNIE	Jamaica
Mr. Huikang HUANG	China	Mr. Marcelo VÁZQUEZ-BERMÚDEZ	Ecuador
Ms. Marie G. JACOBSSON	Sweden	Mr. Amos S. WAKO	Kenya
Mr. Maurice KAMTO	Cameroon	Mr. Nugroho WISNUMURTI	Indonesia
Mr. Fathi KEMICHA	Tunisia	Sir Michael WOOD	United Kingdom of Great Britain and Northern Ireland
Mr. Roman A. KOLODKIN	Russian Federation		
Mr. Donald M. McRAE	Canada		

OFFICERS

Chairperson: Mr. Maurice KAMTO

First Vice-Chairperson: Ms. Marie G. JACOBSSON

Second Vice-Chairperson: Mr. Bernd H. NIEHAUS

Chairperson of the Drafting Committee: Mr. Teodor Viorel MELESCANU

Rapporteur: Mr. A. Rohan PERERA

Ms. Patricia O'Brien, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission.

AGENDA

The Commission adopted the following agenda at its 3080th meeting, held on 26 April 2011:

1. Organization of the work of the session.
2. Reservations to treaties.
3. Responsibility of international organizations.
4. Effects of armed conflicts on treaties.
5. Expulsion of aliens.
6. The obligation to extradite or prosecute (*aut dedere aut judicare*).
7. Protection of persons in the event of disasters.
8. Immunity of State officials from foreign criminal jurisdiction.
9. Treaties over time.
10. The most-favoured-nation clause.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the sixty-fourth session.
13. Cooperation with other bodies.
14. Filling of a casual vacancy in the Commission (article 11 of the statute).
15. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
CAHDI	(Council of Europe) Committee of Legal Advisers on Public International Law
COJUR	Working Party on International Public Law
ECOWAS	Economic Community of West African States
GATT	General Agreement on Tariffs and Trade 1994
IAJC	Inter-American Juridical Committee
IASC	Inter-Agency Standing Committee
IATA	International Air Transport Association
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IFRC	International Federation of Red Cross and Red Crescent Societies
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
INTERPOL	International Criminal Police Organization
ITLOS	International Tribunal for the Law of the Sea
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
UNAMIR	United Nations Assistance Mission for Rwanda
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNOCI	United Nations Operation in Côte d’Ivoire
WHO	World Health Organization
WTO	World Trade Organization

*

* *

AJIL	<i>American Journal of International Law</i> (Washington, D.C.)
BYBIL	<i>The British Yearbook of International Law</i>
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
<i>ITLOS Reports</i>	ITLOS, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

*

* *

In the present volume, “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

*

* *

NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

*

* *

The Internet address of the International Law Commission is <http://legal.un.org/ilc>.

CASES CITED IN THE PRESENT VOLUME

<i>Case</i>	<i>Nature and source of the decision</i>
<i>A. and Others v. the United Kingdom</i>	Application no. 3455/05, Judgment of 19 February 2009, Grand Chamber, European Court of Human Rights, <i>Reports of Judgments and Decisions 2009</i> .
<i>Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo</i>	<i>Advisory Opinion, I.C.J. Reports 2010</i> , p. 403.
<i>Aerial Incident of 10 August 1999</i>	(<i>Pakistan v. India</i>), <i>Jurisdiction of the Court, Judgment, I.C.J. Reports 2000</i> , p. 12.
<i>Ahmadou Sadio Diallo</i>	(<i>Republic of Guinea v. Democratic Republic of the Congo</i>), <i>Merits, Judgment, I.C.J. Reports 2010</i> , p. 639.
	<i>Preliminary Objections, Judgment, I.C.J. Reports 2007</i> , p. 582.
<i>Al-Adsani v. the United Kingdom</i>	Application no. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, <i>Reports of Judgments and Decisions 2001-XI</i> .
<i>Al-Jedda case</i>	<i>R. (on the application of Al-Jedda) v. Secretary of State for Defence</i> , Judgment of the House of Lords, 12 December 2007, [2007] UKHL 58.
<i>Al-Jedda v. the United Kingdom</i>	Application no. 27021/08, Judgment of 7 July 2011, Grand Chamber, European Court of Human Rights, <i>Reports of Judgments and Decisions 2011</i> .
<i>Ambatielos</i>	<i>Greece v. United Kingdom, Jurisdiction, Preliminary Objection, Judgment of 1 July 1952, I.C.J. Reports 1952</i> , p. 28.
<i>Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations</i>	<i>Advisory Opinion, I.C.J. Reports 1989</i> , p. 177.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	(<i>Bosnia and Herzegovina v. Serbia and Montenegro</i>), <i>Judgment, I.C.J. Reports 2007</i> , p. 43.
<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination</i>	(<i>Georgia v. Russian Federation</i>), <i>Preliminary Objections, Judgment, I.C.J. Reports 2011</i> , p. 70.
	<i>Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008</i> , p. 353.
<i>Arbitral Award made by the King of Spain on 23 December 1906</i>	<i>Judgment of 18 November 1960, I.C.J. Reports 1960</i> , p. 192.
<i>Arbitral Award of 31 July 1989</i>	<i>Judgment, I.C.J. Reports 1991</i> , p. 53.
<i>Armed Activities on the Territory of the Congo</i>	(<i>New Application: 2002</i>) (<i>Democratic Republic of the Congo v. Rwanda</i>), <i>Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006</i> , p. 6.
<i>Arrest Warrant</i>	<i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i> , <i>Judgment, I.C.J. Reports 2002</i> , p. 3.
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970</i> , p. 3.
<i>Beagle Channel</i>	<i>Case concerning a dispute between Argentina and Chile concerning the Beagle Channel</i> , Award of 18 February 1977, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), pp. 53–264.
<i>Behrami and Saramati</i>	<i>Behrami and Behrami v. France and Saramati v. France, Germany and Norway</i> , Grand Chamber Decision of 2 May 2007 (Admissibility), Applications nos. 71412/01 and 78166/01, European Court of Human Rights (available from the Court's HUDOC database, http://hudoc.echr.coe.int).
<i>Belhas et al. v. Ya'alon</i>	515 F.3d 1279 (D.C. Cir. 2008).
<i>Ben Tillett</i>	<i>Ben Tillett Arbitration (Great Britain v. Belgium)</i> , C. G. Fenwick, <i>Cases on International Law</i> , Chicago, Callaghan and Company, 1935, p. 181.
<i>Bouterse</i>	<i>Yearbook of International Humanitarian Law</i> , vol. 3 (2000), pp. 677–691. See also <i>Netherlands Yearbook of International Law</i> , vol. 32 (2001), pp. 266–282.
	Judgment on appeal of 18 September 2001, Supreme Court of the Netherlands.
<i>Case 7378 (Guatemala)</i>	Resolution 30/8 of 25 June 1981, Inter-American Commission on Human Rights, <i>Annual Report of the Inter-American Commission on Human Rights 1980–1981</i> , OEA/Ser.L/V/II.81, doc. 9 rev. 1, 16 October 1981 (available from www.cidh.oas.org).
<i>Certain Activities Carried Out by Nicaragua in the Border Area</i>	(<i>Costa Rica v. Nicaragua</i>), <i>Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011</i> , p. 6.

- Certain Questions of Mutual Assistance in Criminal Matters*
Charles Taylor
Chorzów Factory
Čonka
Conservation and Sustainable Exploitation of Swordfish Stocks
Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands
Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights
East Timor
English Channel
Ferrini v. the Federal Republic of Germany
Frontier Dispute (Burkina Faso/Niger)
Gaddafi
General Shaul Mofaz
Gorbachev
Gotovina et al.
Guatemalan Genocide
Hollander
Impregilo S.p.A. v. Argentine Republic
Island of Palmas
Jabari v. Turkey
Japan—Taxes on Alcoholic Beverages
Jaworzina
Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya
- (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177.
Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction of 31 May 2004, Appeals Chamber of the Special Court for Sierra Leone (available from www.rscsl.org/Taylor.html).
Case Concerning the Factory at Chorzów, Claim for Indemnity, Merits, Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A*, No. 17.
Čonka v. Belgium, Application no. 51564/99, Judgment of 5 February 2002, Third Section, European Court of Human Rights, *Reports of Judgments and Decisions 2002-I*.
(Chile/European Community), Order of 20 December 2000, *ITLOS Reports 2000*, p. 148.
Chile—Measures affecting the Transit and Importing of Swordfish, WTO (WT/DS 193).
Application no. 13645/05, Decision on Admissibility of 20 January 2009, European Court of Human Rights, *Reports of Judgments and Decisions 2009*.
Advisory Opinion, *I.C.J. Reports 1999*, p. 62.
(Portugal v. Australia), Judgment, *I.C.J. Reports 1995*, p. 90.
Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 March 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271.
Decision No. 5044/2004 of 11 March 2004, Court of Cassation of Italy, reproduced in *Rivista di Diritto Internazionale*, vol. 87, No. 2 (2004), p. 539. English translation in ILR, vol. 128 (2004), p. 658.
Special Agreement seising the International Court of Justice of the Boundary Dispute between Burkina Faso and the Republic of Niger jointly notified to the Court on 20 July 2010, ICJ, 2010 General List No. 149.
Gaddafi, France, Cour de cassation, chambre criminelle, 13 March 2001, ILR, vol. 125 (2004), p. 490.
District Court (Bow Street), Re General Shaul Mofaz, Judgment of 12 February 2004, reproduced in *International and Comparative Law Quarterly*, vol. 53 (July 2004), pp. 771–773.
30 March 2011, City of Westminster Magistrates’ Court (unreported). Reproduced in R. O’Keefe, “Decisions of British Courts during 2011 involving questions of public or private international law”, *BYBIL 2011*, vol. 82, No. 1, pp. 570–574.
Prosecutor v. Gotovina, Čermak and Markač, “Operation Storm”, Case No. IT-06-90-T, Judgment of 15 April 2011, International Tribunal for the Former Yugoslavia (available from www.ity.org/case/gotovina/4).
Sentencia No. 327/2003 del Tribunal Supremo sobre el caso Guatemala por genocidio de 25 February 2003, Penal Chamber, Supreme Court of Spain (unreported).
(United States v. Guatemala), J. B. Moore (ed.), *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements*, vol. IV, Washington, D.C., Government Printing Office, 1906, pp. 102–108.
ICSID Case No. ARB/07/17, Award of 21 June 2011 (available from <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>).
(Netherlands v. U.S.A.), Award of April 1928, UNRIAA, vol. II (Sales No. 1949.V.1), p. 829.
Application no. 40035/98, Judgment of 11 July 2000, European Court of Human Rights, *Reports of Judgments and Decisions 2000-VIII*.
WTO Appellate Body Report, WT/DS8/AB/R (adopted 1 November 1996).
Advisory Opinion of 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 38.
(The Kingdom of Saudi Arabia), Opinions of the Lords of Appeal of 14 June 2006, House of Lords, [2006] UKHL 26. Reproduced in ILR, vol. 129 (2007), p. 713.
Judgment of 28 October 2004, Court of Appeal, High Court, Queen’s Bench Division. Reproduced in ILR, vol. 129 (2007), p. 649.

- Jones v. the United Kingdom and Mitchell and Others v. the United Kingdom* Applications nos. 34356/06 and 40528/06, Judgment of 2 June 2014, European Court of Human Rights, *Reports of Judgments and Decisions 2014*.
- Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.* *Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 77.
- Jurisdictional Immunities of the State* (*Germany v. Italy*), *Application for Permission to Intervene, Order of 4 July 2011, I.C.J. Reports 2011*, p. 494.
- Application for Permission to Intervene by the Government of the Hellenic Republic, filed in the Registry of the Court on 13 January 2011, ICJ, 2011 General List No. 143.
- Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, p. 310.
- Application instituting proceedings filed in the Registry of the Court on 23 December 2008, ICJ, 2008 General List No. 143.
- Kaing Guek Eav alias Duch* Case No. 001/18-07-2007-ECCC/SC, Judgment of 26 July 2010, Extraordinary Chambers in the Courts of Cambodia.
- Karnuth v. United States* United States Reports, Cases adjudged in the Supreme Court at October term, 1928, United States Government Printing Office, Washington, D.C., 1929, p. 231.
- Kennedy v. Trinidad and Tobago* Communication No. 845/1999, Views adopted on 2 November 1999, Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI.A, p. 258.
- Kordoghliazar v. Romania* Application no. 8776/05, Decision of 20 May 2008, Third Section, European Court of Human Rights, *Reports of Judgments and Decisions 2014* (available in French only).
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* *Advisory Opinion, I.C.J. Reports 2004*, p. 136.
- Legality of the Use by a State of Nuclear Weapons in Armed Conflict* *Advisory Opinion, I.C.J. Reports 1996*, p. 66.
- Loizidou* *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, Application no. 15318/89, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310.
- Maffezini* *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the tribunal on objections to jurisdiction of 25 January 2000, *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1 (2001), p. 1 (available from <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>).
- Mamatkulov and Askarov v. Turkey* Applications nos. 46827/99 and 46951/99, Judgment of 4 February 2005, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2005-I*.
- Matar and Others v. Dichter* 563 F.3d 9 (2d. Cir. 2009).
- Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 14.
- MOX Plant* *Commission of the European Communities v. Ireland*, Case C-459/03, Judgment of 30 May 2006, Grand Chamber of the Court, *European Court Reports 2006*, p. I-4635.
- Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, Final Award, Decision of 2 July 2003, UNRIAA, vol. XXIII, pp. 59–151.
- Mukeshimana-Ngulinzira and Others v. Belgium and Others* RG Nos. 04/4807/A and 07/15547/A, Judgment of 8 December 2010, Court of First Instance of Brussels, *Oxford Reports on International Law in Domestic Courts*, vol. 1604 (BE 2010).
- Nationality Decrees Issued in Tunis and Morocco (French Zone)* *Advisory Opinion, P.C.I.J., Series B*, No. 4, 1923, p. 6.
- Ndindiliyimana et al.* *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu*, Case No. ICTR-00-59-T, Judgment of 17 May 2011, International Tribunal for Rwanda (available from <http://unict.org/en/cases/ictr-00-56>).
- Nishimura Ekiu v. United States* 142 U.S. 651 (1892).
- Northern Cameroons* (*Cameroon v. United Kingdom*), *Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 15.

<i>Nottebohm</i>	<i>(Liechtenstein v. Guatemala)</i> , <i>Second Phase, Judgment of 6 April 1955</i> , <i>I.C.J. Reports 1955</i> , p. 4.
<i>Nuhanović v. Netherlands</i>	LJN:BR5388, Judgment of 5 July 2011, The Hague Court of Appeal, Civil Section, <i>Oxford Reports on International Law in Domestic Courts</i> , vol. 1742 (NL 2011) (available from http://zoeken.rechtspraak.nl and www.oxfordlawreports.com).
<i>Pinochet</i>	<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate</i> , ex parte <i>Pinochet Ugarte (Nos. 1, 2 and 3)</i> , England, House of Lords, 25 November 1998, and 15 January and 24 March 1999, ILR, vol. 119 (2002).
<i>Prosecutor v. Blaškić</i>	Case No. IT-95-14-AR108bis, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgment of 29 October 1997, ILR, vol. 110 (1998), p. 688 (available from www.icty.org).
<i>Questions relating to the Obligation to Prosecute or Extradite</i>	<i>(Belgium v. Senegal)</i> , <i>Provisional Measures, Order of 28 May 2009</i> , <i>I.C.J. Reports 2009</i> , p. 139.
“ <i>Rainbow Warrior</i> ”	<i>Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair</i> , Decision of 30 April 1990, UNRIAA, vol. XX, p. 215. <i>Case concerning the difference between New Zealand and France arising from the Rainbow Warrior Affair</i> , Ruling of 6 July 1986, UNRIAA, vol. XIX (Sales No. E/F.90.V.7), p. 199.
<i>Rankin v. the Islamic Republic of Iran</i>	Award of 3 November 1987, Iran–United States Claims Tribunal Reports, vol. 17 (1987-V), p. 135.
<i>Reparation for Injuries</i>	<i>Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion</i> , <i>I.C.J. Reports 1949</i> , p. 174.
<i>Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear</i>	<i>(Cambodia v. Thailand)</i> , <i>Provisional Measures, Order of 18 July 2011</i> , <i>I.C.J. Reports 2011</i> , p. 537. Application instituting proceedings filed in the Registry of the Court on 28 April 2011, ICJ, 2011 General List No. 151.
<i>Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area</i>	<i>Advisory Opinion of 1 February 2011, Seabed Disputes Chamber, International Tribunal for the Law of the Sea, ITLOS Reports 2011</i> , p. 10.
<i>Restrictions to the Death Penalty</i>	<i>(Arts. 4(2) and 4(4) American Convention on Human Rights)</i> , Advisory Opinion OC–3/83 of 8 September 1983, Inter-American Court of Human Rights, <i>Series A</i> , No. 3.
<i>Samantar v. Yousuf et al.</i>	560 U.S. 305 (2010).
<i>Southern Bluefin Tuna Cases</i>	<i>(New Zealand v. Japan; Australia v. Japan)</i> , Award on Jurisdiction and Admissibility, Decision of 4 August 2000, UNRIAA, vol. XXIII, p. 4.
<i>South West Africa</i>	<i>(Ethiopia v. South Africa; Liberia v. South Africa)</i> , <i>Second Phase, Judgment, I.C.J. Reports 1966</i> , p. 6.
<i>SS “Wimbledon”</i>	Judgments, 1923, <i>P.C.I.J., Series A</i> , No. 1.
<i>Status of Eastern Carelia</i>	Advisory Opinion of 23 July 1923, <i>P.C.I.J., Series B</i> , No. 5.
<i>Tadić</i>	<i>Prosecutor v. Duško Tadić a/k/a “Dule”</i> , Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, International Tribunal for the Former Yugoslavia, <i>Judicial Reports 1994–1995</i> , vol. I, pp. 352 <i>et seq.</i> , at pp. 428–430.
<i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>	<i>Preliminary Objections, Judgment, I.C.J. Reports 2007</i> , p. 832.
<i>Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea</i>	<i>(Nicaragua v. Honduras)</i> , <i>Judgment, I.C.J. Reports 2007</i> , p. 65.
<i>T. I. v. the United Kingdom</i>	Application no. 43844/98, Decision of 7 March 2000, European Court of Human Rights, <i>Reports of Judgments and Decisions 2000-III</i> .
<i>Whaling in the Antarctic</i>	<i>(Australia v. Japan)</i> , Application instituting proceedings filed in the Registry of the Court on 31 May 2010, ICJ, 2010 General List No. 148.
<i>Xuncax v. Gramajo</i>	886 F. Supp. 162 (D. Mass. 1995).

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

Pacific settlement of international disputes

- Conventions I of 1899 and 1907 for the Pacific Settlement of International Disputes (The Hague, 29 July 1899 and 18 October 1907) J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed., New York, Oxford University Press, 1918, p. 41.
- Covenant of the League of Nations (Versailles, 28 June 1919) League of Nations, *Official Journal*, No. 1, February 1920, p. 3.
- Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919) *British and Foreign State Papers*, 1919, vol. CXII, London, HM Stationery Office, 1922, p. 1.
- American Treaty on Pacific Settlement (Pact of Bogotá) (Bogotá, 30 April 1948) United Nations, *Treaty Series*, vol. 30, No. 449, p. 83.
- North Atlantic Treaty (Washington, D.C., 4 April 1949) *Ibid.*, vol. 34, No. 541, p. 243.
- European Convention for the peaceful settlement of disputes (Strasbourg, 29 April 1957) *Ibid.*, vol. 320, No. 4646, p. 243.

Privileges and immunities, diplomatic and consular relations, etc.

- Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo, 26 December 1933) League of Nations, *Treaty Series*, vol. CLXV, No. 3802, p. 19.
- Convention on the privileges and immunities of the United Nations (New York, 13 February 1946) United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.
- Convention on the privileges and immunities of the specialized agencies (New York, 21 November 1947) *Ibid.*, vol. 33, No. 521, p. 261.
- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) *Ibid.*, vol. 500, No. 7310, p. 95.
- Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (Vienna, 18 April 1961) *Ibid.*, No. 7312, p. 241.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, No. 8638, p. 261.
- Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (Vienna, 24 April 1963) *Ibid.*, No. 8640, p. 487.
- Convention on special missions (New York, 8 December 1969) *Ibid.*, vol. 1400, No. 23431, p. 231.
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87. See also A/CONF.67/16, p. 207.
- United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004) *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38.

Human rights

- Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) *Ibid.*, vol. 213, No. 2889, p. 221.
- Protocol [No. 1] to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952) *Ibid.*, p. 262.
- Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (Strasbourg, 13 May 2004) *Ibid.*, vol. 2677–2678, No. 2889, p. 3.
- International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965) *Ibid.*, vol. 660, No. 9464, p. 195.
- International Covenant on Civil and Political Rights (New York, 16 December 1966) *Ibid.*, vol. 999, No. 14668, p. 171.
- International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) *Ibid.*, vol. 993, No. 14531, p. 3.

Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (New York, 26 November 1968)	<i>Ibid.</i> , vol. 754, No. 10823, p. 73.
American Convention on Human Rights: “Pact of San José, Costa Rica” (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, p. 123.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, No. 14861, p. 243.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980)	<i>Ibid.</i> , vol. 1343, No. 22514, p. 89.
African Charter on Human and Peoples’ Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
Convention on the rights of the child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
African Charter on the Rights and Welfare of the Child (Addis Ababa, 11 July 1990)	E/CN.4/2004/WG.21/5, p. 220.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	United Nations, <i>Treaty Series</i> , vol. 2220, No. 39481, p. 3.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	<i>Ibid.</i> , vol. 2515, No. 44910, p. 3.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	<i>Official Records of the General Assembly, Sixty-first Session, Supplement No. 49 (A/61/49)</i> , vol. I, resolution 61/177, annex.
Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 11 May 2011)	Council of Europe, <i>European Treaty Series</i> , No. 210.

Refugees and stateless persons

Convention regarding the Status of Aliens (Havana, 20 February 1928)	League of Nations, <i>Treaty Series</i> , vol. CXXXII, No. 3045, p. 301.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	United Nations, <i>Treaty Series</i> , vol. 189, No. 2545, p. 137.
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (Kampala, 23 October 2009)	Available from https://au.int .

Transport and communications

Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
Convention on offences and certain other acts committed on board aircraft (Tokyo, 14 September 1963)	<i>Ibid.</i> , vol. 704, No. 10106, p. 219.
Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970)	<i>Ibid.</i> , vol. 860, No. 12325, p. 105.
Convention for the suppression of unlawful acts against the safety of civil aviation (Montreal, 23 September 1971)	<i>Ibid.</i> , vol. 974, No. 14118, p. 177.

Navigation

Convention between Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey respecting the Free Navigation of the Suez Canal (Constantinople Convention) (Constantinople, 29 October 1888)	AJIL, <i>Supplement</i> , vol. 3, p. 123.
Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)</i> , vol. III, resolution 51/229, annex.

Educational and cultural matters

Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005)	United Nations, <i>Treaty Series</i> , vol. 2440, No. 43977, p. 311.
--	--

International trade and development

Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	League of Nations, <i>Treaty Series</i> , vol. CXLIII, No. 3316, p. 355.
--	--

- General Agreement on Tariffs and Trade (Geneva, 30 October 1947) United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.
- North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (Mexico City, Ottawa and Washington, D.C., 17 December 1992) Washington, D.C., United States Government Printing Office, 1993.
- Penal matters**
- International Convention for the Suppression of Counterfeiting Currency (Geneva, 20 April 1929) League of Nations, *Treaty Series*, vol. CXII, No. 2623, p. 112.
- Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937) League of Nations, *Official Journal*, 19th Year, No. 1 (January 1938), document C.546.M.383.1937.V., p. 23.
- European Convention on Extradition (Paris, 13 December 1957) United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273.
- Third Additional Protocol to the European Convention on Extradition (Strasbourg, 10 November 2010) Council of Europe, *European Treaty Series*, No. 209.
- European Convention on the suppression of terrorism (Strasbourg, 27 January 1977) *Ibid.*, vol. 1137, No. 17828, p. 93.
- SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism (Kathmandu, 4 November 1987) Available from www.saarc-sec.org.
- Rome Statute of the International Criminal Court (Rome, 17 July 1998) United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.
- International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999) *Ibid.*, vol. 2178, No. 38349, p. 197.
- International Convention for the Suppression of Acts of Nuclear Terrorism (New York, 13 April 2005) *Ibid.*, vol. 2445, No. 44004, p. 89.
- Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (Moscow, 28 October 2011) Council of Europe, *European Treaty Series*, No. 211.
- Law of the sea**
- Convention on the Continental Shelf (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Ibid.*, vol. 1833, No. 31363, p. 3.
- Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995) *Ibid.*, vol. 2167, No. 37924, p. 3.
- Law of treaties**
- Vienna Convention on the law of treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
- Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978) *Ibid.*, vol. 1946, No. 33356, p. 3.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) A/CONF.129/15.
- Law applicable in armed conflict**
- Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949) *Ibid.*, No. 970, p. 31.
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977) *Ibid.*, vol. 1125, No. 17512, p. 3.
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977) *Ibid.*, No. 17513, p. 609.

Disarmament

- Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Moscow, 5 August 1963) United Nations, *Treaty Series*, vol. 480, No. 6964, p. 43.
- Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”) (with annexed Additional Protocols I and II) (Mexico City, 14 February 1967) United Nations, *Treaty Series*, vols. 634 and 1894, No. 9068, p. 281 and p. 335, respectively.
- Comprehensive Nuclear Test-Ban Treaty (New York, 10 September 1996) A/50/1027, annex.
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997) United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

Environment

- Convention for the protection of the marine environment of the North-East Atlantic (OSPAR Convention) (Paris, 22 September 1992) United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67.

Miscellaneous

- Charter of the Organization of American States (Bogotá, 30 April 1948) United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.
- Convention on the Settlement of Matters Arising out of the War and the Occupation (Bonn, 26 May 1952) (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954) *Ibid.*, vol. 332, No. 4762, p. 219.
- Treaty establishing the European Economic Community (Rome, 25 March 1957) *Ibid.*, vol. 294, No. 4300, p. 3. See also the consolidated version of the Treaty establishing the European Community, *Official Journal of the European Communities*, No. C 340, 10 November 1997, p. 173.
- Convention on Mutual Administrative Assistance in Tax Matters (Strasbourg, 25 January 1988) Council of Europe, *Treaty Series*, No. 127.
- Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991) OAS, *Official Records*, OEA/Ser.A/49 (SEPF).
- Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992) United Nations, *Treaty Series*, vol. 1757, No. 30615, p. 3.
- Framework Convention on civil defence assistance (Geneva, 22 May 2000) *Ibid.*, vol. 2172, No. 38131, p. 213.
- Inter-American Democratic Charter (Lima, 11 September 2001) OAS, *Official Documents*, OEA/Ser.G/CP-1. See also ILM, vol. 40, No. 5 (September 2001), p. 1289.
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) (Lisbon, 13 December 2007) *Official Journal of the European Union*, C 306, vol. 50. Partial publication in United Nations, *Treaty Series*, vol. 2702, No. 47938, p. 3.

CHECKLIST OF DOCUMENTS OF THE SIXTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/634	Provisional agenda for the sixty-third session	Mimeographed. The agenda as adopted is reproduced above, p. xiv.
A/CN.4/635 and Add.1–3	Filling of casual vacancies in the Commission: Note by the Secretariat	A/CN.4/635 and Add.2 reproduced in <i>Yearbook ... 2011</i> , vol. II (Part One). A/CN.4/635/Add.1 and 3 mimeographed.
A/CN.4/636 and Add.1–2	Responsibility of international organizations: Comments and observations received from Governments	Reproduced in <i>Yearbook ... 2011</i> , vol. II (Part One).
A/CN.4/637 and Add.1	Responsibility of international organizations: Comments and observations received from international organizations	<i>Idem.</i>
A/CN.4/638	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session, prepared by the Secretariat	Mimeographed.
A/CN.4/639 and Add.1	Reservations to treaties: Comments and observations received from Governments	Reproduced in <i>Yearbook ... 2011</i> , vol. II (Part One).
A/CN.4/640	Eighth report on responsibility of international organizations, by Mr. Giorgio Gaja, Special Rapporteur	<i>Idem.</i>
A/CN.4/641	Peaceful settlement of disputes: Working paper prepared by Sir Michael Wood	<i>Idem.</i>
A/CN.4/642	Seventh report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	<i>Idem.</i>
A/CN.4/643 [and Corr.1]	Fourth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/644	Effects of armed conflicts on treaties: Note on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur	<i>Idem.</i>
A/CN.4/645	Effects of armed conflicts on treaties: Note on draft article 5 and the annex to the draft articles, by Mr. Lucius Caflisch, Special Rapporteur	<i>Idem.</i>
A/CN.4/646	Third report on immunity of State officials from foreign criminal jurisdiction, by Mr. Roman Anatolevich Kolodkin, Special Rapporteur	<i>Idem.</i>
A/CN.4/647 and Add.1	Seventeenth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/648	Fourth report on the obligation to extradite or prosecute (<i>aut dedere aut judicare</i>), by Mr. Zdzislaw Galicki, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.777	Effects of armed conflicts on treaties: Titles and texts of the draft articles on the effects of armed conflicts on treaties adopted by the Drafting Committee on second reading	Mimeographed.
A/CN.4/L.778	Responsibility of international organizations: Texts and titles of draft articles 1 to 67 adopted by the Drafting Committee on second reading in 2011	<i>Idem.</i>
A/CN.4/L.779	Reservations to treaties: Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.780	Draft Report of the International Law Commission on the Work of its Sixty-third Session, chapter I (Organization of the session)	<i>Idem.</i> See the text approved in <i>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)</i> . The final text appears in <i>Yearbook ... 2011</i> , vol. II (Part Two).
A/CN.4/L.781 and Add.1	<i>Idem</i> , chapter II (Summary of the work of the Commission at its sixty-third session)	<i>Idem.</i>
A/CN.4/L.782	<i>Idem</i> , chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.783 and Add.1–8	<i>Idem</i> , chapter IV (Reservations to treaties)	<i>Idem.</i> See the text approved in <i>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10 and Add.1)</i> . The final text appears in <i>Yearbook ... 2011</i> , vol. II (Part Two) and in <i>Yearbook ... 2011</i> , vol. II (Part Three).
A/CN.4/L.784 and Add.1–2	<i>Idem</i> , chapter V (Responsibility of international organizations)	<i>Idem.</i> See the text approved in <i>Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10)</i> . The final text appears in <i>Yearbook ... 2011</i> , vol. II (Part Two).
A/CN.4/L.785 and Add.1–2	<i>Idem</i> , chapter VI (Effects of armed conflicts on treaties)	<i>Idem.</i>
A/CN.4/L.786 and Add.1	<i>Idem</i> , chapter VII (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem.</i>
A/CN.4/L.787	<i>Idem</i> , chapter VIII (Expulsion of aliens)	<i>Idem.</i>
A/CN.4/L.788 and Add.1–2	<i>Idem</i> , chapter IX (Protection of persons in the event of disasters)	<i>Idem.</i>
A/CN.4/L.789	<i>Idem</i> , chapter X (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem.</i>
A/CN.4/L.790 and Add.1	<i>Idem</i> , chapter XI (Treaties over time)	<i>Idem.</i>
A/CN.4/L.791	<i>Idem</i> , chapter XII (The most-favoured-nation clause)	<i>Idem.</i>
A/CN.4/L.792	<i>Idem</i> , chapter XIII (Other decisions and conclusions of the Commission)	<i>Idem.</i>
A/CN.4/L.793	Reservations to treaties: Conclusions on the reservations dialogue provisionally adopted by the Working Group on reservations to treaties on 6, 12 and 14 July 2011	Mimeographed.
A/CN.4/L.794	Protection of persons in the event of disasters: Texts and titles of draft articles 10 and 11 provisionally adopted by the Drafting Committee on 19 July 2011	<i>Idem.</i>
A/CN.4/L.795	Reservations to treaties: Recommendation on mechanisms of assistance in relation to reservations, provisionally adopted by the Working Group on reservations to treaties on 27 July 2011	<i>Idem.</i>
A/CN.4/L.796	Report of the Planning Group	<i>Idem.</i>
A/CN.4/SR.3080–A/CN.4/SR.3127	Provisional summary records of the 3080th to 3127th meetings	<i>Idem.</i> The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-THIRD SESSION

Held at Geneva from 26 April to 3 June 2011

3080th MEETING

Tuesday, 26 April 2011, at 10.05 a.m.

Outgoing Chairperson: Mr. Nugroho WISNUMURTI

Chairperson: Mr. Maurice KAMTO

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Gaja, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-third session of the International Law Commission.

Tribute to the memory of Ms. Paula Escarameia, former member of the Commission

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note owing to the death of Ms. Paula Escarameia, of which he had informed the Commission members in October 2010. Ms. Escarameia had contributed immensely to the Commission's work as a keen advocate of respect for and the progressive development of international law, especially with a view to ensuring the protection of the most vulnerable. Her friendly, positive and charming disposition would be deeply missed.

At the invitation of the Outgoing Chairperson, the members of the Commission observed a minute of silence in memory of Ms. Paula Escarameia.

Statement by the Outgoing Chairperson

3. The OUTGOING CHAIRPERSON provided a brief overview of the Sixth Committee's debates on the Commission's report on the work of its sixty-second

session,¹ a topical summary of which had been prepared by the secretariat and published in document A/CN.4/638. In order to enhance exchanges between the Commission and the Sixth Committee, delegations, encouraged by paragraph 12 of General Assembly resolution 59/313 of 12 September 2005, had made it their practice to complement their discussions by holding a dialogue with some of the members and special rapporteurs of the Commission who were present in New York. That dialogue had become an integral feature of International Law Week, which had been established by the General Assembly in its resolution 58/77 of 9 December 2003 and had focused in 2010 on the topics of reservations to treaties, the effects of armed conflicts on treaties and on the future of the codification and progressive development of international law. Emphasis had been placed on the Commission's future role and mandate and on its relationship and interaction with Member States in the Sixth Committee. The dialogue had been pursued at meetings with legal advisers. As a consequence of the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 65/26 of 6 December 2010, paragraph 4 of which had invited Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session; paragraph 5 of the resolution had again drawn the attention of Governments to the importance of the Commission receiving by 1 January 2011 their comments and observations on the draft articles and commentaries on the topic "Responsibility of international organizations" adopted by the Commission on first reading at its sixty-first session (2009). In paragraph 6, the General Assembly had invited the International Law Commission to give priority to its consideration of the topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)". In paragraph 7, it had taken note of the report of the Secretary-General on assistance to special rapporteurs of the International Law Commission² and of paragraphs 396 to 398 of the report of the Commission on

¹ *Yearbook ... 2010*, vol. II (Part Two).

² A/65/186.

the work of its sixty-second session,³ and had requested the Secretary-General to continue his efforts to identify concrete options for support for the work of special rapporteurs, additional to those provided under General Assembly resolution 56/272 of 27 March 2002.

Election of officers

Mr. Kamto was elected Chairperson by acclamation.

Mr. Kamto took the Chair.

4. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred upon him and paid tribute to Ms. Xue and Mr. Wisnumurti, the successive Chairpersons of the sixty-second session, and to the other officers of the sixty-second session for their outstanding work. He also thanked the members of the Group of African States for proposing his candidature, in particular Mr. Dugard who had refrained from standing in his favour.

Ms. Jacobsson was elected first Vice-Chairperson by acclamation.

Mr. Niehaus was elected second Vice-Chairperson by acclamation.

Mr. Melescanu was elected Chairperson of the Drafting Committee by acclamation.

Mr. Perera was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/634)

The agenda was adopted.

The meeting was suspended at 10.30 a.m. and resumed at 11.10 a.m.

On a proposal from the Bureau, after consultation with Mr. Pellet, a Working Group on reservations to treaties was constituted. It would be chaired by Mr. Vázquez-Bermúdez.

Reservations to treaties⁴ (A/CN.4/638,⁵ sect. A, A/CN.4/639 and Add.1,⁶ A/CN.4/647 and Add.1,⁷ A/CN.4/L.779,⁸ A/CN.4/L.793,⁹ A/CN.4/L.795¹⁰)

[Agenda item 2]

5. Mr. PELLET (Special Rapporteur) said that, at its previous session, the Commission had provisionally

³ *Yearbook ... 2010*, vol. II (Part Two), pp. 203–204.

⁴ At its sixty-second session (2010), the Commission completed the provisional adoption of the Guide to Practice on Reservations to Treaties, which comprises 199 draft guidelines and the commentary thereto (*Yearbook ... 2010*, vol. II (Part Two), chap. IV, pp. 31 *et seq.*, paras. 105–106) and indicated that it intended to adopt the final version of the Guide to Practice at the current session (*ibid.*, p. 19, para. 45).

⁵ Mimeographed; available from the Commission's website.

⁶ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

⁷ *Idem.*

⁸ Mimeographed; available from the Commission's website.

⁹ *Idem.*

¹⁰ *Idem.*

adopted the Guide to Practice on Reservations to Treaties. It had been understood that, in view of the particular nature of the text, which was not destined to become a convention, the Commission would follow a special procedure. The document that had been adopted was therefore a provisional text which should be finalized at the current session, once States' comments had been taken into account. It had been questionable whether the General Assembly would agree with the Commission's approach, since the Sixth Committee was a creature of habit, but those fears had proved to be unfounded, since the General Assembly had asked the Commission to complete the drafting of the Guide to Practice in 2011. That had been made clear in paragraph 4 of resolution 65/26 in which the General Assembly had invited "Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session".

6. That was no mean task, since the Commission must definitively adopt a Guide to Practice comprising no less than 199 guidelines together with their commentaries which formed part and parcel of the Guide. Fifteen States—Australia, Austria, Bangladesh, El Salvador, Finland, France, Germany, Malaysia, Norway, New Zealand, Portugal, the Republic of Korea, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America—which constituted a fairly representative cross section, had submitted written comments within the time limit set by the General Assembly (A/CN.4/639 and Add.1). It would have been inadvisable to consider no more than those written comments; it had also been necessary to take account of all the comments made by States since work had begun on the topic of reservations to treaties. All the comments submitted since 1995 had been collected and collated in files, most of them in French, but a few in English, on the basis of which he had modified the draft guidelines. In doing so, he had also recorded whether or not he endorsed States' proposals. In that connection, he drew attention to the meagre resources the Secretariat made available to special rapporteurs. It was not right that a special rapporteur should have to collect and distribute States' comments and that session documents were not published in at least two working languages.

7. At that stage in its labours, the Commission had at its disposal written comments from Governments, files summarizing the comments made by States on each of the guidelines which had been provisionally adopted at the previous session, amendments proposed on that basis and explanations in support of those proposals. The Working Group would propose to the Commission meeting in plenary session the final text of the draft guidelines of the Guide to Practice (A/CN.4/L.779). They would have to be adopted before the end of the first part of the session in order for him to finalize the commentaries during the period between the two parts of the session, so that they could be adopted by the close of the session on 12 August 2011. In addition, he would present a seventeenth report (A/CN.4/647 and Add.1) comprising three parts, one on the reservations dialogue, another on

the settlement of disputes concerning reservations and a third comprising instructions for the use of the Guide to Practice and some definitions of general notions differing from those defined in the first section of the Guide. In conclusion, he invited all the members of the Commission to ensure the success of the project in as consensual a spirit as possible.

Organization of the work of the session

[Agenda item 1]

8. The CHAIRPERSON drew the members' attention to the programme of work for the following two weeks. In addition to the subject of reservations to treaties, which had already been mentioned, the Commission would consider the topic of responsibility of international organizations at the current meeting and at the following plenary meetings. That afternoon, the Drafting Committee would hold a meeting on "The effects of armed conflicts on treaties" and the Working Group on reservations to treaties would convene that afternoon. The Bureau proposed that the following meeting be dedicated to the memory of Ms. Paula Escarameia.

9. Sir Michael WOOD said that it was essential to complete work on reservations to treaties at the current session. It would therefore be necessary to ensure that the Working Group on reservations to treaties had enough time during the first part of the session to look carefully at all the issues raised in States' comments. Sufficient time would also have to be allowed, during the second part of the session, for a thorough examination of the commentaries, which were as important as the guidelines themselves.

The programme of work for the first two weeks of the session was adopted.

Responsibility of international organizations¹¹ (A/CN.4/636 and Add.1–2,¹² A/CN.4/637 and Add.1,¹³ A/CN.4/640,¹⁴ A/CN.4/L.778¹⁵)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

10. The CHAIRPERSON invited Mr. Gaja, the Special Rapporteur, to present his eighth report on responsibility of international organizations (A/CN.4/640).

11. Mr. GAJA (Special Rapporteur) said that he would introduce the first half of his eighth report on responsibility of international organizations at the current meeting and that he would deal with the provisions relating to circumstances precluding wrongfulness and the rest of the draft articles at a later stage. As it was his last report, since he was not seeking re-election, he greatly hoped

that it would be the final report on the topic and that the Commission would be able to adopt the draft articles on second reading at the current session.

12. While several States had urged the Commission to complete what they regarded as a useful, or even very useful, exercise, some international organizations had expressed doubts as to its merits, given the scarcity of practice. Most States and international organizations had been unable, or unwilling, to disclose aspects of their practice which might have had some bearing on the Commission's work. That was not, however, a reason to abandon the study which had begun in 2002.¹⁶ As one State had argued, the activities of international organizations had multiplied and affected both international relations and the daily life of private individuals. It was therefore necessary to have a system in place, a set of general rules, even though practice might not be extensive. The elaboration of rules on responsibility of international organizations was a vital step in the development of the international legal order.

13. The very existence of the current draft articles had furthered the development of practice relating to the responsibility of international organizations. One recent example had been the internal document of the United Nations Legal Counsel which had been leaked to the press,¹⁷ part of which was quoted in paragraph 47 of the eighth report. Further criticism from international organizations had stressed the diversity of international organizations and what some of them called "the principle of speciality", implying that the responsibility of each international organization was governed by specific rules, most of which were supposedly embodied in the rules of the relevant organization. Insofar as special rules existed, they took precedence over general rules of international law, as indicated in draft article 63. It could not, however, be held that they covered many of the matters considered in the draft articles. In any event, the comments submitted by international organizations had provided very few examples of such rules.

14. As one State had observed, the draft articles on responsibility of international organizations were sufficiently general to cover the wide variety of existing international organizations. It would be wrong to assume that the existing wide variety of international organizations should require a similar wide variety of rules on responsibility for those organizations. According to the definition contained in draft article 2, the draft articles applied to international organizations possessing legal personality. As international legal persons, those organizations bore rights and obligations and, since they could have obligations under international law, the possibility that they might violate them could not be ruled out. If that happened, it must be possible to hold them responsible. That was true of any international organization with legal personality.

¹¹ For the draft articles and the commentary thereto adopted on first reading by the Commission, see *Yearbook ... 2009*, vol. II (Part Two), pp. 19 *et seq.*

¹² Reproduced in *Yearbook ... 2011*, vol. II (Part One).

¹³ *Idem.*

¹⁴ *Idem.*

¹⁵ Mimeographed; available from the Commission's website.

¹⁶ At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work, constituted a Working Group on the topic and named Mr. Gaja Special Rapporteur (*Yearbook ... 2002*, vol. II (Part Two), p. 93, paras. 461–463). The Working Group presented its report at the same session (*ibid.*, pp. 93–96, paras. 465–488).

¹⁷ Jeffrey Gettleman, "U.N. told not to join Congo army in operation", *The New York Times*, 9 December 2009.

15. The Organization for Security and Co-operation in Europe (OSCE) and a group of other international organizations had suggested moving the provision on *lex specialis* from draft article 63 to make it a new draft article 3. That change of position would not alter the content of the provision in question. In his own opinion, it was preferable to keep draft article 63 where it was, since it was more logical for the draft articles to begin by setting forth general rules before mentioning the possible existence of different rules. Moreover, the inclusion of the *lex specialis* article in Part Six (General Provisions) was consistent with the pattern adopted for the articles on responsibility of States for internationally wrongful acts,¹⁸ adopted by the Commission in 2001.

16. Another general point that had been made with regard to the relationship between the articles on State responsibility for internationally wrongful acts and the current draft articles was that the latter were modelled too closely on the former. In that connection, he had nothing to add to what he had said on the subject in paragraph 5 of his report.

17. Before moving on to specific draft articles, he noted that neither he nor the secretariat of the Commission had been consulted about some editorial changes that had been introduced in the text of his report. He particularly regretted that references in the text to the Secretariat of the United Nations had often been shortened to “the Secretariat”.

18. Some international organizations had wanted to hold further consultations with the Commission on the draft articles. That was hardly warranted, since the Commission intended to adopt not the text of a draft convention, but a set of draft articles which would then be submitted to the General Assembly. Most international organizations had availed themselves of the ample opportunity they had been afforded to submit their comments.

19. Opinions had diverged on whether the Commission should examine the invocation of the responsibility of a State by an international organization. It seemed preferable to postpone any decision in that regard, since it would not affect the content of any of the current draft articles. The Commission could then consider whether to undertake a study which might lead it to amend several articles on State responsibility. In that context, it might also wish to consider whether the articles on State responsibility and the current draft articles should be supplemented in order to address issues concerning the responsibility of States and international organizations towards individuals and other entities.

20. The definitions of “international organization” and “rules of the organization” had elicited few comments. Most observations had been confined to the definition of “organ” and the revision of the definition of “agent”. Given the diversity of approaches followed in the constituent instruments of international organizations, a definition of “organ” based on the rules of each

organization would be a source of discrepancy, whereas a uniform definition that departed from the rules of organizations could be confusing. If a decision were taken to include a definition of “organ” in the draft articles, it would be logical to place it before the definition of “agent”. Paragraph 20 of the report proposed the wording “‘Organ of an international organization’ means any person or entity which has that status in accordance with the rules of the organization”. According to draft article 2 (c), “agent” included officials and other persons or entities through whom the organization acted. Another longer definition, which the Commission had not adopted, explained that the person or entity in question was “charged by an organ of the organization with carrying out, or helping to carry out, one of its functions”.¹⁹ Both sets of wording stemmed from the advisory opinion of the International Court of Justice (ICJ) on *Reparation for Injuries*. If the idea of including a definition of “organ” were accepted, it would be preferable to avoid any overlapping of the categories of organs and agents. For that reason, the definition could be reformulated to read: “‘Agent’ means an official or other person or entity, other than an organ, through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions”. That wording contained no reference to “the rules of the organization” which might give rise to an overly restrictive definition of “agent”.

21. Draft article 6 concerned the conduct of an organ of a State or an international organization which had been placed at the disposal of another international organization. Several States and the Secretariat of the United Nations had endorsed the Commission’s criticism of the decision of the European Court of Human Rights in *Behrami and Saramati*, but one State had dissociated itself from it. Draft article 6 made the decisive criterion for attributing conduct “the effective control” exercised over the conduct in question. The Secretariat of the United Nations had drawn attention to the fact that, for a number of reasons, notably political ones, the practice of the United Nations had been to maintain the principle of United Nations responsibility *vis-à-vis* third parties in connection with peacekeeping operations, although it was in favour of “the inclusion of draft article 6 as a general guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization” (A/CN.4/637 and Add.1, observations on draft article 6, para. 6). On 8 December 2010, an interesting example of practice had been furnished by the judgment of the Court of First Instance of Brussels in the *Mukeshimana-Ngulinzira and Others v. Belgium and Others* case, which had found that the decision of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a *de facto* refugee camp in Kigali in April 1994 had been taken under the aegis of Belgium and not UNAMIR.

22. Draft article 7, on *ultra vires* acts, was modelled on the corresponding provision of the articles on State responsibility for internationally wrongful acts. It did not therefore expressly require the act to have been committed in an official capacity. Paragraph (4) of the commentary

¹⁸ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

¹⁹ *Yearbook ... 2009*, vol. II (Part Two), p. 18, para. 36, footnote 18.

was fairly clear in that respect. As the Secretariat of the United Nations had suggested, the commentary could explain that the organ or agent was acting “within the overall functions of the organization” (*ibid.*, observations on draft article 7, para. 2). A group of international organizations had maintained that draft article 7 should take account of the practice related to privileges and immunities, which it deemed to be more restrictive with regard to *ultra vires* acts (*ibid.*). In his opinion, the privileges and immunities granted by a headquarters agreement covered only acts within the functions of an organ or agent, but that did not necessarily mean that *ultra vires* acts should not be attributed to the international organization.

23. With regard to draft article 8, concerning conduct acknowledged and adopted by an international organization as its own, the Secretariat of the United Nations had sought clarification of “the form of the acknowledgement” (*ibid.*, observations on draft article 8, para. 1), and had asked whether the act of acknowledgement should be made in full knowledge of the unlawful character of the conduct and of the legal and financial consequences of such acknowledgement. He intended in paragraph (5) of the commentary to provide a more detailed explanation of the role that the rules of an organization could play in ascertaining the validity of the acknowledgement of an act.

24. The only provision of chapter II which had given rise to very few comments was draft article 9. The substance of that provision had not been criticized. For the sake of clarity, the commentary could specify that, as the Secretariat of the United Nations had proposed, “only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9” (*ibid.*, observations on draft article 9, para. 3).

25. The commentaries to draft articles 13 and 14 obviously needed to be developed by drawing on the commentaries to articles 16 and 17 of the draft articles on State responsibility for internationally wrongful acts. Paragraph (5) of the commentary to article 16 of the draft articles on State responsibility, stating that “the aid or assistance must be given with a view to facilitating the commission of the wrongful act and must actually do so”²⁰ would be difficult to reconcile with draft article 13 on the responsibility of international organizations, which mentioned only knowledge of the circumstances of the wrongful act and did not imply in any way that the organization must have intended to facilitate its commission.

26. The opinion expressed by the United Nations Legal Counsel, which was reproduced in paragraph 47 of the eighth report, did not contend that international responsibility presupposed an intention to facilitate the commission of a wrongful act. Notwithstanding the strength of the argument resting on the commentary to article 16 of the draft articles on State responsibility, there were no grounds for reproducing the passage in question in the commentary to draft article 13, whose scope was considerably narrower.

27. One State had suggested, in order to avoid any overlapping of draft articles 13, 14, 15 and 16, that the phrase “subject to articles 13 to 15” should be inserted at the beginning of draft article 16.

28. Another minor amendment to the text of draft article 16 would be to include a general reference to a “member” instead of a “member State or international organization”, as an international organization might adopt a decision binding on a member which was neither a State nor an international organization. Draft article 16, paragraph 1, would then read:

“Subject to articles 13 to 15, an international organization incurs international responsibility if it adopts a decision binding a member to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.”

29. The term “circumvent” had elicited a number of comments. The question had been raised of whether the phrase “and would circumvent an international obligation” was really necessary, or whether it amounted to no more than an explanation which would be better placed in the commentary. However, it seemed that an international organization would not incur responsibility unless it had intentionally misused its powers.

30. Draft article 16, paragraph 2, had given rise to criticism from several States, the International Monetary Fund (IMF), the Secretariat of the United Nations, the International Labour Organization (ILO) and the European Commission. Two arguments had been put forward. First, the provision’s scope was said to be too wide given the number of recommendations issued by international organizations. Secondly, it was held that there should be a closer link between the recommendation and the member’s conduct. In response, he suggested—and it was probably the most radical proposal he had made in his eighth report—that paragraph 2 should simply be deleted (para. 58 of the report). The two paragraphs of draft article 16, which were designed to prevent an international organization from taking advantage of the separate legal personality of its members, were certainly not based on practice and could therefore be regarded as attempts at progressive development. Hence it was probably preferable to retain only paragraph 1, which had been generally endorsed despite its innovative character.

31. Mr. NOLTE said that the topic of responsibility of international organizations was central to the Commission’s current agenda. As the Special Rapporteur had been able to complete his work on time, the Commission might be able to finalize its work on the subject 10 years after its adoption of the articles on responsibility of States for internationally wrongful acts. It would be a great achievement for the Commission, and for international law in general, if the law of the responsibility of the most important subjects of international law could be articulated authoritatively. The Special Rapporteur’s eighth report offered an excellent basis for the remaining work and provided the key to a successful outcome. His own statement would be confined to some general comments on the introduction and first part of the report.

²⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 66.

32. He agreed with most of the Special Rapporteur's analysis and conclusions. The draft articles were all well-crafted and formed a coherent, cohesive whole. It was unnecessary to change radically the approach which had been adopted. All that was needed was some finishing touches.

33. That meant, for example, that there was no need to ask whether the "principle of speciality" should be expressed in a manner different to that proposed by the Special Rapporteur, which was modelled on the articles on State responsibility. That principle was clearly set forth in draft article 63. Altering the overall structure of the articles and putting the principle of speciality in the chapter devoted to general principles could give rise to misunderstanding and suggest that the Commission was uncertain about their authoritative force. That could lead to the practice of "special pleading", which would undermine the whole regime of responsibility of international organizations.

34. It was unnecessary to revisit the question of whether the draft articles rested on a sufficient amount of State or organizational practice. The law of responsibility of international organizations was not as self-contained as, for example, the law of diplomatic relations among States, since it was closely related to the law of State responsibility. That justified the Special Rapporteur's general approach which consisted in asking, with regard to rules resting on little practice, whether there were any good reasons for departing from the approach adopted for the articles on State responsibility. If there were none, the need to preserve the consistency of the law of responsibility and the principle of responsibility itself called for adherence to the rule established for States. The same approach had been followed successfully when the Commission had drafted the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "1986 Vienna Convention").²¹

35. At that juncture, it was preferable not to try to solve the question of rules on the invocation of the responsibility of a State by an international organization. While it was regrettable that this issue had not been addressed in either the articles on State responsibility for internationally wrongful acts or the draft articles on responsibility of international organizations, since no clear trend had emerged, either in the Commission or among States and international organizations, in favour of deciding the initial question of whether rules on that matter should be included in the draft articles under consideration, it was too late to attempt, for the sake of completeness, to formulate rules which had not been properly researched. He therefore agreed with the Special Rapporteur's proposal to contemplate a separate study and not to delay the completion of work already under way. Draft article 1 should therefore remain unaltered.

36. As far as draft article 2 was concerned, he still agreed with the Special Rapporteur that the definition of

"international organization" should not be confined to intergovernmental organizations, but he wondered if the commentary could explain that not every association of one or more States with private entities was necessarily an international organization. That status also presupposed that the association had a public function and that the participating State(s) had a special position within it.

37. He concurred with the Special Rapporteur that the Commission should not seek to narrow the definition of "rules of the organization", because the great variety of rules might not be fully appreciated if some were highlighted and others omitted.

38. He supported the Special Rapporteur's proposal to include a definition of "organ" in draft article 2, but the term should not be defined in such a way as to exclude the possibility of an "agent" being an "organ" and vice versa. In proceedings before the ICJ, for example, the agent of a Government could be an organ of the State. The difference between an "organ" and an "agent" lay primarily in the focus on various aspects of the same phenomenon: the term "organ" referred to the specific legal competence of an entity, including a natural person, to act, whereas the term "agent" referred primarily to the person with specific legal competence to act. The difference between "organ" and "agent" was not that an "agent" operated on the basis of being charged *ad hoc* with a function, while an "organ" exercised a certain function continually. That distinction was often difficult to make in practice and was unnecessary for the purposes of the draft articles under consideration. He therefore proposed that "organ" and "agent" should be defined in the following manner:

"(c) 'organ of an international organization' means any person or entity which has a legal capacity to act in accordance with the rules of the organization;

"(d) 'agent' means an official or other person or entity through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions."

39. It was not necessary to define "organ" as any person "who has that status". A reference to "that status" might have been advisable in the context of the law of State responsibility to bring out the fact that it was up to States to define their organs. Technically, however, that reference was not only superfluous, it made the definition circular.

40. Mr. AL-MARRI thanked the Special Rapporteur for his presentation of his eighth report on responsibility of international organizations. That complex subject had triggered great controversy as the comments and observations from States and international organizations had shown. Despite the difficulties which had been encountered, the Special Rapporteur had worked ably with wisdom and perseverance and there was no doubt that the Commission would add the requisite final touches to the draft articles at second reading.

41. Mr. PETRIČ endorsed the comments of members who had congratulated the Special Rapporteur on the excellent work he had done. He was sure that the consideration of the subject, which was of fundamental

²¹ For the draft articles adopted on second reading by the Commission and the commentary thereto, see *Yearbook ... 1982*, vol. II (Part Two), chap. II, sect. D, pp. 17 *et seq.*, para. 63.

importance, would be completed during the current quinquennium. He supported the proposal of the Special Rapporteur and Mr. Nolte to keep draft article 1 as it stood, in order to avoid reopening the debate on the responsibility of member States of international organizations. Mr. Nolte's proposal regarding the definition of "organ" and "agent", which provided useful clarification, deserved closer scrutiny. He approved of the proposal to delete paragraphs 2 and 3 from draft article 16 in view of the particularly sharp criticism which paragraph 2 had elicited from international organizations.

Organization of the work of the session (*continued*)

[Agenda item 1]

42. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) announced that the Working Group on reservations to treaties comprised Mr. Candiotti, Mr. Gaja, Mr. Huang, Mr. McRae, Mr. Nolte, Sir Michael Wood and Mr. Perera (*ex officio*).

The meeting rose at 12.55 p.m.

3081st MEETING

Wednesday, 27 April 2011, at 10.05 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Ms. Paula Escarameia, former member of the Commission (*continued*)

1. The CHAIRPERSON recalled that at the previous meeting the Commission had observed a minute of silence in memory of Ms. Escarameia. Following her election to the Commission in 2002, she had made a substantial contribution, with competence and enthusiasm, to its work. Deeply committed to the development of the rules of international law, she had had a special regard for the ways in which the law could help to protect the weak and vulnerable. With her warm and friendly manner and positive attitude, she would long be remembered by the members of the Commission.

2. Mr. WISNUMURTI said that Commission members had had first-hand experience of Ms. Escarameia's expertise in international law, her analytical mind and the intellectual rigour with which she had defended her views. Her warm personality had helped them to reach consensus on many occasions. Speaking first on many topics, she had often set the tone of their discussion. As an advocate for

human rights, gender equality and humanitarian causes, she had demonstrated her commitment to promoting social justice. Among her many achievements in the field of international law was the instrumental role she had played in the negotiation of the Rome Statute of the International Criminal Court.

3. Mr. SABOIA said that among Ms. Escarameia's many fine qualities had been her deep knowledge of international law, her dedication to the Commission's work and her combative spirit, which had been tempered by a sense of humour. She had shown a strong interest in environmental issues and a genuine enthusiasm for bringing young people along in the study of international law.

4. Mr. PELLET said that Ms. Escarameia had been a truly "good person", a phrase he was using advisedly, and not in its usual saccharine sense. As a former Commission member, Mr. James Crawford, had once written about another colleague, Ms. Escarameia had made Special Rapporteurs think hard and twice about their topics, thereby bettering their work. He himself was sure that his own work on reservations to treaties had benefited substantially from her remarks.

5. Ms. Escarameia had had a natural aptitude for the defence of good causes, as demonstrated by her work as a founding member of the International Platform of Jurists for East Timor, and she had often combined her scientific legal knowledge with her desire to fight for human rights. She had been the moral conscience and heart of the Commission, constantly reminding its members that the law was not some abstract game but a tool for justice and progress.

6. The law was a sad and arid thing if it lacked a soul, and she had known how to endow it with one. He was certain that, if they listened carefully, her colleagues could catch the echoes of her vibrant and vigorous voice in the conference room, which would be a much less exciting place without her.

7. Mr. DUGARD agreed that Ms. Escarameia had had a profound impact on the Commission. As one of the first women elected to serve on it, she had injected a new spirit into its work, sharing her belief in a new legal order in which the individual occupied an important place. While she had been a strong individualist, she had also been a good team player. In his work as Special Rapporteur on diplomatic protection, he had learned to appreciate her lively and intelligent contributions. Her best legacy was the Commission's continuing awareness that there was always a place for principles and conviction in its debates.

8. Mr. COMISSÁRIO AFONSO said that Ms. Escarameia had been a highly valued member of the Commission whose solid contribution to its work would remain a true monument to what she had stood and fought for. She had challenged some of the Commission's traditions in the interest of generating a better working environment. His own friendship with her had been based, not on their common Portuguese language and culture, but on mutual respect, an eagerness for learning and a shared desire for dialogue. He was grateful to have known and worked with her.

9. Mr. GALICKI said that although he had met Ms. Escarameia only recently, he felt as if he had always known her. She had been an unusual woman with a deep knowledge of and passion for public international law. Even when she had disagreed with others, she had done so without antagonizing them and with a will to find common ground. She had been not only a prominent specialist in international law but also a dedicated and sensitive teacher. Her admission to the Commission as one of its first female members had been a historic event.

10. Mr. NOLTE said that Ms. Escarameia had combined impressive competence in international law with warmth and generosity—heart with reason, to paraphrase Mr. Pellet's remarks. In a sense, she had been the Commission's conscience. With her capacity to be critically constructive and a civilized fighter for her ideals, she had seen the bad but had projected the good.

11. Mr. AL-MARRI said that it would be unfortunate if Commission members' tributes to Ms. Escarameia did not gain a wider hearing. He therefore proposed that a record of the statements made should be sent via the Embassy of Portugal in Geneva to Ms. Escarameia's family and community in Portugal, who could then see how her larger family, the international community, cherished her memory.

12. Ms. JACOBSSON endorsed the comments of members who had praised Ms. Escarameia as a colleague who had influenced the course of the Commission's work and as a special person who had combined exceptional integrity with a generous heart. It was the view of some members that an event should be organized to honour Ms. Escarameia's intellectual contribution to the Commission. Accordingly, in conjunction with the Graduate Institute of International and Development Studies of Geneva and with the support of the Commission secretariat, she was in the process of coordinating a commemorative event to be held later during the current session. It was hoped that colleagues who were not members of the Commission, as well as Ms. Escarameia's husband, would be able to attend the event. As soon as she was in a position to do so, she would inform members of the date of the proposed event.

13. The CHAIRPERSON said that he would take note of the proposal and looked forward to receiving details of the event.

14. Mr. PELLET announced that another event in commemoration of Ms. Escarameia was being organized by some of her assistants and students with the support of the Fundação Calouste Gulbenkian. A conference was to be held in Lisbon in late October 2011 at which participants would discuss the various topics of international law that had been of particular interest to Ms. Escarameia. The members of the Commission were warmly invited to participate in that event.

15. Mr. HUANG said that, as a new member of the Commission, he wished to join others in expressing regret at the passing of Ms. Escarameia. Although he had worked with her for only one brief week the previous year, she had left a lasting impression on him. Listening to

the tributes paid to her memory by other members, he had also been impressed by the high degree of competence and professionalism exhibited by all the Commission's members. He was honoured to be included in such a body yet sobered at the responsibility that it entailed, and he would spare no effort in helping to achieve the Commission's objectives.

16. The CHAIRPERSON said that even when speaking with great passion and conviction, Ms. Escarameia had always maintained a spirit of friendship. If he had to sum up her contribution to the Commission in one sentence, it would be that her strong convictions had literally impelled the Commission towards the progressive development of international law, which lay at the very heart of its mandate. Consistently seeking out the rules of international law that would support the weakest and most vulnerable, she had raised members' awareness of the need to transcend the narrow confines of legal reasoning in order to develop new standards of protection. The Commission owed her a debt of gratitude, and he was certain that her memory would remain uppermost in the minds of members throughout the morning's meeting.

The meeting was suspended at 10.50 a.m. and resumed at 11.25 a.m.

Responsibility of international organizations (continued) (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

17. The CHAIRPERSON invited the members of the Commission to resume their consideration of the eighth report on responsibility of international organizations (A/CN.4/640).

18. Mr. McRAE said that, although it would be hard to emulate the rigour that had typically characterized Ms. Escarameia's assessments of the reports of Special Rapporteurs, his own comments were intended to challenge the Special Rapporteur on several points, and he liked to think that Ms. Escarameia's critical spirit was still present within the Commission.

19. He welcomed the Special Rapporteur's incorporation of comments from States and international organizations in the draft articles that had been submitted for second reading. However, some of those comments reflected fundamental concerns that deserved to be addressed by the Commission in greater depth than had been suggested by the Special Rapporteur in his eighth report and in his introductory statement at the previous meeting, particularly if the final version of the draft articles was to embody an exhaustive analysis of the issues raised.

20. The first concern was that the Commission was producing draft articles whose underlying assumption was that all international organizations had the same legal status—namely, that they possessed international legal personality—and could therefore be treated equally. Yet such an assumption of similarity was not borne out

in fact, since international organizations were actually characterized by diversity, or “speciality”, a point that had been mentioned by the United Nations Secretariat in its comments on the draft articles. Although many of the large, multifaceted international organizations that had responded to the Commission’s request for comments were perhaps the kind to which uniform rules might apply, there were a vast number of international organizations that had not commented on the draft articles. They differed significantly from those that had, yet would be covered by the same provisions of the draft articles.

21. Another aspect of the issue of speciality was the question of the extent to which the uniqueness of a particular organization, as evidenced by its internal rules (referred to in the draft articles as the “rules of the organization”), affected the manner in which responsibility attached to the organization. Although the Commission had addressed that issue in draft article 63, he was not certain that it had dealt with it adequately.

22. A second concern related to the recurrent criticism that the draft articles on the responsibility of international organizations were little more than a “carbon copy” of the articles on State responsibility for internationally wrongful acts,²² giving rise to questions of methodology and outcome. The Special Rapporteur had correctly responded in paragraph 5 of his report that the draft articles paralleled the articles on State responsibility in certain cases because the Commission had concluded that there was no reason in those cases to make a distinction between States and international organizations. However, a further question was whether that conclusion could stand up to scrutiny in all cases.

23. In that connection, he did not find compelling the argument made by the Special Rapporteur in paragraph 26 of his report that damage should not be included among the elements of an internationally wrongful act since that notion had been rejected in the articles on State responsibility. Furthermore, the Special Rapporteur’s reference to the need for coherence among the instruments on international responsibility prepared by the Commission suggested that it had been the Commission’s strategy all along merely to follow the articles on State responsibility. He also disagreed with the invocation of the articles on State responsibility in paragraph 99 of the report to justify the retention of the term “fundamental human rights” in draft article 52. Since the Commission had rejected that concept in the context of the topic of expulsion of aliens, he did not believe it should be retained in draft article 52, regardless of what had been done in the articles on State responsibility.

24. At the previous meeting, Mr. Nolte had argued that if the rules applicable to treaties between States were to serve as the model for treaties between international organizations, then it stood to reason that the rules governing the responsibility of States should apply also to the rules governing the responsibility of international organizations. While the point was an interesting one, he

himself was not sure that the correlation between the two sets of rules was quite that clear-cut, since responsibility could vary depending on the nature of the actors concerned, whereas the applicability of treaties could not.

25. In his view, the current draft articles and commentary did not adequately address the relationship between the rules of State responsibility and those of the responsibility of international organizations, and failed to clearly establish the separate identity of the articles on the responsibility of international organizations. While he appreciated the Special Rapporteur’s efforts to avoid undermining the articles on State responsibility, that goal should not be achieved at the expense of the credibility and legitimacy of the draft articles on the responsibility of international organizations. Further consideration should therefore be given to that issue.

26. A third concern related to the frequent observation by international organizations that the draft articles were based in many instances on inadequate or non-existent practice. That fact had been freely acknowledged by the Commission, and the onus was thus on international organizations to divulge their practice—something they had done only sparingly. The extent to which the draft articles were based on practice had an impact on how the Commission characterized the outcome of its work: draft articles that were based on widespread or generally accepted practice of international organizations represented a form of codification. In the case of draft articles not based on practice, however, the question arose as to what constituted their basis: was it assimilation of an international organization to a State, common sense or the progressive development of international law? And if all the draft articles represented an exercise in progressive development, should the Commission include a disclaimer concerning all of them?

27. The Special Rapporteur’s approach to the lack of practice in certain circumstances appeared to be inconsistent. Whereas in paragraph 60 he had stated that the infrequent occurrence of an act was not a reason for not including a draft article on the subject, in paragraph 88 he argued that the rare exercise of functional protection was a reason for not addressing it specifically in a draft article. Such inconsistency reinforced the need to delve deeper into the question of the role of the practice of international organizations in the elaboration of the draft articles.

28. He had a number of suggestions as to how the Commission might address those concerns. First, with regard to the principle of speciality, it should be noted that the term was used in two senses in the context of the current topic: to refer to areas of divergence between the draft articles on responsibility of international organizations and the articles on State responsibility, and to refer to differences between international organizations *inter se*. Both the United Nations Secretariat and the European-based international organizations had emphasized the importance of the principle of speciality and had suggested that two clarifications be made. The first would make clear that the Commission’s methodology did not involve a simple transposition of the articles on State responsibility for internationally wrongful acts with minor amendments, but constituted an independent analysis of

²² General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

the practice and needs of international organizations. The second clarification would show how differences between international organizations had been taken into account in the text of the draft articles and would be accommodated in the application of the articles. Both clarifications needed to be debated in the Commission, and he believed that the Commission should pursue the suggestion made by international organizations in their comments to include an introduction to the draft articles that would elucidate in detail what had been only vaguely expressed in draft article 63. The Special Rapporteur's recognition in paragraph 3 of his eighth report of the greater practical importance that the principle of speciality might have in the case of international organizations was a further argument for addressing speciality at the outset. That could be accomplished either in a separate introduction to the draft articles or in article 1, on the scope of the draft articles.

29. He suggested that an entire meeting of the Commission be set aside to discuss the scope and content of speciality in the proposed introduction. The Commission might also wish to follow up on the proposal made by legal advisers to European-based international organizations that both they and a representative of the United Nations Secretariat be invited to such a meeting. Guest participants could be presented with a series of questions developed by the Special Rapporteur, who could be assisted by a working group in preparing for the meeting.

30. Consideration should be given at the meeting as to whether international organizations had differing levels of international responsibility, depending on their nature and functions, and as to the role that the rules of an organization played in determining the scope of that responsibility. For example, the Special Rapporteur's indication in paragraph 4 of his report that some draft articles were hardly relevant to certain organizations might be elaborated further in the introduction. The technical organizations referred to in that paragraph needed to know why they could not invoke certain circumstances precluding wrongfulness as well as the circumstances in which their own responsibility could be invoked.

31. The proposed introduction to the draft articles should describe the relationship of the present draft articles to the articles on State responsibility, making express reference to their autonomous status and to areas of overlap. The Commission needed to show that it had independent reasons for adopting a particular draft article; it should consequently revise or remove from the commentaries any statement that implied that it had adopted a particular formulation because it paralleled what was found in the articles on State responsibility for internationally wrongful acts. Coherence among the instruments prepared by the Commission was not a very compelling reason for adopting a particular formulation.

32. The question of how to deal with the lack of practice in relation to some draft articles posed a problem. He was not in favour of including a general disclaimer, as that would diminish the value of those draft articles that did have a solid basis in practice. Perhaps the Commission could take the unusual step of identifying certain draft articles as having been explicitly based on the notion of progressive development where that was deemed

necessary. Further discussion was needed on that question, and it, too, should be placed on the agenda of the proposed meeting with the legal advisers of international organizations. As they were in many respects the most important consumers of the Commission's work, the legal advisers to international organizations should be able to refer to the draft articles in the same way that legal advisers to States referred to the articles on State responsibility. It was therefore critical for the Commission to respond to them and to be seen as taking their views into account.

33. He realized that the suggestions he had made might constitute a departure from the way the Commission had functioned in the past. Nevertheless, he believed that they would help to ensure widespread acceptance of the draft articles.

34. Lastly, he agreed with the Special Rapporteur that the Commission should take up separately the issue of the invocation by an international organization of the responsibility of a State, and that it should undertake an analysis of the relevant practice and law before taking a position on the issue.

35. The CHAIRPERSON said that he had taken note of the suggestion to organize a meeting with the legal advisers of international organizations and would refer the suggestion to the Special Rapporteur.

36. Mr. NOLTE said that as he had commented on Part One of the eighth report on responsibility of international organizations at the previous meeting, he would now focus on Part Two of the report. He endorsed the Special Rapporteur's approach to draft articles 4 to 9, in particular his remark in paragraph 43 that the application of international law was not entirely excluded even in areas covered by European Union law. He did, however, have some concerns regarding draft articles 13 to 16.

37. The most important element of Part Two of the report was the suggestion made in paragraph 58 to delete draft article 16, paragraph 2, whereby the responsibility of international organizations would be incurred for recommendations addressed to member States and international organizations to commit an internationally wrongful act. Having always been critical of the idea of such responsibility for recommendations, he was in favour of the suggestion; however, he considered that the Special Rapporteur had not fully explained the implications of that step.

38. The decision not to accept responsibility for recommendations also affected the responsibility incurred in the provision of aid or assistance in the commission of an internationally wrongful act, which was covered by draft article 13. Care must therefore be taken to ensure that the principle of responsibility for recommendations was not reintroduced indirectly by providing the possibility for considering recommendations as a form of aid and assistance.

39. His main concern, however, was the commentary to draft article 13. He had no objections to transposing the principle of responsibility for aid or assistance from the law of State responsibility to the law of responsibility of

international organizations, and he had no problem with the wording of the draft article. However, the potentially far-reaching and novel form of responsibility for aid or assistance should be carefully limited, similarly to what had been done in the commentaries to the articles on State responsibility. Otherwise, important forms of cooperation and innovation in international relations might be unduly inhibited by concerns of potential liability. For instance, it might sometimes be apparent to a United Nations peacekeeping operation that its actions could provide support for the commission of war crimes, and such conduct should not be permissible; however, the World Bank should not be placed under a regime that would require it to verify or ensure that its loans were properly used. He was therefore in favour of the approach adopted by the Commission in its commentary to the parallel draft article on State responsibility (draft article 16) with respect to the requirement of intent.²³ The Commission should not only follow the suggestion made by the European Commission, referred to in paragraph 49 of the Special Rapporteur's eighth report, to add to the commentary some limitative language (intent) in line with the commentaries of the draft articles on State responsibility, in his view, it should go a step further and strengthen the subjective requirement by including language calling for some form of intent or, in some cases, even conscious misuse.

40. A reference to the subjective element of intent was not the only addition that should be made to the commentary to draft article 13. The Special Rapporteur recognized that the commentary was very short and needed to be supplemented, but the Commission needed to decide what direction such additions should take. In his view, they should generally be of a limitative nature. He therefore endorsed the idea of establishing a "*de minimis* criterion", mentioned in paragraph 45 of the report, which could be formulated positively as a requirement that the wrongful act had "contributed significantly to that end".

41. The same general approach should be taken when supplementing the commentary to draft article 14 on direction and control exercised over the commission of an internationally wrongful act. He therefore endorsed the Special Rapporteur's suggestion made in paragraph 50 of his report that the commentary indicate that the simple exercise of oversight was not sufficient to generate responsibility.

42. The Special Rapporteur had acknowledged that draft articles 13 to 16 were closely interrelated and overlapped in part. It was therefore important to explain their interrelationship, primarily by explaining the purpose of the individual articles and by giving appropriate examples. However, it would be helpful to describe the relationship between the articles by inserting the words "subject to articles 13 to 15" at the beginning of draft article 16, as suggested in paragraph 51 of the report. It was not clear whether such an inclusion was meant to imply that draft articles 13 to 15 should have priority and, if so, what that priority would entail. Would it mean that even if draft article 16 did not establish responsibility for

recommendations, such responsibility could be derived from draft articles 13 to 15? His sense was that once the reference to responsibility for recommendations was deleted from draft article 16 there would no longer be any need to explain how the provision related to draft articles 13 to 15.

43. He wished to make a few comments on Mr. McRae's statement, since it went against the general thrust of the statement he himself had made at the previous meeting. When discussing the diversity of international organizations, it was important to focus on when such diversity was really relevant. There were two dimensions to the project under consideration. The first was the relationship of the international organizations to their members. In that relationship, diversity played an extremely important role, and there were many references in the draft articles to "the rules of the organization", which was a reaffirmation of the principle of diversity. However, in the relationship between an international organization and a third State subjected to an internationally wrongful act, such diversity should not be overstated; it was not of paramount importance whether the international organization in question was large or small, technical or general in nature.

44. As far as the "carbon copy" criticism was concerned, his statement at the previous meeting had been misunderstood if it had been interpreted as meaning that the Commission's work on the law of treaties was similar to its work on the responsibility of international organizations. It was in fact more difficult to take a carbon copy approach in the area of the law of treaties because parliaments were required to ratify treaties, whereas international organizations did not have analogous bodies.

45. Similarly, there were certain norms that he considered as being close to general principles of international law and for which it was not necessary to give numerous examples of practice, even though such practice was assumed to exist. Responsibility was one area in which the notion of a general principle was more inherent than in other areas of international law, such as diplomatic law. The distinction between codification and progressive development in that particular area of the law was not as clear-cut as it was in other areas, and it should not be made so artificially.

46. As to whether damage ought to be included as an element of an internationally wrongful act, the reasons that it had not been included in the draft articles on State responsibility had nothing to do with the nature of States but related to the nature of certain rules of international law which did not require the payment of damages in the event of their violation. He did not see why the same should not apply to international organizations. Sometimes relying on a general underlying principle was a legitimate approach to follow, and he did not feel it was necessary to seek instructions or further advice from representatives of international organizations on the matter.

47. Lastly, while he had no objection to the idea of adding an introduction to the draft articles that would outline the concerns raised, he believed it was important to keep things in perspective and not to reopen the debate on a project that was close to fruition.

²³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 65–67 (paras. (3)–(5) of the commentary).

48. Sir Michael WOOD endorsed the eloquent comments made by previous speakers about Ms. Escarameia.

49. With regard to the responsibility of international organizations, he commended the Special Rapporteur for his eighth report. It was user-friendly and timely, notwithstanding certain practical difficulties, such as the late submission of comments, including indications of practice, by international organizations and States. He also wished to thank the Special Rapporteur for his introduction of the report at the previous meeting. Although what he had to say might sound rather critical, he wanted to be clear about two things: first, any criticism was not directed at the Special Rapporteur, whose work he greatly appreciated; and, secondly, his doubts did not simply reflect views he might have expressed on behalf of the Government of the United Kingdom in the Sixth Committee several years previously, when the topic had been relatively new.

50. The Commission faced a dilemma, having received, late in the process, what might be termed a barrage of adverse comments from Governments and from virtually all the international organizations that had responded. There had also been strong reactions from experts speaking in a private capacity, for example at seminars organized by the World Bank and by Chatham House.²⁴ Writings on the subject, such as those of José Alvarez,²⁵ had also raised many questions. The Commission needed to reflect carefully on what had been said, react to it appropriately and, where necessary, continue the dialogue with those most concerned. In that connection, he endorsed Mr. McRae's suggestion that a meeting should be held with the legal advisers of the various international organizations.

51. The adverse comments were both general and specific. They might not be well founded and they might be self-interested, but they were not necessarily wrong. If the Commission's work was to be useful, it had to be accepted by practitioners. The Commission was under considerable pressure to complete its work on the topic within the coming weeks. Yet such pressure had been resisted in the past, with topics of great importance, like the present one, taking many years to mature and benefiting from reflection and a variety of views from within and outside the Commission.

52. To reconcile those competing pressures, he urged the Commission not to be dismissive, even if some members believed that the comments received were misguided. The Commission could not simply say that comments ought to have been submitted earlier or that there was no room for further dialogue. Many of the comments had been made previously, particularly those referred to as "recurrent themes" by the Special Rapporteur. While he would welcome the completion of the topic during the present session, he was not in favour of rushing to an unsatisfactory outcome. The implications of an unsatisfactory text

that failed to meet the needs of States and international organizations were considerable. The topic itself had far-reaching implications for the future of international cooperation, particularly for the many organizations whose *raison d'être* was to assist Governments.

53. Another dilemma was that there was little relevant practice. Yet it was not sufficient to fall back upon some general theory of international responsibility, however convincing it might seem in the abstract. The Commission must pay close attention to what happened in the daily life of international organizations.

54. He had a number of general suggestions to make. First, the Commission should set out clearly in an opening general commentary to the draft articles its views on the central issues of methodology raised by the topic, thus acknowledging the key concerns of States and international organizations. The commentary should include the points covered in paragraphs 3 to 6 of the report. The United Nations Secretariat and the Geneva-based organizations had suggested something along those lines, and the Special Rapporteur had indicated that he was open to that suggestion. A precedent existed, since the draft articles on State responsibility also opened with a general commentary, although the commentary to the draft articles on the responsibility of international organizations would need to be more elaborate.

55. Secondly, the Commission must set out as clearly as possible its views on where the various draft articles stood in relation to existing international law. As the Special Rapporteur had indicated, the draft articles under consideration did not enjoy the same level of authority as the articles on State responsibility for obvious reasons: the lack of relevant practice and case law, the fact that 10 years had elapsed since the adoption of the articles on State responsibility for internationally wrongful acts in 2001 and the generally favourable reception those articles had received from States and international courts and tribunals. The status of the draft articles was an essential point and was also related to any recommendation the Commission might make to the General Assembly concerning its handling of the text. Unless the Commission made its views on the standing of the draft articles explicit, there was a risk that lawyers and judges, especially national judges, might be misled, with unfortunate consequences.

56. Thirdly, the general introductory commentary should also address in detail the differences between the responsibility of international organizations and State responsibility. The matter was touched upon lightly in paragraph 4 of the report, where the Special Rapporteur noted that a recurrent theme in the comments received was the great variety of international organizations. He agreed with the Special Rapporteur that it would serve little purpose to move draft article 63 to an earlier part of the text. However, there was an important point underlying the suggestion, namely that the diversity of international organizations and the consequences that this diversity might have for the application of the draft articles needed to be stated prominently early on in the text; otherwise the point risked being overlooked. It was not sufficient to respond that the "principle of speciality" referred to by the ICJ in its advisory opinion concerning the *Legality of*

²⁴ "Legal responsibility of international organisations in international law", summary of the International Law Discussion Group meeting held at Chatham House on 10 February 2011 (available from www.chathamhouse.org).

²⁵ For example, "International organizations: accountability or responsibility?", in J. McManus (ed.), *Responsibility of Individuals, States and Organizations: Proceedings of the 35th Annual Conference of the Canadian Council on International Law, Ottawa, 26–28 October 2006*, Ottawa, Canadian Council on International Law, 2007, pp. 121–134.

the Use by a State of Nuclear Weapons in Armed Conflict meant only that international organizations had limited functions compared with States, and that those functions differed from one organization to another.

57. International organizations differed from States in many respects. They had no territory; even when they engaged in so-called “international territorial administration”, their relationship to the territory in question was different from that of a State and was specific to each case. International organizations had no nationals and no legal system in the sense that States did; even the corpus of international law that was binding on them was not the same as that which bound States. International organizations were party to few international conventions. The extent to which the rules of customary international law binding on States were—or could be—binding on international organizations was a largely unexplored field. International organizations and States were subject to compulsory dispute settlement to quite different degrees. International organizations had different structures and facilities available to them, and their relations with other international legal persons, not least their member States, had a significant impact on the applicable law. To draw an abstract distinction between primary and secondary rules, and to say that none of this mattered, hardly constituted a sufficient answer to all those differences. Responsibility did not exist in a vacuum but in the context of the day-to-day life of the organizations concerned.

58. Fourthly, the Commission needed to pay as much attention to the commentaries as to the draft articles: they constituted a whole, and one could not be understood or applied without the other. Indeed, particular draft articles might not be acceptable unless read in conjunction with the commentaries. However, the commentaries to the draft articles on the responsibility of international organizations should not simply reproduce the commentaries to the articles on State responsibility, although they might draw on them where appropriate. They could not simply reproduce them because of the many differences in practice between organizations and States and because of developments that had taken place since 2001, which included experience gained in the application of the articles on State responsibility that ought to be reflected in the commentaries. If the Commission was to complete its work on the topic during the current session, it needed to set aside at least one week during the second part to consider the Special Rapporteur’s revised draft commentaries.

59. Lastly, much remained to be done with regard to the substance of the draft articles. It was not simply a matter of adding “finishing touches”, as had been suggested in the debate the previous day. While he may have misunderstood what had been said in that debate, he believed that the parallel drawn with the law of treaties was far from convincing. It could not be the right approach to assume that in matters of responsibility the position of international organizations was the same as that of States unless the contrary was shown.

60. Turning to the text of draft articles 1 to 18, he welcomed the amendments proposed by the Special Rapporteur in his report, subject to their consideration by the Drafting Committee. He welcomed in particular

the important amendment proposed to draft article 16. If accepted, it would eliminate a major problem that had arisen during the first reading of the draft articles. He also appreciated the Special Rapporteur’s indication that the commentaries needed to be developed in a number of respects and that it was not the time to reopen the question of the scope of the draft articles. Nevertheless, it was striking how few amendments were proposed in the eighth report, notwithstanding the numerous critical comments and observations received from States and organizations. While comments made before 2009 had to some extent been taken into account in the seventh report,²⁶ and thus in the first reading of the draft articles,²⁷ the amendments introduced at that time had been quite modest and did not necessarily absolve the Commission from reviewing those earlier comments again.

61. Many of the comments received concerning draft articles 1 to 18 were essentially of a drafting nature and would be taken up by the Drafting Committee. However, he wished to make a few points regarding the substance of those articles. He was not certain that draft article 1, and in particular paragraph 2 thereof, captured clearly enough the scope of the draft articles. It was rather misleading to say that “the present draft articles ... apply to the international responsibility of a State”. It was true that the draft articles contained a section on that subject, but it was not the case that the draft articles as a whole were relevant to State responsibility. The Drafting Committee might therefore wish to consider that point, together with the title of the whole set of draft articles, which ought to reflect their scope.

62. Draft article 13, on aid or assistance in the commission of an internationally wrongful act, would become one of the most important provisions in practice. The concerns of the international financial institutions and organizations whose *raison d’être* was to aid and assist had been loud and clear. He agreed with Mr. Nolte that the commentary to the draft article would be crucial. However, he did not share the Special Rapporteur’s doubts concerning the discussion of intention in the commentary to the articles on State responsibility. Indeed, it was essential that the matter be reflected in the commentary to draft article 13 in more or less the same terms as the commentary to the equivalent article on State responsibility (article 16). Like Mr. Nolte, he was in favour of going even further and expanding the scope of the commentary to draft article 13.

63. In conclusion, he wished to thank the Special Rapporteur for his tireless efforts, and he looked forward to working closely with all members of the Commission with a view to reaching consensus on the draft articles during the current session.

64. Mr. MELESCANU endorsed the tributes paid by previous speakers to the memory of Ms. Escarameia.

65. Turning to the eighth report on responsibility of international organizations, he congratulated the Special Rapporteur on his lucid presentation of the comments made by States and international organizations on the

²⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610.

²⁷ *Ibid.*, vol. II (Part Two), chap. IV, sect. C, pp. 19 *et seq.*

draft articles adopted on first reading at the Commission's sixty-first session (2009). He would begin his statement with some general observations before addressing some specific points.

66. During the current debate he had not heard any convincing arguments for radically altering the Commission's approach to the topic. Most of the comments from international organizations had been editorial in nature and had been prompted by the organizations' specific interests. As they did not concern the substance of the text proposed by the Special Rapporteur, it ought to be possible to adopt the final version of the draft articles at the current session.

67. While he had no objection to holding a meeting with the legal advisers or other representatives of the international organizations that had submitted comments, it was ultimately up to the Commission to decide whether to accept those comments and to incorporate the suggested amendments in the draft text. The Commission should naturally bear the concerns of international organizations in mind, even though they mainly reflected unease about situations that could potentially arise and were not actually based on existing practice.

68. Prefacing the draft articles with an introductory commentary or an introduction that formed part of the draft articles was problematic. He had nothing against the inclusion of more detailed commentaries on certain issues, but in a draft international convention it would be unwise to combine a first part expounding philosophical viewpoints with a text consisting of individual articles and, possibly, expanded commentaries thereto.

69. Much depended on whether the Commission thought that the draft articles should be debated solely in the General Assembly or whether comments should be invited from international organizations or specialists, whose views might run counter to those of the Commission. Whatever the answer to that question might be, it would not prevent the draft articles from being applied: the crucial test was whether international judicial bodies took them into consideration, since that would show how pertinent the draft text was. Although some members had held that the inclusion of an introductory commentary would facilitate the finalization and adoption of the draft articles, he believed that the Commission should not spend time exploring a new avenue but should concentrate on producing a final version of the draft text.

70. The approach taken by the Commission to the responsibility of international organizations in the draft articles was reasonable. Although it was plain that the draft articles were closely related to the articles on State responsibility, neither the text of nor the commentaries to the draft articles under consideration automatically replicated the articles on State responsibility for internationally wrongful acts—rather, they were the result of debate and the Special Rapporteur's analysis of that debate. It was nevertheless true that the Commission had benefited from its earlier work, and it had therefore been able to incorporate rules that had already been adopted in the draft articles on State responsibility and had been well received at the international level.

71. As for the recurrent theme of diversity, it was obvious that international organizations varied greatly in size and type; the European Union, for example, was quite different from a small, highly specialized technical organization. He nevertheless agreed with Mr. Nolte that, when it came to the responsibility of States, their size, economic status and geographical location did not matter; they all had to abide by the same legal rules because States, like people, were or should be equal before the law. The question of diversity was an interesting philosophical topic, but it was of no relevance to the codification of the responsibility of international organizations. Once an international organization had legal personality, it had to be responsible for its acts. The extent of that responsibility was determined by *lex specialis*. In that connection, he agreed with the Special Rapporteur that the article which set out that principle was best placed at the end and not at the beginning of the draft text. If the text began by tackling the question of diversity, the conclusion might be drawn that international organizations' disparity made it impossible to adopt draft articles on their responsibility. In order to move forward, the Commission would first have to lay down some commonly agreed rules and then find a means of addressing huge differences in organizations. That subject might well need to be discussed by the Commission meeting in plenary session.

72. He concurred with the Special Rapporteur that issues not covered in the draft articles should form the subject of subsequent study by the Commission. He welcomed the suggestion contained in paragraphs 20 and 24 of the eighth report that draft article 2, subparagraph (c), should include a definition of the term "organ" and that the definition of "agent" should be reworded accordingly. In the context of draft article 16, several comments had been received regarding the possibility of extending an international organization's responsibility if it recommended that a member State or international organization commit an internationally wrongful act. Some organizations had expressed the opinion that this article went too far and would lead to an unacceptable widening of the notion of the responsibility of international organizations that was not supported by practice. Although the Special Rapporteur had proposed the retention of draft article 16, paragraph 2, the Commission should study the matter more carefully, since recommendations could have far-reaching consequences. For example, more thought might be given to the legal force that recommendations could have.

73. Mr. Nolte had referred to international organizations' concerns about having to accept liability. While that question did merit further consideration, the Commission should not dwell on it because the very aim of the draft articles was clearly to limit responsibility along the lines of State responsibility for internationally wrongful acts. It seemed unlikely that a recommendation made in good faith by an international organization in accordance with its rules could be deemed an internationally wrongful act entailing responsibility.

74. Mr. DUGARD said that he would like to hear the Special Rapporteur's views on the advisability of convening a special meeting of legal advisers to international organizations. The Commission should take a decision on the matter immediately, because if such a meeting was to be held, the Commission would have to postpone its consideration of the topic.

75. Mr. GAJA (Special Rapporteur) said that holding a meeting with the legal advisers of international organizations in the very near future would be an unprecedented and problematic move. In fact, few of the comments that had been submitted concerned the substance of the draft articles. Moreover, some of the concerns voiced about their wording could be accommodated to a greater extent than he had suggested in his eighth report.

76. Although the draft articles would be of interest not only to the legal advisers of international organizations but also to the legal advisers of States which had problems with international organizations, it would not be good policy to dismiss their request to be further involved out of hand. Perhaps the text of the commentaries should include a general statement, in particular about diversity and the principle of speciality. There was no reason why the opinion of legal advisers should not be sought on such a text, because it would be only a provisional draft. It would show that the Commission was prepared to build bridges towards the legal advisers of international organizations, some of whom had displayed a fairly radical approach to the draft articles, even implying that the Commission should drop the whole exercise.

77. There were in fact some precedents for a commentary starting with a general introduction. He therefore proposed to draft a text which could be submitted to the Geneva-based legal advisers towards the end of May.

Organization of the work of the session (*continued*)

[Agenda item 1]

78. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the Drafting Committee on the effects of armed conflicts on treaties would consist of Mr. Candioti, Mr. Fomba, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

79. The Drafting Committee on responsibility of international organizations would comprise Mr. Candioti, Mr. Fomba, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

The meeting rose at 12.55 p.m.

3082nd MEETING

Thursday, 28 April 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu,

Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute) (A/CN.4/635 and Add.1–3)

[Agenda item 14]

1. The CHAIRPERSON said that the Commission was to hold an election to fill a casual vacancy. The election would take place, as was customary, in a private meeting.

The public meeting was suspended at 10.05 a.m. and resumed at 10.15 a.m.

2. The CHAIRPERSON announced that Ms. Escobar Hernández (Spain) had been elected to fill the seat that had become vacant following the death of Ms. Paula Escaraméia.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. The CHAIRPERSON invited the members of the Commission to continue their consideration of the eighth report on responsibility of international organizations (A/CN.4/640).

4. Mr. PELLET said, first of all, that he was in an awkward position: he had always criticized members of the Commission who combined the role of independent expert with that of legal adviser to their country's ministry of foreign affairs, or even of minister. It was now he who wore two hats, that of an independent expert and that of a legal adviser to an international organization, the World Tourism Organization. In that capacity, he had attended meetings of legal advisers of international organizations within the United Nations system and had signed a joint submission from 13 international organizations on the draft articles on the responsibility of international organizations (A/CN.4/637 and Add.1). The situation seemed less objectionable, however, since, in many respects, the concerns expressed in that document echoed the comments he had made as a Commission member in the course of the work on the topic.

5. It was a matter of concern that in his extremely interesting and lucid introductory statement, the Special Rapporteur had paid little heed to the critical remarks elicited by the draft articles and had not really taken account of them in the amendments he had proposed. That was particularly regrettable because, although the remarks had been formally submitted by the international organizations only a short time earlier, many of them had been formulated long ago by legal advisers. He therefore agreed with Mr. McRae and Sir Michael Wood that it

would be very useful to hold another meeting with the legal advisers of specialized agencies. The draft articles would be much more satisfactory and more generally acceptable if the opinions of legal advisers were taken into serious consideration, and it was not too late to do so. As the advisers would be meeting in Basel on 26 and 27 May 2011, they could be invited to make a stopover in Geneva or, if that proved to be too complicated, a special meeting could be convened with the legal advisers of international organizations with headquarters in Geneva and those who were prepared to make the journey. Several advisers had done that when the World Health Organization (WHO) had invited them to the meeting which had culminated in the joint submission just mentioned, which attested to their interest in the matter. The Commission could not complain that insufficient practice was available, yet at the same time refuse to hear what practitioners had to say. At the previous meeting, the Special Rapporteur had rightly emphasized the fact that the draft articles were not a negotiating text, but the purpose of the meeting would not be to negotiate. The aim would be to exchange very specific views in order to arrive at a text that was satisfactory and of practical use. Although he had always harboured serious doubts about the methodology used by the Special Rapporteur, the legal advisers would have to be told in plain terms that there could be no revisiting the issues at that stage of the work.

6. With regard to that methodology, he said he did not entirely endorse the reproaches directed at the Special Rapporteur by some legal advisers and Commission members who assumed that he was aiming to produce a carbon copy of the articles on State responsibility for internationally wrongful acts.²⁸ It was not unreasonable to use those articles, which offered an excellent starting point. While it was true that international organizations were very different entities compared to States, there was just one unequivocal notion of responsibility in international law and in law in general. As for the example cited by Mr. McRae at the previous meeting, the reasons given by Roberto Ago²⁹ in the late 1960s for removing damage from the definition of State responsibility were valid in all particulars for the responsibility of international organizations. It was a known fact that international responsibility was not purely civil or criminal, but combined both aspects. That being so, he agreed with Mr. McRae that the commentary should highlight that positive reasoning rather than repeat the usual argument about the lack of differences. However, while the common feature of the draft articles under consideration and the 2001 articles on State responsibility was that they both dealt with a subject that was central to international law, namely responsibility, the two sets of articles concerned dissimilar holders of responsibility. That was where the question of methodology became one of substance, because the great disparity between States

²⁸ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

²⁹ See, *inter alia*, the history of the work of the Commission on the topic of State responsibility in *Yearbook ... 1973*, vol. II, document A/9010/Rev.1, pp. 165–168, paras. 14–30, the general comments on the scope of the draft articles (*ibid.*, pp. 169–170, paras. 37–42) and chapter II of the draft articles (*ibid.*, pp. 170–172, paras. 46–51), as well as paragraph (13) of the commentary to draft article 1 (*ibid.*, p. 176).

and international organizations raised the issue of the principle of speciality, a matter on which, in some respects, he disagreed strongly with the Special Rapporteur.

7. There was no doubt that international organizations formed a special category of entities to which a number of common rules applied, including those on responsibility. One of the main differences between States and international organizations was that, while the former were global institutions possessing the totality of the competences recognized by international law, as the ICJ had clearly explained in its advisory opinion of 11 April 1949 on *Reparation for Injuries*, the competencies of international organizations were limited by the principle of speciality, under which they could exercise only such powers as they needed to perform the mission with which they were entrusted by their constituent instrument. Those powers were thus not inherent to international organizations but were derived and functional, a fact that inevitably had a bearing on responsibility. On that subject, he disagreed with the opinion expressed by Mr. Melescanu at the previous meeting. Unlike the equality before the law of States and human beings, despite their differences, the notion of equality before the law was meaningless when it came to international organizations, and that should be reflected in the draft articles. That was in fact one of the principles which should inform the whole text: it was not sufficient to refer, as was done in paragraphs 3 and 4 of the report, to draft article 63 on *lex specialis*, or to move that provision to the beginning of the draft articles. The principle of speciality and the principle of *lex specialis* were two quite distinct notions. Under the principle of *lex specialis*, it was always possible that rules might derogate from the general rules that normally applied in the absence of special rules. The principle of speciality, on the other hand, implied that this was possible only within the framework set by the constituent instrument of each organization: it was not that something went against a general rule, but that something informed its very content. The principle of speciality should therefore have pride of place in the draft articles, which should expressly state that international organizations incurred international responsibility only when they acted within the framework of the functions conferred upon them by their constituent instrument. A number of practical consequences would have to be drawn from that principle. For one thing, the question of *ultra vires* acts—of great concern to the legal advisers—would have to be re-examined. Although he had initially agreed with the Special Rapporteur that there was no reason to depart from article 7 of the draft articles on State responsibility, which was reproduced *mutatis mutandis* in article 7 of the draft articles on the responsibility of international organizations, he now thought that draft article 31 ought to be revised and that the inclusion in draft article 6 of the criterion of the exercise of the functions of the organization, as proposed by Austria, would be a step in the right direction (A/CN.4/636, observations on draft article 6). Generally speaking, the whole set of draft articles should be thoroughly scoured, in order to make sure that the principle of speciality was taken into account throughout.

8. As for the scope of the draft articles, it was surprising that the Special Rapporteur and a number of speakers had finally come round to the view that it might be wise to address the question of responsibility *towards* international

organizations—a step he himself had advocated for many years to no avail—but that it was too late to think about that now. While States might hold divided opinions on the matter, a fair number of them supported his point of view, as did the legal advisers to international organizations. The response provided in paragraph 11 of the Special Rapporteur's eighth report did not seem satisfactory. The joint comments from international organizations suggested that the Commission's approach was inconsistent, which it was. The Commission had gone along with the Special Rapporteur, who had adopted an overly formalistic approach, claiming that he was just keeping to the title of the topic, "Responsibility of international organizations", and not responsibility *towards* them. On the other hand, the draft articles explicitly and sometimes implicitly tackled issues related to State responsibility *vis-à-vis* international organizations. That was true of draft article 1, paragraph 2, which stated that "[t]he present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization".³⁰ The subject was thus very definitely the responsibility of the State, but that did not at all square with the Special Rapporteur's general excommunication of the small pockets of State responsibility still requiring codification.

9. The same comment could be made with reference to draft article 32, paragraph 2, and to draft articles 38, 49 and 57 to 61: they were about the responsibility of the State and not the responsibility of international organizations. He endorsed those provisions, but did not think one could say that the subject was limited to the responsibility of international organizations: it was responsibility in relation to international organizations, and it included elements of the responsibility of the State that the Commission had not codified. In paragraph 12 of the report, the Special Rapporteur displayed unusual flexibility in proposing that the Commission embark on a study of those issues in order to complete its work on responsibility. He warmly welcomed that proposal and fervently hoped that that positive mindset would be followed by action.

10. Several members of the Commission, including Mr. McRae and Sir Michael, had suggested that a general introduction to the draft articles on the responsibility of international organizations should be orchestrated by the Special Rapporteur. He could agree to that proposal if it received wide support, although he did so without enthusiasm, and with some trepidation. If he understood correctly, the introduction to the commentary to the draft articles was to be modelled on the introduction to the commentary to the draft articles on State responsibility. It would define the scope and limits of the current draft articles and make it clear that the Commission had adopted a set of draft articles resting on very limited practice; that the text had given rise to much criticism; and that it did not measure up by a long shot to the 2001 draft articles on State responsibility. While that was undoubtedly true, it would be a rather masochistic exercise, and the compromise introduction should not salve the Commission's conscience to such an extent that it failed to make what seemed to be the requisite improvements to the draft articles. The Commission's statute required it to make a recommendation

to the General Assembly as to the action to be taken on its draft texts: it was at that point that it would have to arrive at a final decision. Although he would personally find it very difficult to go along with a categorical recommendation at the current stage of the work, that was no reason to oppose progress towards the desired goal. The worst was not always a foregone conclusion, and it was still possible to make considerable improvements to the draft articles. The Commission had the special rapporteur best suited to that task who would, it was to be hoped, bring to bear on it all his talents and energy.

11. He wished to say a few words about the existing draft articles that he saw as the most questionable, although it was the articles yet to come that caused him the greatest concern: some of those which had not yet been introduced would seem to call for the most criticism. First of all, it would be most regrettable if the Special Rapporteur's proposal to delete draft article 16, paragraph 2 (A/CN.4/640, para. 58), a proposal which unfortunately enjoyed the support of some members of the Commission, were to be adopted. It was surprising that, in contrast to his position on a number of other points, the Special Rapporteur should suddenly attach an excessive amount of importance to the criticisms elicited by that provision, although they were neither as numerous nor as radical as he claimed. Draft article 16, paragraph 2, was criticized for being too categorical, but nothing suggested that anyone was asking for its deletion. Even that fairly moderate position rested on a misreading of the provision in question. Contrary to the view which seemed to be held by a number of its detractors, including the ILO and Austria, draft article 16 laid down the principle of the responsibility of an international organization, not solely because the latter issued a recommendation, but because a State followed that recommendation. It was the combination of the two which generated responsibility. Moreover, that was quite logical, for it would be disastrous to contend that recommendations were immaterial and that international organizations could freely make them, with no resulting obligations or consequences: irresponsibility would then become the rule. The idea set forth in draft article 16, paragraph 2, should therefore be retained. He was particularly against its deletion since it was one of the few provisions in the draft articles that were specific to international organizations. An attempt could be made to establish a stronger link between the recommendation and the conduct of the member, as suggested by several States and by the Special Rapporteur in paragraph 57 of his report, but it was unnecessary to go so far as to delete draft article 16, paragraph 2.

12. He was in favour of including a definition of the term "organ" in draft article 2 but had no particular preference for either the wording proposed by the Special Rapporteur or that suggested by Mr. Nolte. On the other hand, he saw no reason whatsoever why draft article 2 (*d*) (A/CN.4/640, para. 24) should rule out the possibility that an agent might be an organ: the secretary-general of an organization, for example, was both an organ and an agent. The dual reference might be unnecessary from an intellectual standpoint, but it reflected reality and there were no grounds not to retain it. He regretted the fact that in draft article 7, the Special Rapporteur had not heeded the serious concerns expressed by the legal advisers to

³⁰ *Yearbook ... 2009*, vol. II (Part Two), p. 19.

the specialized agencies. He also failed to understand why, at the end of paragraph 49 of his report, the Special Rapporteur said that in view of the conflicting comments on draft article 13, it seemed preferable not to include in the commentary to that provision a discussion of the relevance of intention on the part of the assisting or aiding international organization. On the contrary, those comments must be addressed precisely because they were conflicting, even if that meant leaving the question open, something he was not particularly in favour of doing. Lastly, he had no particular objection to the inclusion of the phrase “subject to articles 13 to 15” at the beginning of draft article 16, as suggested in paragraph 51 of the report.

13. Mr. WISNUMURTI congratulated the Special Rapporteur on his eighth report on responsibility of international organizations, which covered some instances of recent practice and contained a summary of views expressed in the literature. The Special Rapporteur had produced an excellent analysis of the most relevant and important comments and observations from Member States and international organizations on a number of draft articles. Most of the critical comments from international organizations had focused on the lack of practice, the need to take into account the great diversity of international organizations and the recurrent theme of the extent to which the draft articles should differ from the articles on State responsibility. Some of the comments and observations from international organizations also related to the commentaries to some of the draft articles.

14. In the light of the views expressed by some international organizations on the structure of the draft articles, the Special Rapporteur suggested that the Commission should examine the possibility of moving draft article 63 on *lex specialis* to Part One (Introduction) of the draft articles as a new draft article 3. He himself had noted the arguments put forward by the Special Rapporteur in favour of keeping draft article 63 where it was now located, and he fully subscribed to them. There were occasions when it was appropriate to retain some consistency between the current draft articles and those on State responsibility. The draft article on *lex specialis* was placed towards the end of the current text as a kind of “without prejudice” clause.

15. Some international organizations, including the Secretariat of the United Nations, considered that it was necessary to take into account the specificities of the various international organizations. Different types of international organizations did exist, but it would be too risky and impractical to embark on an exercise of clearly distinguishing between those that fell within the scope of the draft articles and those that did not. The definition of “international organization” set forth in draft article 2 was sufficient to designate the type of organizations concerned. As the Special Rapporteur said in paragraph 4 of his report, the draft articles under consideration would apply to an organization only if the required conditions were met.

16. The importance of draft article 1 on the scope of the draft articles must not be underestimated: he, too, thought they should cover State responsibility *towards* international organizations. Regarding paragraph 2 of this draft article, there was merit in the proposal by Ghana, referred to in paragraph 13 of the report, that the draft

articles also apply to the international responsibility of a State for an act by an international organization that was wrongful under international law.

17. In response to suggestions that the definition of “agent” should be accompanied by that of “organ”, the Special Rapporteur proposed such a definition and made the requisite adjustments to subparagraph (c), even though he took the view that the distinction between the two terms was of limited significance. He himself thought that Mr. Nolte’s proposal to draw a stronger distinction between them deserved serious consideration by the Drafting Committee.

18. As far as draft article 9, paragraph 2, was concerned, he supported the opinion of the Secretariat of the United Nations (see paragraph 42 of the report) that “only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9”.

19. The possible overlapping of draft articles 13 to 15 with draft article 16 was unlikely to give rise to any inconsistencies, since each provision addressed quite different situations or circumstances. If, however, it were deemed necessary to remove any appearance of inconsistency, he would have no objection to the inclusion of the phrase “subject to articles 13 to 15” at the beginning of draft article 16.

20. Draft article 16, paragraph 2, on international responsibility arising out of non-binding acts or recommendations, had raised concern. Some considered it to be an exercise in progressive development and thought that it would extend the notion of responsibility far beyond the scope of previous practice. He endorsed that opinion and would be in favour of the deletion of the paragraph.

21. Mr. FOMBA said that some contentious issues that had arisen during the previous day’s debate seemed to be philosophical in nature and to belong to the sphere of legal policy. Such was the case, for example, with the recurrent themes of what made international organizations different from States and of the lack of practice.

22. As far as the second point was concerned, it was too late to reopen a substantive debate; the aim should be to complete the work as soon as possible by adopting the most practical approach. In his view, there were no real questions of principle to be decided, and the draft articles and proposed amendments should therefore be referred to the Drafting Committee.

23. The proposal regarding Part One made by the Special Rapporteur in paragraph 25 of his report seemed acceptable and might circumvent some potential difficulties with respect to approach.

24. In Part Two, the recommendation concerning draft article 16 seemed to be a step in the right direction. Paragraph 1 of that provision did not raise any particular difficulties and its scope might be clarified by paragraph 2.

25. Mr. SABOIA said he agreed with Mr. Fomba, Mr. Melescanu and Mr. Wisnumurti that any remaining problems could be settled in the Drafting Committee.

26. With regard to the principle of specificity, he concurred with Mr. Wisnumurti that it would be too complicated to divide international organizations into categories and, in any case, when the articles were applied, the diversity of international organizations would be taken into account. He supported the text proposed by Mr. Pellet regarding specificity.

27. The dearth of practice, which was one of the recurrent comments made, might be caused by the scarcity of rules on the subject and perhaps by international organizations' preference for the greatest possible degree of independence. But those organizations tended to overstep their mandate, especially in respect of the use of force or the imposition of adjustment policies.

28. He agreed with Mr. Pellet that the draft articles should also deal with the responsibility of member States of the organizations and that the proposal by Ghana, referred to in paragraph 13 of the report, had merit.

29. Draft article 16, paragraph 2, should be retained, as it was essential for the balance of that provision.

30. Mr. DUGARD said that he agreed with Mr. Pellet about the title of the draft articles: it would indeed be more accurate to speak of responsibility regarding international organizations, of which the responsibility of States was a part.

31. He agreed with Mr. Nolte that draft article 63 should remain where it was. He would not be averse to the insertion in the text of an introductory note on the principle of speciality, as proposed by Mr. Pellet.

32. It was not only inevitable, but also desirable, that the draft articles under consideration closely follow the pattern set by the articles on State responsibility: it would be very unfortunate if they did not.

33. While State practice was not very abundant, the draft articles could not be seen solely as an exercise in progressive development. State practice had clearly informed the practice of international organizations, and it was therefore quite legitimate for the Commission to borrow from the articles on State responsibility. It would be fortunate if the Commission could complete the draft articles on responsibility of international organizations faster than it had produced the articles on State responsibility.

34. He was not sure about the advisability of including a definition of "organ" in draft article 2. If it was decided to do so, a clear distinction would have to be drawn between the notions of "agent" and "organ". The term "organ" applied to a legal person or an entity, whereas "agent" applied more to a natural person. The word "person" should therefore be deleted from the definition of the first term and the word "entity" removed from the definition of the second term. It would be better not to use the expression "charged with", because it suggested that agents of the United Nations were given a specific task to perform, whereas in fact they were given a general mandate.

35. Paragraph 2 (b) should not be deleted from draft article 16. The arguments in support of doing so were not

persuasive. He was in favour of retaining the provision, because some elements of progressive development would inevitably come into the exercise.

36. Mr. VÁZQUEZ-BERMÚDEZ said he was pleased that the Commission was about to adopt the draft articles on responsibility of international organizations on second reading. Given the proliferation of international organizations and their growing influence in the world today, the international legal order must be equipped with a set of systematic rules governing their responsibility for breaches of international obligations.

37. While it was true that international organizations were quite diverse, they were all subjects of international law, and general rules should apply to them. However, it was important to remember that, as the Special Rapporteur had said, in each specific case the various articles would apply only if the necessary conditions were met. That was, of course, without prejudice to the principle of speciality and *lex specialis*, and in particular the rules of the organization, which governed relations between international organizations and their members.

38. As the Special Rapporteur had mentioned in his report, the draft articles on responsibility of international organizations followed the articles on State responsibility closely whenever there was no reason to make a distinction between those two subjects of international law. Obviously, the responsibility of subjects of international law must form a coherent system while being flexible enough to respond appropriately to the elements specific to international organizations.

39. He thought that, for reasons of logic, draft article 63 on *lex specialis* should remain where it was.

40. He had no difficulty with the proposal to organize new consultations with the legal advisers of international organizations, as long as the draft articles could still be adopted on second reading during the current session. The Special Rapporteur's proposal to draft some introductory notes on the main aspects of the draft articles that had piqued the interest of international organizations, with a view to submitting them to the legal advisers for review in the weeks to come, was reasonable and welcome. The Commission could then take into account the legal advisers' views before concluding the second reading.

41. In draft article 1, on the scope of the draft articles, paragraph 2 stated that "[t]he ... draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization".³¹ That issue, covered in Part Five of the draft articles, had not been covered in the articles on State responsibility. There were others that had not been explicitly addressed either in the articles on State responsibility or in the draft article under review—for example, the invocation of a State's international responsibility by an international organization. He supported the Special Rapporteur's suggestion that those matters should be studied further so as not to delay the consideration of the draft articles adopted on first reading.

³¹ *Ibid.*, p. 25.

42. The Special Rapporteur's proposal to include a definition of the term "organ" in draft article 2 was pertinent, and it should be examined in the light of Mr. Nolte's suggestion.

43. He was pleased that many of the comments and observations made by States and international organizations were reflected not only in the draft articles but also in the commentaries. He supported the idea of developing the latter, which were too succinct, as it would certainly be useful for all concerned.

44. He was opposed to the removal from draft article 16 of paragraph 2, which he had supported on first reading and which dealt with the international responsibility of an international organization with regard to an internationally wrongful act committed by one of its members because of an authorization or recommendation from the organization. It would not be fair for the member who had committed the internationally illegal act to incur international responsibility when that member had acted with the authorization or recommendation of an organization which would itself escape all responsibility.

45. With the reservations he had just expressed, he endorsed the referral to the Drafting Committee of all the draft articles submitted by the Special Rapporteur.

46. Mr. HUANG said that the Commission should already have definitively adopted the draft articles by now. The topic of the responsibility of international organizations had been placed on the Commission's agenda in 2002, and from 2002 to 2009, the Special Rapporteur had submitted seven reports³² and developed a set of draft articles that had been unanimously approved by the Commission at its sixty-first session in 2009. It was important not to reopen the debate, at least on substantive issues, without good reason.

47. While it was true that the Commission should duly consider the comments and observations submitted by international organizations (21 in all), it was not necessary to organize a meeting of those organizations' legal advisers, as some members had recommended, given that the comments clearly expressed the official positions.

48. He recommended establishing a drafting committee as soon as possible to ensure that the Commission could adopt all the draft articles under review during its current session.

49. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to make four general observations. First, the responsibility of international organizations, like that of any subject of law, stemmed from their legal status. That was really the starting point for the codification or progressive development by the Commission of any specific regime.

50. Indeed, as soon as one acknowledged that international organizations had a legal status and that that status affected not only States members of the organizations, but also third parties, it was clear that an international organization had obligations that it could violate and that it could therefore commit an internationally wrongful act. Consequently, the rules of international responsibility, adjusted as required by the specific nature of international organizations, were applicable to those organizations. Concepts such as "obligation", "lawfulness", "internationally wrongful act", "injury or damage", "reparation" and the like remained constant whether one was dealing with States or international organizations. Any differences had more to do with the way in which they were used. Thus, there was no need for undue concern over the absence of practice with regard to the responsibility of international organizations.

51. Secondly, with regard to the diversity of international organizations, the main points that he wished to make had already been made by Mr. Melescanu at the previous meeting. He himself agreed that there was no reason to draw distinctions among international organizations based on their size or even the nature of their activities. Such distinctions were not even appropriate among States which, despite the fiction of sovereign equality, ranged from major Powers to "micro-States".

52. Furthermore, the fact that the responsibility of an international organization came into play only for an internationally wrongful act that it had committed—and solely for such an act—was generally accepted.

53. Thirdly, it was important not to confuse the principle of speciality and *lex specialis*. The principle of speciality had substantive and functional content. It had to do with the international organization's specific area of activity and the fact that, unlike a State, an organization had, not general powers, but rather derivative legal personality, and could act only in its area of activity. The principle of *lex specialis*, on the other hand, was essentially prescriptive and limited the scope of certain legal rules, a limitation that in general was *ratione loci*. Thus, from the perspective of the principle of speciality, the competence of the WHO was limited to health at a general and global level, whereas the rules of the Central African Economic and Monetary Community, or those governing the relationship between the African, Caribbean and Pacific Group of States and the European Economic Community, constituted *leges speciales* against the background of the rules of the World Trade Organization (WTO). As a consequence of that distinction, an international organization could apply the general rules of international law instead of *lex specialis* in its specific area of activity, defined on the basis of the principle of speciality. It followed that the general rules of responsibility could and should be applied to all international organizations with regard to any internationally wrongful act that they might have committed in the context of their specific activities. The introduction of a draft article on the principle of speciality would be all the more inappropriate given that the responsibility of an international organization must *a fortiori* be firmly established if that organization had acted outside its specific area of activity, defined on the basis of the principle of speciality.

³² *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/532 (first report); *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541 (second report); *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553 (third report); *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/564 and Add.1–2 (fourth report); *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/583 (fifth report); *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/597 (sixth report); and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610 (seventh report).

54. Fourthly, and paradoxically, practice on the part of international organizations with regard to responsibility was non-existent, meaning that rules governing responsibility were supposed to emerge from the practice of entities that essentially sought to ward off all responsibility. It was more properly for the States that created international organizations to establish such rules. If the draft articles under consideration were approved, whether in the same form as the draft articles on State responsibility for internationally wrongful acts in 2001 or in the form of a convention, it would be for States, and not the international organizations themselves, to take that initiative. Such had been the case with the 1986 Vienna Convention, of which it could not be said that all the provisions were grounded in firmly established practice.

55. He thought that the Commission should not put off finalizing the draft articles for too long. He also wished to make some observations on draft articles 13 and 16, though he had no particular comments on the other draft articles introduced by the Special Rapporteur at the first meeting of the current session: the solutions proposed by the Special Rapporteur in response to the concerns of States and international organizations seemed to him satisfactory.

56. He only wished to mention draft article 13 because of his concern regarding a statement made at the previous meeting. Mr. Nolte had said that the text could apply to an organization such as the United Nations, but that an institution like the World Bank should not be held to constant vigilance over the proper use of the funds it made available to States. It was important to remember that the World Bank, like other institutions in its category, was not a philanthropic institution. It was aptly named: it was a bank, albeit one operating on a global scale. Furthermore, no legal system had ever held a bank responsible for the use of the money it lent to its clients, unless the bank was shown to have knowingly agreed to a loan that was clearly to be used, for example, to facilitate the organization of a crime against humanity.

57. That was the meaning of draft article 13, whose *chap-eau* mentioned an international organization that “aids or assists a State or another international organization in the commission of an internationally wrongful act”. The reference was specifically to aid or assistance in the commission of an internationally wrongful act, not to just any aid or assistance. Draft article 13 was thus very useful and very much in the spirit of the laws governing international responsibility. It deserved to be retained as currently worded.

58. His opinion regarding draft article 16 differed from that of the international organizations that had called for the removal of paragraph 2. He regretted that the Special Rapporteur had given in to their urgings, as it seemed to him that the entire draft article could be salvaged through a few amendments. Removing paragraph 2 would amount to abandoning an important facet of the responsibility of international organizations, which it was all the more essential to address given that international practice of the past 15 years had shown an increasing risk of deviation.

59. He therefore proposed to delete only the references to recommendations in the draft article’s title and in

paragraphs 2 and 3. The title would then read: “Decisions and authorizations addressed to member States and international organizations”. Paragraph 2 (a) and (b) would read:

“An international organization incurs international responsibility if:

“(a) it authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization;

“(b) that State or international organization commits the act in question because of that authorization.”

Paragraph 3 would end with the words “to which the decision or authorization is directed”.

60. Draft article 16 could then be retained in its entirety.

61. Mr. NOLTE explained, in order to dispel any confusion, that he had not intended to make a distinction between the various international organizations in suggesting that the United Nations should be subject to a stricter regime than the World Bank. In taking up the two examples used in the Special Rapporteur’s report, he had sought to stress the difference between two cases: in the first, the provision of aid or assistance was closely linked to the commission of wrongful acts, for example, during peacekeeping operations, when violations of humanitarian law were known to occur and getting involved entailed complicity in the associated violations; in the second example, however, the World Bank lent money and one of its branches knew that the money was to be used for or would facilitate the commission of wrongful acts, and there, the responsibility of the World Bank would come into play. The two cases were very different, and it was important to take those differences into account, because in the second case, where the causal link was less direct, the more distant the relationship between what might ultimately facilitate a wrongful act and the act itself, the greater the risk of refraining from carrying out useful activities, out of fear that they might give rise to responsibility. It was thus important not to develop rules that might have an inhibiting effect on the useful activities carried out by international organizations, whether the World Bank or the United Nations. That point concerned, not draft article 13, but the commentary thereto, which should clearly cover the two cases. As for the reference to recommendations in paragraph 2 of draft article 16, he recalled that, as the Chairperson had said, the fact that a State recommended that another State do something did not suffice to cast doubt on its responsibility.

62. Mr. GAJA (Special Rapporteur) said that the main issue at the current stage of the debate was what to do with draft articles 1 to 18, namely, whether the Commission should send them to the Drafting Committee or wait for further developments. Unless his role of Special Rapporteur had affected his understanding of the situation, it would seem that many of the Commission’s members were in favour of sending the draft articles to the Drafting

Committee to finalize the text and enable the Commission to complete its consideration thereof on second reading during the current session. Some draft articles required merely editorial amendments; even if he himself did not necessarily support them, the decision was for the Drafting Committee to make. At least 10 speakers—Messrs. Al-Marri, Fomba, Huang, Kamto, Melescanu, Nolte, Petrič, Saboia, Vázquez-Bermúdez and Wisnumurti—had clearly indicated during the debate that work on the draft articles should proceed in the Drafting Committee, and others had privately expressed the same view. Mr. McRae and Sir Michael had requested, not that the draft articles remain unchanged, but that an introductory chapter be added to the commentary to permit a more detailed analysis of what he himself termed “recurrent” themes: he had expressed support for that approach at the previous meeting. That chapter—in which the Commission should not express undue remorse, given what Mr. Pellet had said at the current meeting—should be drafted on the basis of informal consultations. If the text was ready early enough, it should be possible to submit it at least to the United Nations legal advisers, with whom the Commission would shortly meet, so as to see their reactions and decide how to proceed. Before examining in plenary the rest of the commentary, which was to be drafted in May 2011 if the Drafting Committee provisionally adopted the draft articles, it would be useful to establish a working group along the lines of the one on responsibility of States for internationally wrongful acts which Mr. Melescanu had chaired in 2001. All members were invited to put forth their proposals, since the drafting of commentaries was a collective undertaking whereby the Commission could make greater strides than he could on his own.

63. Before turning to the examination of those draft articles which had elicited comments, he wished to quickly outline his vision of the introductory chapter, subject to later contributions and comments. The draft articles on the responsibility of international organizations would be placed in the context of the articles on State responsibility but would be defined as standing alone, based on an analysis of existing practice and on the consideration of issues that specifically concerned international organizations. It would be emphasized that they were far from being, as rumour had it, a “carbon copy” of earlier articles, even if the same solutions had been retained for some issues. Where the two texts were identical, footnote 66 to the report of the Commission on the work of its sixty-first session was relevant (“[t]o the extent that provisions of the present articles correspond to those of the articles on the responsibility of States, reference may also be made, where appropriate, to the commentaries on those earlier articles”³³). That principle could be set out in the introductory chapter, followed by a discussion of the diversity of international organizations and mention of the fact that this diversity could lead to the formulation of special rules. Most of those special rules appeared in the rules governing the organization in question and thus applied only to relations between the organization and its members. Even then, one could not assume that the organization’s rules could be applied so comprehensively that all the general rules changed and a wrongful act did not entail responsibility. Furthermore, those rules, which were quite singular, could not be taken into consideration

in the current study. That was why, in the commentary to draft article 63, he had used the example of the attribution to the European Community of behaviour adopted by its States members when they implemented a binding decision of the Community—an example that was perhaps not very relevant since, in the negotiations on the adoption by the European Union of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the European Commission seemed to have taken the opposite view. He would give another example, although it would be difficult to find one, when he introduced the second part of his report. Regarding the principle of speciality, which would also be mentioned in the introductory chapter, it seemed that the text mentioned by Mr. Pellet did indeed express the idea that an international organization’s constituent instrument established the limits of its responsibility, yet he did not see how an international organization could assert to a non-member that its responsibility was not engaged because the wrongful act that it had committed was not connected to its functions. That point, to which he would return in his discussion of draft article 31, could also be clearly presented in the introductory chapter.

64. The last part of the introductory chapter would deal with the dearth of practice. The rumours that some States and international organizations had supplied new examples of practice were greatly exaggerated: he had found the passage quoted in paragraph 47 of his eighth report, not in the comments of the Secretariat of the United Nations, but on the website of *The New York Times*. The dearth of practice inevitably weakened the draft articles, which would be more authoritative if they were more firmly grounded in practice. Perhaps in the longer term the text would become more authoritative; for the moment some draft articles were simply based on the principle that there was no reason to draw a distinction, “positive” or otherwise (to borrow Mr. Pellet’s term), between an international organization and a State. It would also be necessary to indicate that some other draft articles—like some of those on State responsibility—represented progressive development of the law, and, if necessary, to specify which ones: in his view, draft articles 16 and 60 were good examples. During the discussion, the comments made by States and international organizations about certain draft articles had been characterized as hostile. In reality, as Mr. Vázquez-Bermúdez had pointed out, most of the provisions had been endorsed or had not been mentioned at all: most of the comments concerned the commentaries to the draft articles. Some concerned the texts of the draft articles themselves, but those would in any case be re-examined in their entirety by the Drafting Committee.

65. Regarding draft article 1, several speakers—Mr. McRae, Mr. Nolte, Mr. Petrič and Sir Michael—had supported the proposal to leave for later examination the problem of the responsibility of a State being invoked by an international organization. It had arisen relatively late in his work, and the States and international organizations consulted had provided differing answers, though those of the latter had tended to be favourable. In his view, the issue—Mr. Pellet’s pet subject—should be the focus of another study, which could also cover the even thornier cases in which a State or an international organization bore responsibility towards an individual or an entity

³³ *Yearbook ... 2009*, vol. II (Part Two), p. 30.

other than a State or an international organization, thereby raising a number of other problems. Since the draft articles on State responsibility did not touch on the issue either, one could even “kill two birds with one stone”. As for including the issue in the draft articles under review, his main objection was that this would require the amendment of 10 to 15 draft articles on State responsibility, for which the moment was not, in his view, opportune—even if clearly some provisions would have to be re-examined in the future, whether in the context of an international conference or of the Commission’s own work.

66. Sir Michael had made a proposal regarding the formulation of draft article 1, paragraph 2, which the Drafting Committee could take up in the light of article 57 of the draft articles on State responsibility. In the context of work on the draft articles on the responsibility of international organizations, he himself saw nothing wrong with discussing the responsibility of States members of such organizations. The responsibility of States for the acts of an organization of which they were members was generally considered a part, and sometimes the main part, of any text on the responsibility of international organizations. While the title of the draft articles was perhaps not very precise, the text was known to cover the responsibility of international organizations *and* the responsibility of States members of those organizations for internationally wrongful acts committed by the organizations. He had proposed adding a definition of the term “organ” to draft article 2, something which had elicited general agreement, though Mr. Nolte had thought that the suggested definition was circular and had proposed different wording. The definition was in fact based on the rules of the organization, which determined whether a person or entity constituted an organ; that notwithstanding, he was willing to consider a different approach. As for the term “agent”, which was always associated with the term “organ”, he saw no reason why his definition should not be made more precise if the Drafting Committee considered that useful. As Mr. Pellet had criticized draft article 7 and had not seemed satisfied with the changes he himself had suggested to the commentary, he invited him to propose wording that would take into account the concerns expressed by the international organizations, which had made no specific proposals. If all the draft articles were sent to the Drafting Committee, nothing would prevent it from amending draft article 7 and the commentary thereto.

67. Regarding draft article 13, on aid or assistance in the commission of an internationally wrongful act, Mr. Nolte and Sir Michael had urged the insertion in the commentary of a passage taken from the commentary to the corresponding text of the articles on State responsibility to the effect that in order for the international organization’s responsibility to arise, the aid or assistance needed to have been provided with the intention of facilitating the commission of the wrongful act. To return to Mr. Nolte’s example, if the World Bank had supervised the building of a dam which it itself had financed, and the dam had collapsed—as had, unfortunately, recently been the case—then, for the World Bank to incur responsibility, it had to have had the intention of facilitating the dam’s collapse. He found it troubling that the wording proposed did not seem to be solidly based on the text of the draft article, to put it mildly. Introducing the criterion of intent would, on

the other hand, be in conformity with the policy of making the commentaries consistent with those on the articles on State responsibility when the texts of the provisions were identical: it was understandable that the Commission should wish to proceed along those lines.

68. Regarding draft article 16, he said that the proposal to insert the phrase “subject to articles 13 to 15”, which appeared in paragraph 72 of the eighth report, was designed to avoid overlapping and to make draft article 16 into an additional condition. Mr. Nolte had expressed reservations, while Mr. Pellet seemed to take a more favourable view; the Drafting Committee could doubtless discuss the matter and reach a decision. Lastly, as to the main proposal concerning draft article 16—to remove paragraph 2 in the light of the many criticisms voiced by States and international organizations, and of the innovative nature of the provision—he explained that he had made the proposal not because he had changed his mind but because it was up to the Commission to take into account certain concerns expressed by States and international organizations. He had been reproached for proposing too few changes, but he could not make proposals that did not seem convincing to him. He still thought that paragraph 2 should be improved and that the Commission had not yet found satisfactory wording; it was for a policy reason that he had proposed to delete it, so as to show that the Commission had taken into account at least the most critical comments directed at that paragraph. Mr. Nolte, Mr. Petrič, Mr. Wisnumurti and Sir Michael had been in favour of that deletion, Mr. Pellet had firmly opposed it, and Mr. Dugard, Mr. Fomba, Mr. Melescanu, Mr. Saboia and Mr. Vázquez-Bermúdez had preferred that the paragraph be retained but reworked. The Chairperson, speaking as a member of the Commission, had proposed what could be a compromise solution, namely to remove the reference to recommendations so as to retain paragraph 2 while considerably lessening its sting. The Drafting Committee thus had its work cut out for it, as only after considering the issue in depth would it be able to give its opinion on that difficult matter. In conclusion, he proposed that draft articles 1 to 18 should all be referred to the Drafting Committee.

69. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 1 to 18 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

3083rd MEETING

Tuesday, 3 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera,

Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the eighth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/640).

2. Mr. GAJA (Special Rapporteur), introducing the second part of his eighth report, said that chapter V of Part Two of the draft articles on the responsibility of international organizations, concerning circumstances precluding wrongfulness, raised the question of whether the draft articles should encompass circumstances that were unlikely to be encountered by international organizations and for which few examples of practice had been provided. The fact that those circumstances were relevant for only a few organizations was not sufficient reason to ignore them, since the exclusion of a particular circumstance precluding wrongfulness would imply that it could never be invoked. Accordingly, none of the provisions concerning circumstances precluding wrongfulness should be deleted.

3. The opinions of States on draft article 20 (Self-defence) had been divided. The Secretariat of the United Nations, the only international organization to have expressed a view on the subject, had been in favour of retaining it. Some criticism had been levelled at the reference to “international law” as the criterion for assessing whether a measure of self-defence was lawful. That reference did not purport to widen the scope of self-defence but was simply intended to align the text with such rules as international law might contain on the matter.

4. States’ views on draft article 21 (Countermeasures) had also been divided, but the prevailing opinion had been that the Commission should take a “cautious approach”. The Secretariat had been against the inclusion of countermeasures in the draft articles, while the OSCE had accepted the “possibility of countermeasures by and against international organizations”. No other organization had commented on that provision. Countermeasures were also dealt with in chapter II of Part Four of the draft articles.

5. With regard to relations between an international organization and its members, draft articles 21 and 51 both stipulated that countermeasures must not be inconsistent with the rules of the organization. One State had encouraged the Commission to retain its restrictive reading of those rules. However, as he had made clear in other places in the report, it was not incumbent upon the Commission to interpret an organization’s rules, and that point should be made throughout the commentaries to the draft articles.

6. On the whole, States had been in favour of maintaining draft article 24 (Necessity). The Secretariat in particular had advocated its retention. On the other hand, opinions had been divided on the proposed amendments to the draft article; a few States had requested a precise definition of the essential interests that an international organization might invoke. One State had endorsed the opinion of some Commission members that an international organization could invoke necessity in order to safeguard an essential interest of its member States.

7. As he had noted at the beginning of his statement, he had not proposed the deletion of any of the draft articles on circumstances precluding wrongfulness. No clear trend in favour of any of the proposed amendments had emerged from the comments. If the draft articles were referred to the Drafting Committee, the latter would no doubt suggest possible improvements to their wording.

8. Turning to Part Three, chapter I, of the draft articles, he noted that various international organizations had suggested that it would be difficult for international organizations to comply with the principle of “full reparation for the injury caused by the internationally wrongful act”, to which reference was made in draft article 30. As indicated in the commentary, that principle, which reflected the need to protect the injured party, was in practice often applied in a flexible manner by States and international organizations. There were hardly any examples of cases in which full reparation had been given. Thus the draft article in question expressed a principle which was unlikely to be applied *in toto* in practice.

9. Several international organizations had been encouraged by draft article 39 (Ensuring the effective performance of the obligation of reparation) but had expressed the hope that it might be amended to “state the obligation of member States to provide sufficient financial means to organizations with regard to their responsibility” (A/CN.4/637 and Add.1, joint submission). Needless to say, several States would have liked the draft article to specify that member States had no obligation under international law other than obligations that might exist under an organization’s rules to provide the organization with the means for effectively making reparation.

10. Two States had suggested the inclusion in the draft articles of an alternative text, originally suggested by Mr. Valencia-Ospina and supported by some members of the Commission, which was reproduced in paragraph (4) of the commentary. On further reflection, he had concluded that that text could be combined with the wording of the draft article itself which, with a few drafting changes, would then read:

“1. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this chapter.

“2. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter.”

11. Draft article 31, paragraph 1, had likewise elicited comments from several international organizations, some of which had used the paragraph as a means for launching a more general campaign to give greater weight to the rules of an organization. They had maintained that an international organization could not be held responsible when it complied with its rules. That had been the traditional position of the IMF, and the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe had come to hold the same view.

12. Paragraph 2 addressed those concerns by stating that paragraph 1 was without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations. Thus if the rules of the organization contained special rules, the latter would apply in the relations between the organization and its members, but they could not modify the general rules governing relations between the organization and non-members unless the special rules became general rules or were accepted by non-members.

13. The written comments and statements from international organizations had yielded few examples of such special rules. The Secretariat of the United Nations had cited a special rule providing for financial limitations to claims against the United Nations arising out of peacekeeping operations. That rule stemmed from a General Assembly resolution that had been adopted by consensus. While it would affect claims lodged against the United Nations by its Member States, it would not apply *per se* to claims made by other parties unless that special rule had become applicable to them.

14. During the debate on the first part of his eighth report, one member had suggested that the reluctance to address in paragraph 88 of the report the question of functional protection in relations between two international organizations on the grounds that such an issue was unlikely to arise was inconsistent with other parts of the report where a lack of practice had not been regarded as an obstacle to proposing draft articles—for example, concerning certain circumstances precluding wrongfulness. However, the argument underlying paragraph 88 was not that there was a dearth of practice, but that functional protection exercised by an international organization against another international organization was of marginal importance. That was why there was no need to address that issue, whereas circumstances precluding wrongfulness, as he had already explained, had to be dealt with exhaustively in the draft articles because otherwise they could not be invoked.

15. In draft article 48, paragraph 3, concerning the invocation by an international organization of the responsibility of another organization when the obligation breached was owed to the international community as a whole, the Commission's view was that this entitlement depended on whether "safeguarding the interest of the international community [as a whole] underlying the obligation breached is included among the functions of the international organization invoking responsibility". One instance of practice which indirectly confirmed the appropriateness of that approach was to be found in the advisory opinion on *Responsibilities and obligations of*

States sponsoring persons and entities with respect to activities in the Area, delivered in February 2011 by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. The Chamber had held that the entitlement of the International Seabed Authority to claim compensation for breaches of obligations in the Area was "implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind". While that finding had been based on a specific provision of the United Nations Convention on the Law of the Sea, in essence it rested on the fact that the relevant international organization had been given certain specific functions. The Chamber had deemed each State party to be entitled to claim compensation for breaches of *erga omnes* obligations in the Area, but had taken the view that the international organization in question was entitled to claim compensation because of those functions. Thus while the Chamber had not made any direct reference to draft article 48, paragraph 3, but only to article 48 of the draft articles on responsibility of States for internationally wrongful acts, it seemed to have taken an approach to the invocation of responsibility by an international organization that was similar to that of the Commission.

16. Turning to Part Five, he observed that, while draft article 60 might be viewed as constituting progressive development, several States had endorsed the Commission's view that a member State incurred responsibility "if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation". Draft article 60, in the version adopted on first reading, did not use the term "*circumvention*", although it implied the existence of a subjective element, or some kind of abuse, on the part of the member State. That position could be further clarified in the commentary, which should emphasize, as three States and the European Commission had suggested, that the specific intent of taking advantage of an international organization's separate legal personality was required in order to establish the responsibility of the member State in question.

17. He suggested that in order to avoid any overlapping with draft articles 57 to 59, draft article 60 should be amended by the insertion, at the beginning of the article, of the phrase "subject to articles 57 to 59".

18. Despite the importance of *lex specialis*, none of the comments submitted on Part Six of the draft articles had provided any examples that could be added to the commentary to draft article 63. However, one new case concerning the question of the attribution to the European Union of the conduct of a member State,³⁴ which he had mentioned in paragraph 116 of his eighth report, should be added to the commentary.

19. The final provision, draft article 66, was a saving clause referring to the Charter of the United Nations. A general statement was needed that the draft articles were without prejudice to the Charter of the United Nations, but draft article 66 had prompted a variety of observations, and it would be better to refrain in the commentary from expressing views that some States regarded as

³⁴ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*.

controversial. He would therefore amend some parts of the commentary to which certain States had objected.

20. Mr. NIEHAUS said that a pall had been cast over the start of the session by the loss of Ms. Escarameia, and he wished to join his voice to those who had expressed deep sorrow at her passing.

21. The lack of rules on the responsibility of international organizations had long been a major deficiency of international law. In the set of draft articles submitted in his eighth report on that topic, the Special Rapporteur had done a masterly job of bringing together all the contributions and additions to his original proposals. Some of the comments made so far on the text, however, went beyond the sort of analysis suited to a second reading, going into details that had largely been addressed during the first reading. He therefore suggested that speakers in plenary should confine themselves to comments that were appropriate to the second-reading phase: most of those heard so far would have been better made in the Drafting Committee. The written comments made by international organizations should obviously be taken into account. To that end, it would be useful to hold a meeting with the legal advisers of those organizations.

22. The draft articles adopted on first reading should now be referred to the Drafting Committee, together with those comments that the Special Rapporteur deemed to be especially relevant to a second reading, so that the text could be adopted in final form before the end of the current session. That would constitute an enormous step forward in the development of international law and a noteworthy achievement by the Commission in fulfilment of its mandate.

23. Mr. VALENCIA-OSPINA joined in the expression of sadness at the passing of Ms. Escarameia and welcomed the new member of the Commission, Ms. Escobar Hernández.

24. He congratulated the Special Rapporteur on responsibility of international organizations on his efforts of nearly 10 years, which would come to an end at the current session with the completion of the Commission's work on an important topic. All the elements the Commission needed to finalize the text in conformity with its usual practice were now in place. He endorsed the eighth report and thanked the Special Rapporteur for citing him as the author of a proposal that, after due consideration, he had incorporated in draft article 39, paragraph 2.

25. Mr. CANDIOTI agreed that the second reading was indeed the final stage of the Commission's work and should thus culminate in the adoption of the text. He, too, was grateful to the Special Rapporteur for incorporating Mr. Valencia-Ospina's proposal in draft article 39. He likewise welcomed the fact that the eighth report reflected the Commission's views on how to deal with countermeasures. The Commission could now send the text to the Drafting Committee.

The meeting rose at 10.40 a.m.

3084th MEETING

Thursday, 5 May 2011, at 10.05 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute) (*continued*)* (A/CN.4/635 and Add.1-3)

[Agenda item 14]

1. The CHAIRPERSON, welcoming the new member Ms. Concepción Escobar Hernández, said that he was sure that her recognized experience and ability would enhance the Commission's deliberations.

2. Ms. ESCOBAR HERNÁNDEZ said that, as there had not been a Spanish member of the Commission for more than 25 years, she was very honoured to join such eminent colleagues who were making an outstanding contribution to the development of international law. It was also a privilege to succeed Ms. Paula Escarameia, who had been an excellent jurist and also a friend of long standing. She therefore sincerely thanked all her colleagues for their support and was pleased to be able to offer her modest contribution to the Commission's work.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1-2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. The CHAIRPERSON invited the Commission to continue its consideration of the eighth report of the Special Rapporteur on the responsibility of international organizations (A/CN.4/640).

4. Mr. PERERA said that he would confine himself to a few general comments focusing mainly on chapter V of Part Two of the draft articles, on circumstances precluding wrongfulness, which had prompted some very lively discussions within the Commission.

5. He supported the suggestion made by several Commission members that an introductory section should clarify three important issues which had come to light during the debates. First, the relationship between the

* Resumed from the 3082nd meeting.

draft articles under consideration and the articles on State responsibility for internationally wrongful acts³⁵ must be preserved while retaining the stand-alone character of the articles that would be adopted on the responsibility of international organizations. The related question of the paucity—or complete lack—of practice often obliged the Commission to draw analogies. He agreed with the Special Rapporteur that provisions not backed by practice should be treated as progressive development of international law, but that approach should be limited to essential aspects which would leave lacunae in the regime that the Commission was proposing to establish if they were not addressed. Lastly, the diversity of international organizations was a matter of no less importance. In that context, as Mr. Pellet had proposed, the draft articles would have to distinguish between the principle of speciality and *lex specialis*, which was the subject of draft article 63.

6. Draft article 20 on self-defence as a circumstance precluding wrongfulness had received a mixed reception, to say the least. The concerns expressed by Governments and international organizations were such that the Commission should perhaps review its position on retaining that draft article. One State had noted that “the substance [of the right of self-defence] with respect to international organizations was not well established under international law, and its scope and the conditions for exercising it were far less clear than in the case of States” (see the last footnote to paragraph 61 of the report). Another State had commented that: “it would be risky to make too general an inference concerning the analogy between the State’s natural right to self-defence against armed aggression ... and any right of any international organization or of its organs or agents to resort to force in a variety of circumstances” (para. 62). Although the Secretariat of the United Nations had not been opposed to the inclusion of such a provision in the draft articles, it had envisioned instances of self-defence solely in the context of an armed conflict where peacekeeping forces were present. In that connection, attention had been drawn to the fact that the extent to which forces operating under the auspices of the United Nations could resort to force depended on primary rules delimiting the scope of their mission. The above-mentioned difficulties strengthened his conviction and that of a number of other Commission members that that draft article should be deleted.

7. Draft article 21 on countermeasures touched on a matter which, in the opinion of some States, should be approached with extreme caution owing to the scarcity of practice, the uncertainty surrounding the relevant legal regime and the risk of abuse (see paragraph 65 of the report). The Secretariat had emphasized the fundamental difference between international organizations and States and expressed the opinion that the draft article should be deleted on account of the nature of the special relationship existing between an international organization and its member States.

8. Since most Governments had submitted comments along similar lines, the Commission must devote its

full attention to the crucial question of the consistency of countermeasures with an organization’s rules. That was undoubtedly a challenging task, but one which the Commission must undertake.

9. With regard to draft article 24 on necessity, he agreed with the approach taken in the commentary to article 25 of the articles on State responsibility, namely that “[t]he extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged”.³⁶ It would also be preferable to retain the current wording of draft article 24, paragraph 1 (a). The scope of the principle of necessity in the relationship between an organization and its members and the possibility of dealing with it in an organization’s rules *qua* special rules should perhaps be clarified in the commentary.

10. Several international organizations had welcomed the retention of draft article 39 on ensuring the effective performance of the obligation of reparation and they had hoped that it would be strengthened as an exercise in the progressive development of international law. The Commission had amply discussed that draft article, an alternative version of which had even been proposed (see paragraph (4) of the commentary to article 39³⁷). The discussion had clearly shown that an organization’s member States had no obligations under international law other than those which might exist under the organization’s rules to supply it with the effective means of complying with its obligation to make reparation. Since several States had clearly endorsed that approach, there seemed to be no reason to depart from it. He therefore approved of the recasting of the draft article proposed in paragraph 84 of the Special Rapporteur’s report and the referral of the new wording to the Drafting Committee. He was in favour of sending all the draft articles in the second cluster to the Drafting Committee. As for draft article 20, he would go along with the majority opinion.

11. Sir Michael WOOD said that the general comments which he had made a few days earlier also applied to draft articles 19 to 66, to which he would refer at the current meeting. He had listened carefully to what the previous speaker had said about draft article 20; while it was a finely balanced question, he would still be in favour of retaining that provision as it stood.

12. He would consider draft article 21, which concerned the difficult issue of countermeasures, together with draft articles 50 to 56. The Secretariat’s suggestion that the provisions on countermeasures be omitted had great merit, since there was very little practice and experience on which to base provisions on what was a very complex field. Perhaps the draft articles in question could be replaced by a saving clause which would read: “The draft articles are without prejudice to any question of countermeasures taken by an international organization.” Countermeasures by an international organization might fall into three categories: first, those taken by an international organization in response to a breach of international law by a non-member of an organization; secondly, those taken by an international organization in

³⁵ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

³⁶ *Ibid.*, p. 83, para. (15) of the commentary.

³⁷ *Yearbook ... 2009*, vol. II (Part Two), chap. IV, p. 57.

response to a breach by a member of the organization of a rule of international law that was binding on the member other than by reason of its membership; and thirdly, those taken by an international organization in response to a breach by a member of the organization of a rule of international law that was binding on the member because of its membership (for example failure to pay its assessed contributions).

13. In the first and second categories, the international organization ought to be able to take countermeasures under the same strict conditions as States. As difficulties arose in relation to the third category, where there was little available experience, it might be better to deal with it in a saving clause.

14. Turning to draft article 24 on necessity, he would have preferred there to be no such article either there or in the draft articles on State responsibility. The concepts of “an essential interest of the international community as a whole” and of an organization which had “the function to protect that interest” were far from clear. In any event, it seemed wrong to limit the right to invoke necessity in such a way as to exclude virtually all organizations, in particular specialized and regional organizations. Since there was no reason to subject an international organization’s right to invoke necessity to conditions different from those that applied to States, draft article 24, paragraph 1 (a), should be aligned with the corresponding provision of the articles on State responsibility (article 25, paragraph 1 (a)).

15. He approved of the current formulation of draft article 30 on reparation. The example given by the Secretariat, where the General Assembly had apparently sought to limit payments in respect of claims against the Organization, did not seem to be particularly relevant, since it concerned breaches of obligations under domestic law. Presumably, the United Nations had to reach agreements with States so that the matter could be dealt with under domestic law. He likewise supported the retention of draft article 31. That draft article did not deal with questions concerning primary rules, because international organizations’ obligations under those rules were likely to be very different from those of States. Some of the concerns of international organizations seemed to arise from their supposition that the draft articles implied the application of certain primary obligations. For example, draft article 48 might be misinterpreted as implying that, in the Commission’s view, international organizations, like States, had obligations towards the international community as a whole. It was therefore important to indicate clearly in the commentary that the Commission was not adopting a position on the primary rules by which particular international organizations might be bound, that the draft articles dealt exclusively with secondary rules of international law and that they had no bearing on the primary rules, applicable to any particular organization.

16. He endorsed the Special Rapporteur’s comments on draft articles 32, 36 and 37. He approved of the revised version of draft article 39 which was to be found in paragraph 84 of the eighth report, although paragraph 2 thereof still needed some improvement. The Commission should not go as far as imposing a legal obligation upon the General Assembly to adopt a particular budgetary

decision, for that was something about which States were very sensitive. He therefore proposed that the wording of paragraph 2 be amended to read: “The responsible organization should take all appropriate measures in accordance with its rules in order to encourage its members to provide it with the means to meet its obligations under this chapter.”

17. As far as chapter I of Part Four was concerned, he fully agreed with the Special Rapporteur’s comments on draft article 44.

18. Moving on to Part Five of the draft articles entitled “Responsibility of a State in connection with the act of an international organization”, he said that draft articles 57 to 59 did not call for any comments at that stage. The commentaries to those articles would be particularly important and should replicate and, as necessary, update those to the corresponding articles on State responsibility. As the Special Rapporteur had noted, draft article 60 might overlap with draft articles 57 to 59 and should therefore be deleted, especially as the meaning of the word “prompting” was unclear and should be replaced with a word with a clearer legal meaning such as “causing”.

19. The text would be better organized if draft articles 60 and 61 were placed in chapter IV of Part Two (where they would replace the current draft article 17). In Part Five they could then be repeated (in order to avoid a cross reference) or a provision along the same lines as the current draft article 17 could be included, so as to avoid the rather awkward cross reference to a subsequent provision which the current draft article 17 contained.

20. In conclusion, he supported the suggestion from one State, as recorded in paragraph 117 of the eighth report, to include a “provision requiring the special characteristics of a particular organization to be taken into account in applying the draft articles”, although draft article 63 was not necessarily the right place for it. In fact, that idea was already expressed to some degree in paragraph (14) of the commentary to draft article 2. It was to be hoped that the Special Rapporteur would find a way of highlighting it either in a new provision or in a general commentary. All the remaining draft articles could be sent to the Drafting Committee.

21. Mr. PELLET said that, without revisiting the questions of principle that he had already raised in respect of the first and second clusters of draft articles, he would comment on draft articles 19 *et seq.* which the Special Rapporteur had presented at the previous meeting.

22. On the whole, he welcomed the idea that chapter V of Part Two, on circumstances precluding wrongfulness, reflected the rules on international responsibility. There was no reason why those circumstances should not preclude the responsibility of international organizations, as they did in the case of any other subject of international law. He was, however, still firmly opposed to the inclusion of self-defence in draft article 20, because it was part not of the general rules governing responsibility, but of the law of the Charter of the United Nations. He was therefore in favour of its deletion, which the Special

Rapporteur had proposed in his previous report,³⁸ as he stated in paragraph 63 of his eighth report.

23. As far as countermeasures were concerned, he had no objection to retaining the current wording of draft article 21, although he wondered whether paragraph 2 (*a*) might not be a good place to reflect the principle of international organizations' speciality. It could state that countermeasures must not be inconsistent with the rules of the organization and specify that they must be carried out within the framework of the functions conferred on them by their constituent instrument. In any event, notwithstanding the view expressed by the Special Rapporteur in paragraph 95 of his eighth report, unless that were done expressly in draft article 21, paragraph 2, it would be essential to explain in draft article 50, paragraph 1, that the injured international organization could take countermeasures only in the context of the functions conferred on it by its constituent instrument, in accordance with the principle of speciality. There was probably no need to mention that fact expressly in the text; an explanation in the commentary would suffice. Austria had made a proposal to the same effect and Germany was also aware of the issue.

24. There was something extremely worrying about the linkage between draft article 21 and chapter III of Part Three. Draft article 21, paragraph 2, laid down the circumstances in which an international organization could take countermeasures against another international organization and against a State. That was a good thing, as it helped to fill the well-known lacuna in respect of States' responsibility towards international organizations. However, it was not enough, even with regard to countermeasures, for that paragraph concerned only the responsibility of member States of an international organization towards that organization. Admittedly, it was probably possible to infer *a contrario* from paragraph 2 that the general rule set forth in paragraph 1 applied to non-member States. What was no good at all were draft articles 50 to 56 which provided for countermeasures only against international organizations, but not against States, irrespective of whether they were members, thereby giving no effect to the principle established in draft article 21. Apart from that very important aspect, he was not opposed in principle to maintaining what was said about countermeasures in the draft articles although, as he had already said, it was absurd that there was such obstinate resistance to filling the above-mentioned lacuna. In substance, he was not in favour of deleting the provisions on countermeasures, or of replacing them with a saving clause. On the other hand, he had been very interested by Sir Michael's breakdown of the various kinds of countermeasures. The Drafting Committee would be well advised to follow that approach when it examined the provisions on countermeasures.

25. With regard to Part Three of the draft articles on the content of the international responsibility of an international organization, he still thought that assurances and guarantees of non-repetition were out of place in draft article 29, as they were a form of satisfaction, the subject of draft article 36. Of course, the draft articles merely repeated the mistake made in the articles on State responsibility—*perseverare diabolicum*. The most

significant issue in that respect was reparation. Once again, there was no doubt that the responsible entity must make full reparation for the consequences of the injury caused by its internationally wrongful act. That was true of States, international organizations or any other author of such an act. Nevertheless, he approved of the main thrust of the provisions in Part Three of the draft articles, including those on reparation. He wished, however, to draw the attention of the Special Rapporteur and Commission members to the very serious concerns which the legal advisers to international organizations had about the resources which organizations had, or to be more precise did not have, to cope with the consequences of their responsibility. Those concerns, which he had always shared and which, in his opinion, should have formed the basis of the thinking on the responsibility of international organizations, were reflected in the reactions of international organizations to draft articles 30 and 39 in particular. In order to make sure that a deaf ear was not turned to those worries, he wished to read out some significant passages. The ILO wrote that international organizations

have to rely on funds allocated to them. If they were to provide funds for contingent obligations such as a possible compensation, they would have reduced funds for fulfilling their original mandates. By imposing such a parallel obligation on international organizations, the Commission risks limiting effectively their future operations. The requirement of "full reparation" may lead, in the case of compensation, to the disappearance of the international organization concerned (A/CN.4/637 and Add.1, comments and observations of the ILO on draft article 30, para. 3).

26. The 13 organizations that had presented a joint submission wrote that they were

concerned that limited attention seems to have been paid by the Commission to the special situation of international organizations in relation to the obligation to compensate. If international organizations are "under an obligation to make full reparation for the injury caused by the internationally wrongful act", this could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources but rely on compulsory or voluntary contributions from their members. This could be unrealistic (*ibid.*, joint submission on draft article 30).

Although he had signed that document in a different capacity, he thought that the conclusions of the international organizations were wrong. International organizations must make full reparation for the consequences of their internationally wrongful acts. The contrary would be the very negation of international law. Draft article 30 could therefore not be amended. The only margin for manoeuvre was with regard to the resources which must be made available to international organizations to enable them to honour an obligation inherent in the very idea of law.

27. It was therefore essential not to abandon the principle set forth in draft article 21. At the same time, draft article 39 was the vital complement to the principle of full reparation, which must not be forsaken. As he had said before, contrary to what Sir Michael had seemed to suggest, the principle set forth in draft article 39 had by no means been invented by the Commission. It was the logical, normal and unavoidable consequence of the fact that the member States of an international organization, by conferring legal personality on the latter, necessarily accepted that it could incur responsibility, once again in accordance with the principle of speciality, and that

³⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610.

it must bear the consequences thereof. But the States which had created that entity must naturally bear those consequences.

28. In paragraph 84 of his eighth report, the Special Rapporteur proposed the retention of the current text of draft article 39, for which he personally was grateful, and the addition of proposed wording that had been rejected by a straw vote on first reading in 2009. He was not opposed to combining that wording as the two ideas were complementary. The reason that proposal had been rejected on first reading was because its author, who had introduced it somewhat stealthily, had been against the combination of both texts. The text proposed by the Special Rapporteur showed that such a combination was perfectly possible.

29. On the other hand, what Sir Michael had said at the current meeting about paragraph 2 was rather unconvincing. When States gave international organizations the wherewithal to meet their obligations, perhaps they were not prompted by legal considerations. Nevertheless, it was the Commission's task to tell States what international law dictated. They were then free to vote differently but, by refusing to give an international organization the means to honour its obligation to make full reparation for the consequences of an injury caused by an internationally wrongful act, States would be breaching a legal rule and the Commission should not encourage them to do so.

30. He endorsed the regrets expressed about the lack of any mention of functional protection in draft article 44. That silence was a further manifestation of the unfortunate lacuna to which he had already referred at some length. That lacuna also lay at the root of the main problems posed by Parts Five and Six of the draft articles which, when all was said and done, consisted in a string of saving clauses. Those problems obviously had to be addressed directly and not circumvented in such a strange manner.

31. Mr. MELESCANU said that he had already had occasion to express his support for the draft articles under consideration. The comments and observations received from States and, above all, from international organizations appeared to be very general or purely editorial. In his opinion, that should encourage the Commission to pursue the approach it had mapped out in the text adopted on first reading.

32. In draft article 29, subparagraph (b), Part Three of the draft articles, he also supported the proposal to include a reference to the offer by international organizations of appropriate assurances and guarantees of non-repetition. International organizations could not be exempted from an obligation that was incumbent upon States pursuant to article 30, subparagraph (b), of the articles on State responsibility. The final version of the draft article proposed by the Special Rapporteur had the very important advantage of offering some flexibility. The last phrase of draft article 29, subparagraph (b), which spoke of offering appropriate guarantees "if circumstances so require" would make it possible not to create huge difficulties for international organizations.

33. With regard to the question of full reparation, the fact that draft article 30 had prompted very lively reactions

from international organizations, especially the WHO and the ILO, and even the Secretariat of the United Nations, spoke volumes. The main argument was that such a provision could expose international organizations to excessive risk, an argument that had been echoed at the current meeting by some Commission members. That rationale was equally applicable to a number of States, but that had not prevented the Commission from including similar provisions in the draft articles on State responsibility. Of course, international organizations could not be placed on exactly the same footing as States, but it was necessary to retain some consistency when applying the principle of international responsibility. He therefore expressly supported the Special Rapporteur's proposals which, moreover, had been accepted by the Commission on first reading.

34. Another observation that had triggered some comment at the current meeting had been the statement of the Secretariat of the United Nations that it was the Organization's practice not to accept the principle of full reparation in the context of peacekeeping operations, but to offer limited reparation through the conclusion of bilateral agreements with the States where such operations took place. Sir Michael had put forward a very interesting idea, namely that that could be seen as a way of setting a ceiling to responsibility, which would then be governed by the country's domestic law and would no longer be based on the organization's internationally wrongful act.

35. As for the financial resources to ensure the effective performance of the obligation to make reparation, a crucial question for international organizations, several of them had submitted comments on draft article 39 in which they had virtually called for the inclusion of a provision requiring member States to supply the organization with the necessary funds to meet its obligation to make reparation. Although he could well understand that international organizations might find themselves in an awkward situation, there was no legal basis or international practice to support such a step. As far as he knew, whenever an international organization had faced a financial quandary, including in areas other than the obligation to make reparation, it had been solved on the basis of a single principle, which might be deemed a customary norm of international organizations, namely that States could make voluntary contributions. For example, during the crisis in funding peacekeeping operations in the Republic of Korea, whose effects were still being felt, the accepted rule had been that States should pay voluntary contributions to cover needs. There was therefore nothing which could give international organizations the right to demand such a provision. For that reason, he approved of the wording proposed by the Special Rapporteur in paragraph 84 of his report, since it satisfied international organizations in part, but did not contain specific obligations that would be very hard for member States to accept. It was also very well balanced, because it accompanied the obligation for an international organization to do its best to solve these questions with the corollary obligation for States to do everything in their power to assist the international organization. The inclusion of that wording in the draft article might alleviate the concerns expressed by international organizations about the idea of making full reparation for an injury caused by an internationally wrongful act.

36. In Part Four of the draft articles, which concerned the implementation of the international responsibility of an international organization, most of the observations that had been submitted related to countermeasures and had been general in nature. In the final analysis, it seemed unnecessary to recast draft articles 50 and 52, but he was prepared to consider the various views expressed during the current meeting. In Part Five, on the responsibility of a State in connection with the act of an international organization, he endorsed the proposal made by the Special Rapporteur in paragraph 107 of the report to insert the phrase “subject to articles 57 to 59” at the beginning of draft article 60. With regard to the responsibility of a State due to its conduct as a member of an international organization, he also thought that a State bore no responsibility if its conduct complied with the rules of the organization. He had greatly appreciated Sir Michael’s ideas on countermeasures and their classification into three categories. Generally speaking, it was hard to imagine the adoption of countermeasures against member States, primarily because it was they that made up the legal fiction that was the international organization. He fully endorsed the idea that it would be better to refer to sanctions, for which provision was made in the internal rules, rules of procedure and statute of an international organization, rather than to countermeasures. In fact, it was regarding relations between an international organization and a third State that one might speak of countermeasures. It remained to be seen whether the Commission would have the time to reword the draft article along those lines. In conclusion, he was in favour of sending the draft articles to the Drafting Committee.

37. Mr. DUGARD said that he had only a few comments to make on the provisions of the draft articles. However, as States and international organizations had called for the inclusion of further information in the commentaries, generally speaking there seemed to be a need to expand the commentaries on a number of draft articles. The Special Rapporteur should err on the side of lengthy rather than short commentaries, because many of the draft articles constituted progressive development of international law. In the chapter on circumstances precluding wrongfulness, he concurred with the Special Rapporteur that draft article 20 on self-defence should be retained as it stood. It was preferable to include a general reference to international law, rather than to the Charter of the United Nations, because some States were not Members of the United Nations. As far as draft article 21 on countermeasures was concerned—the same remark also applied to draft articles 52 to 56—it was necessary to remember that countermeasures were a necessary evil. When they had been included in the articles on State responsibility, some members of the Commission had been strongly in favour of their deletion, on the grounds that, although they were a part of international law, they were such an unfortunate element of it, that it would have been better to omit them. Obviously that path could not be taken, and the Commission had rightly opted for the cautious approach advocated by one State. With regard to draft article 24 on necessity, he supported the suggestion in paragraph 71 that the commentary should provide fairly detailed examples of the practice of the North Atlantic Treaty Organization (NATO), the United Nations and the Organization of American States (OAS). The new wording

of draft article 39, proposed in paragraph 84, made member States’ obligations much clearer and he endorsed it for the reasons given by Mr. Melescanu. He agreed with the criticism by El Salvador of draft article 44, which seemed to be the most questionable provision. In his opinion, as he had stated on a previous occasion, paragraph 1 did not deal with a situation where a claim was brought by an uninjured State after the violation of an *erga omnes* obligation. As he had already observed, by failing to deal with that eventuality in the articles on State responsibility, the Commission had committed an error which he saw no reason to perpetuate. According to the Special Rapporteur, it was plain from draft article 48, paragraph 5—what he probably meant was draft article 48, paragraph 5, read together with draft article 48, paragraph 2—that draft article 44, paragraph 1, did not apply to an uninjured State, but it would be preferable to say so expressly. He therefore urged the Special Rapporteur to give serious attention to that issue in the Drafting Committee. With respect to paragraph 88, Commission members would recall that during the debate on the draft articles on diplomatic protection, he had proposed that the Commission should deal with the subject of the exercise of functional protection, but the general view had been that it constituted a separate topic.³⁹ He therefore repeated the suggestion that this subject should be covered in a special set of draft articles.

38. Lastly, he was delighted that draft articles 48 and 56 had given rise to little criticism, although the provisions on uninjured States and the interests of the international community as a whole had been considered to be the most controversial when they had been inserted into the draft articles on State responsibility. It was gratifying to see that States seemed to have accepted those provisions, because they had not opposed their inclusion in the draft articles on the responsibility of international organizations. In conclusion, he supported the referral of the draft articles to the Drafting Committee.

39. Mr. PETRIČ said that it was most encouraging that States and, in particular, international organizations had reacted to the draft articles by submitting comments and suggestions. It was to be hoped that the next phase of work would also prompt some reactions, so that a dialogue could be maintained and the final result would reflect the interest shown in the Commission’s deliberations and would include all the proposals that were deemed to be useful. He congratulated the Special Rapporteur on his extremely detailed comments on the recommendations and proposals put forward by States and international organizations. Having analysed the replies that had been received, above all in paragraphs 72, 86, 102, 113 and 122 of his eighth report, the Special Rapporteur had proposed some amendments, all of which he personally supported. The text of draft article 20 on self-defence had formed the subject of a lengthy debate during which all the opinions that had been expressed had been examined. That was why the Special Rapporteur was right to abandon his proposal to delete that draft article. In paragraph 72, the Special Rapporteur had presented a new draft article 16 which took account of the changes proposed in paragraphs 51, 55

³⁹ See *Yearbook ... 2006*, vol. II (Part Two), chap. IV, p. 26, paragraph (3) of the general commentary on the draft articles on diplomatic protection, adopted by the Commission at its fifty-eighth session.

and 58 of the report. That draft article was quite acceptable. If it proved necessary to alter it, it was up to the Drafting Committee to do so. The only amendment proposed in the section of the report from paragraphs 29 to 86 concerned draft article 39, which had likewise been debated at length in the Commission. In paragraph 84, the Special Rapporteur proposed a text which was a synthesis of all the opinions that had been expressed, including the minority view defended by Mr. Valencia-Ospina. It was a very good solution. He also fully agreed with the amendment of draft article 60 proposed in paragraph 107, which concerned only its form. He had hoped that draft article 44 would be amended. The Special Rapporteur had not submitted any proposals, but the Drafting Committee could look into the matter.

40. In conclusion, he was in favour of sending all the draft articles to the Drafting Committee. Since the text had been approved by the Commission on first reading after some lengthy debate, the Drafting Committee should concentrate on the comments and proposals made by States and international organizations and, if possible, it should not revisit questions that had been decided five or more years earlier. He fully agreed with Mr. Dugard and, like him, he hoped that the Special Rapporteur would flesh out the commentaries on draft articles which represented progressive development of international law.

The meeting rose at 11.30 a.m.

3085th MEETING

Friday, 6 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Later: Mr. Maurice KAMTO (Chairperson)

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the next two weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

* Resumed from the 3081st meeting.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

2. The CHAIRPERSON invited the Commission to resume its consideration of the eighth report on responsibility of international organizations (A/CN.4/640).

3. Mr. NOLTE, after welcoming Ms. Escobar Hernández to the Commission, said that he had little to criticize in the second part of the eighth report on responsibility of international organizations. He was in favour of retaining draft article 20 (Self-defence), particularly as the Special Rapporteur had indicated that the resorting by an international organization to self-defence was not a purely hypothetical situation. However, he agreed with other members that the limited likelihood of such an occurrence should be emphasized in the commentary to the draft article.

4. He expressed support for draft article 21 (Countermeasures), welcoming the suggestion in paragraph 67 of the report that some international organizations did exclude the possibility of countermeasures against their members. He found useful the distinction drawn between three contingencies which existed with regard to countermeasures: the relationship between an international organization and non-members; the relationship between an international organization and its members with respect to the members' rights; and the relationship between an international organization and its members in respect of treaties concluded by member States in a capacity other than as members of the organization. However, the Commission should not draw too great a distinction with regard to the latter category, for if a State was a member of an international organization it assumed additional responsibilities for supporting the organization, and those responsibilities could also affect treaties that it had concluded outside the context of its membership of the international organization.

5. A case in point was Switzerland, which upon joining the United Nations had agreed to abide by Article 2, paragraph 5, of the Charter of the United Nations, which set out a general obligation to support the Organization. Yet there were surely situations in which that provision could affect the interpretation of treaties concluded by Switzerland or the responsibility of Switzerland as a State, and from that perspective the country could not be viewed merely as a third party.

6. He was also in favour of draft article 30 (Reparation). With regard to draft article 31 (Irrelevance of the rules of the organization), he welcomed the emphasis placed in paragraph 77 of the report on the fact that international organizations could not be relieved by their rules from complying with their obligations. He supported the Special Rapporteur's balanced proposal in paragraph 84 of the report regarding draft article 39 (Ensuring the effective performance of the obligation of reparation). The Special Rapporteur had recognized the ambiguity that existed in the original version of draft article 39, which could be

taken to imply that there was an independent obligation on the part of member States to provide an international organization with financial means to fulfil its obligation of reparation, when such an obligation should in fact arise from the rules of the organization.

7. Nonetheless, he disagreed with Mr. Pellet that the obligation for member States to provide an international organization with the means to fulfil an obligation of reparation was a logical consequence of having conferred legal personality on the organization; under domestic legislation, for example, the establishment of a limited company did not give rise to responsibility. Similarly, he was not in favour of Sir Michael's suggestion that the wording of the proposed new second paragraph of draft article 39 should be softened by replacing "shall" with "should". The obligations in question were international legal obligations of the international organization itself that had no effect on the obligations of the State.

8. In conclusion, he commended the Special Rapporteur for his very balanced, subtle and thorough report, and in particular the second part of it.

9. Mr. McRAE, after welcoming Ms. Escobar Hernández to the Commission, said that he greatly appreciated the Special Rapporteur's response to the concerns raised by members earlier in the debate and his willingness to draft an introduction that would appear in the report on the work of the session, that would allay some of those concerns and contribute to the wider acceptability of the draft articles among States and international organizations as well as among the academic community.

10. Broadly speaking, he found the Special Rapporteur's responses to the comments of States and international organizations acceptable, and he therefore wished to focus on some of the issues raised by international organizations that had caused difficulty in the Commission in the past. In that regard, he noted that while the extensive comments of the Secretariat of the United Nations were helpful and informative, it was unfortunate that the Secretariat had waited until practically the end of the process before submitting them. The Commission would have benefited significantly had it been able to analyse those comments at an earlier stage.

11. Concerning draft article 20, he agreed with the Special Rapporteur that there was no need to reopen the question of self-defence. However, some further reflection might be needed with regard to draft article 21 (Countermeasures), although he would not go as far as Sir Michael by suggesting that the draft article should be replaced by a saving clause.

12. The treatment of countermeasures by the Secretariat highlighted the principle of speciality. Given the universality of the United Nations, countermeasures taken by or against the Organization would in most cases be actions taken by or against a Member State. However, such a situation was far less likely to arise when countermeasures were taken by or against the European Union, which interacted on a variety of levels with States that were non-members. Moreover, a decision by the United Nations to take countermeasures was effectively a decision taken by the vast majority of the

world's States, which gave the decision enhanced status and possibly greater credibility than the decisions of other international organizations.

13. Perhaps because of the particular position of the United Nations, the comments of the Secretariat had tended to focus on countermeasures in relation to a Member State. Yet there were two types of relationship between an organization and its member States, as Sir Michael and Mr. Nolte had noted: a relationship with the State in its capacity as a member and a relationship with the State independently of membership. In the case of the United Nations, the comprehensiveness of the Charter of the United Nations suggested that, with the possible exception of the conclusion of a headquarters agreement, it was hard to think of the relations between the United Nations and a Member State as being completely independent of the organization/membership relationship.

14. The primary source for the rules governing the relationship between a State and another State in its capacity as a member was the rules of the organization, a context in which it could be argued that rules relating to countermeasures had no place. Moreover, it was at that point that the analogy with States broke down: States were simply self-contained units, whereas international organizations were entities with an international legal personality composed of other international legal persons.

15. All of those considerations raised questions as to whether draft article 21, paragraph 2, and draft article 51, both of which dealt with countermeasures in respect of members, sufficiently reflected the distinction between members acting as members and members acting independently of membership, and whether they made it sufficiently clear that the relationship between an organization and its members was governed by the rules of the organization. It had to be made clear that the rules on countermeasures were not designed to give member States or member organizations greater rights than they would otherwise have under the rules of the organization. Although draft articles 21 and 51 had been the subject of extensive debate in the Commission and in the Drafting Committee, they perhaps warranted further attention. The Commission might wish to address the role of the rules of the organization in the organization/member relationships in greater depth in the commentary.

16. With regard to draft article 30 (Reparation), he observed that the United Nations practice of concluding bilateral agreements with States in whose territory peacekeeping units were based raised an important question about the extent of the obligation to make "full" reparation under that article. Presumably, international organizations could limit their responsibility to provide reparation by means of bilateral agreements. Since the conduct of military or peacekeeping operations was probably the area in which the likelihood of responsibility was greatest, it was not surprising that it was regulated by such agreements, and that practice needed to be taken into account in the draft article itself or at least in the commentary.

17. He welcomed the Special Rapporteur's proposal concerning draft article 39, yet in a sense both of the proposed paragraphs were unsatisfactory. However,

States had made it clear that they did not want a provision making them directly responsible for the wrongful acts of international organizations, including the responsibility to make reparation. And while that was understandable in the case of organizations with a large membership where decisions were not taken by unanimity, in the case of smaller organizations, where the actions of the organization were clearly those of a limited number of States acting collectively, the claim that member States should be exonerated from responsibility for the actions of the organization was less credible. He was not convinced by Mr. Nolte's analogy with limited liability companies.

18. The question of reparation offered a classic example of an area in which the diversity of international organizations meant that differentiated rules should be applied to them—in some cases, that implied obligations upon member States that were much more onerous than those imposed under the existing version of draft article 39. However, he would not press the point, as he knew that he was in a minority.

19. He did wonder, however, whether the order of the proposed two paragraphs should not be inverted. The draft articles primarily concerned international organizations, and thus the obligation upon organizations should be stated before the obligations upon member States. Moreover, like Mr. Pellet and Mr. Nolte, he did not agree with Sir Michael that the wording in paragraph 2 should be changed from “shall take” to “should take”. The provision required only that the responsible international organization should take appropriate measures “in accordance with its rules”, and he did not consider that to be too great an interference in the budgetary autonomy of the General Assembly.

20. In conclusion, he recommended that all the draft articles be referred to the Drafting Committee.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

21. Mr. NOLTE said that he wished to clarify his earlier comments. He had not meant to imply that international organizations were like limited liability companies; he had merely disagreed with the argument put forward by Mr. Pellet that it was a logical consequence that one was fully liable for what one created, as evidenced by the existence under domestic law of limited companies, which had limited liability.

22. However, he agreed with Mr. McRae that, in many cases, smaller organizations could act collectively yet not necessarily as international organizations. When considering the draft articles on responsibility of international organizations it was important to bear in mind that States were always responsible, whether they acted together or in parallel. A salient example was the action of certain members of NATO, who had emphasized that, particularly in their actions *vis-à-vis* third States, they were acting not as an international organization but as a group of States.

23. Mr. FOMBA, after welcoming Ms. Escobar Hernández and commending the Special Rapporteur for his introduction of the second part of his eighth report, said that he wished to recall his position of principle with regard to the topic under consideration. States were primary and

full subjects of international law and must therefore assume fully their international responsibilities, while international organizations were derivative subjects of international law, albeit no less important. *Prima facie*, issues relating to international responsibility should be considered in those terms. Although the entire legal regime of international organizations was governed by the principle of speciality, the approach to the issue of responsibility should be based not on the nature of speciality but rather on the degree of speciality. The problem lay in deciphering, in legal terms, the possible consequences of the principle of speciality and the derivative and functional nature of the legal personality of international organizations.

24. Where circumstances precluding wrongfulness were concerned, he believed that the overall analytical framework should be the same. The principal difficulty lay in correctly assessing the respective roles of codification and progressive development. The absence or lack of practice should not be a major reason for not considering the issues from the standpoint of reasonable progressive development, where necessary; accordingly, the Commission should not be afraid to tackle important and sensitive issues such as self-defence, countermeasures or reparation. In his view, the circumstances precluding wrongfulness listed in chapter V of Part Two as adopted by the Commission on first reading in 2009⁴⁰ should be retained, despite the reservations and concerns—some of them legitimate—expressed by States and international organizations.

25. Responding to some of the views expressed during the debate on the previous day, he suggested that the Drafting Committee might wish to consider Sir Michael's proposal concerning the treatment of countermeasures. The suggestion by Mr. Petrič that the Special Rapporteur elaborate on progressive development in the commentaries to the draft articles also warranted attention. He was in favour of referring all the draft articles to the Drafting Committee.

26. Mr. WISNUMURTI, commenting on the second part of the eighth report, said that the idea of an international organization having a right to self-defence had been controversial. He had entertained serious doubts about transposing the notion of self-defence from article 21 of the articles on responsibility of States for internationally wrongful acts to the draft articles on responsibility of international organizations,⁴¹ because an international organization could not be treated in the same way as a State Member of the United Nations. Moreover, if a United Nations peacekeeping force was attacked by an armed gang or rebel forces, its right to self-defence would emanate from the headquarters agreement concluded with the State in which the operation was deployed (which must be consistent with international law) and not from Article 51 of the Charter of the United Nations. He therefore supported the current version of draft article 20, since it represented a compromise solution reached after intense debate within the Commission.

⁴⁰ *Yearbook ... 2009*, vol. II (Part Two), pp. 21–22.

⁴¹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

27. In general, the Special Rapporteur had responded appropriately to the wide range of views and suggestions put forward with regard to draft article 24, concerning necessity as a ground precluding the wrongfulness of an act by an international organization. For example, in paragraph 71 of his report, he had accommodated the viewpoint expressed by Austria by offering to incorporate in the commentary a reference to practice that showed that international organizations considered the operational/military necessity principle to be a rule based first and foremost on customary law. Inclusion of that wording in the commentary would add clarity to the notion of necessity, even though, as the Special Rapporteur had noted, it pertained more to the primary rules governing the conduct of armed conflicts than to circumstances precluding wrongfulness.

28. With respect to draft article 30 (Reparation), it had been argued that the fact that international organizations did not generate their own financial resources might hamper their ability to make full reparation for an injury caused by an internationally wrongful act that they had committed. The Special Rapporteur had rightly countered that argument by emphasizing that, in practice, the principle of full reparation was often applied in a flexible manner. In that connection, there was merit in Mr. McRae's suggestion that the Commission should consider the inclusion of a reference, in the text of the draft article or in the commentary thereto, to the option of setting a limit to reparation in the headquarters agreement with the State in which the international organization was operating.

29. Several suggestions had been made for strengthening the provisions of draft article 39 by stressing member States' obligation to provide an international organization with sufficient financial means to make reparations. Since the existing text had been regarded as unclear, it was heartening to note that in order to build up that provision, the Special Rapporteur had returned to wording suggested by Mr. Valencia-Ospina, currently contained in paragraph (4) of the commentary, to the effect that it was the duty of the responsible international organization to take all appropriate measures in accordance with its rules to ensure that its members provided it with the means for effectively fulfilling its obligations. Inserting that wording in draft article 39, as suggested by the Special Rapporteur in paragraph 84 of his report, would reinforce the provisions aimed at ensuring the effective implementation of organizations' obligations regarding reparation.

30. States had generally approved of draft article 60, which dealt with the responsibility of a member State seeking to avoid compliance with one of its international obligations. Furthermore, paragraph 107 of the report made it plain that a State would not incur responsibility for conduct that was in accordance with the rules of the organization. He agreed with the Special Rapporteur's suggestion that, in order to avoid any overlap between draft article 60 and draft articles 57 to 59, the phrase "subject to articles 57 to 59" should be inserted at the beginning of draft article 60.

31. Draft article 65, concerning the individual responsibility under international law of any person acting on behalf of an international organization or State, was important. He agreed with the suggestion that it was

necessary to clarify in the commentary that the individual responsibility in question encompassed both criminal and civil responsibility.

32. He was in favour of retaining draft article 66 as a saving clause and therefore welcomed the Special Rapporteur's intention to allay the fears of the Secretariat of the United Nations mentioned in paragraph 121 of the report by making it clear that paragraph (3) of the commentary did not purport to exclude the United Nations from the scope of application of the draft article.

33. He was in favour of referring the draft articles to the Drafting Committee.

34. Mr. GAJA (Special Rapporteur) said that the Commission's views on some of the draft articles had been divided, as they had been at first reading. Mr. Fomba, Mr. McRae, Mr. Nolte, Mr. Petrič and Sir Michael had been in favour of retaining the provisions on self-defence, while Mr. Pellet, Mr. Perera and Mr. Wisnumurti had advised against it. As Mr. Perera had observed, the Secretariat had defended draft article 20 for the wrong reason, but it had been clearly in favour of keeping that provision. One possible option that the Drafting Committee might consider would be to turn draft article 20 into a "without prejudice" clause.

35. On the subject of countermeasures, which one speaker had described as "a necessary evil", he observed that Mr. Candioti, Mr. Dugard, Mr. Melescanu, Mr. Nolte and Mr. Pellet had defended the retention of draft articles 21 and 50 to 56. Mr. Perera and Mr. McRae had been more sceptical and Sir Michael had proposed their deletion or, alternatively, the introduction of a "without prejudice" clause with regard to the "question of countermeasures taken by an international organization in response to a breach by a member of the organization of a rule of international law that is binding on the member because of its membership". The substance of that proposal, which had received some support, was not far from that of the current text of draft article 21, paragraph 2 (a), which stated that countermeasures against members must not be "inconsistent with the rules of the organization". Under the current text, the admissibility of countermeasures in the relationship between an organization and its members was essentially decided by the rules of the organization. Unlike Sir Michael's proposal, that paragraph did not distinguish between countermeasures taken by an international organization against its members according to whether they related to a breach of an obligation under a rule binding the member because of membership; the paragraph reflected the view that the rules of the organization might or might not make such a distinction. The point had been made that, in the relationship between the European Union and its members and between the United Nations and its Member States, the possibility of adopting countermeasures might differ according to the breach giving rise to the countermeasure. If a "without prejudice" clause was introduced, or if paragraph 2 was recast to give more weight to the rules of the organization, it might be preferable to cover all countermeasures taken by an organization against its members. If an organization's rules did restrict countermeasures in situations in which the breach concerned a rule that was binding because of membership, the case would be covered by paragraph 1.

36. He suggested that Sir Michael's proposal regarding a "without prejudice" clause and Mr. Pellet's proposal to limit countermeasures by an international organization to those adopted "within the framework of its functions" should be considered by the Drafting Committee. Presumably, the latter proposal was intended to convey the idea that an international organization might not exceed its functions when taking countermeasures.

37. Sir Michael's critical position on the draft article on necessity, which did not appear to be shared by any other States or speakers, was that if the article was retained, international organizations would be placed in a position similar to that of States. The Commission's intention was in fact to restrict the possibilities open to international organizations of pleading necessity. He also disagreed with Sir Michael's view that the requirement that the act in question should be the only means whereby an international organization could safeguard an essential interest against a grave and imminent peril constituted a very strict test. While Mr. Perera had expressed some doubts about the current text of draft article 24 and would like to see it fleshed out, he had also been in favour of restricting the ability of international organizations to rely on necessity.

38. The second set of rules addressed in the debate concerned reparation. The principle of full reparation had been defended by Mr. Melescanu, Mr. Nolte and Mr. Pellet. In that context, some speakers had wondered whether General Assembly resolution 52/247 of 26 June 1998, which concerned claims against the United Nations arising from peacekeeping operations, also covered claims under international law. That question could be left open in the commentary. Mr. McRae and Mr. Wisnumurti had referred to the impact of bilateral agreements. He had difficulty, however, in understanding how the impact of such agreements should affect the wording of draft article 30, since it was clear that States and international organizations could modify the rules laid down in the draft articles. Perhaps a general statement should be made to that effect in the commentary. The Commission's intention was not to lay down peremptory rules that a State or international organization could not modify.

39. The proposal that he had made in paragraph 84 of his eighth report regarding a revision of draft article 39 had met with general, albeit not unanimous, approval. Mr. Candioti, Mr. Dugard, Mr. McRae, Mr. Melescanu, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina and Mr. Wisnumurti agreed to add a new paragraph to that draft article, which would read:

"The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter."

Sir Michael wished the word "shall" to be replaced with "should", while Mr. Pellet would prefer to see members' obligation strengthened, although he had not suggested any wording. The overall impression he had gathered from the debate was that the proposed text of the draft article was acceptable, subject to some fine-tuning by the Drafting Committee, which could also consider

Mr. McRae's proposal to invert the order of the two paragraphs. In addition, Mr. McRae had stressed the element of speciality and drawn a distinction between international organizations based on the size of their membership. He wondered whether that point was relevant to draft article 39, or whether it might be better dealt with in the commentary to draft article 61.

40. As far as draft article 44 (Admissibility of claims) was concerned, he had been pleased to hear the former Special Rapporteur on diplomatic protection, Mr. Dugard, suggest that functional protection, which was essentially protection extended by an international organization to one of its agents against a State, should be studied by the Commission as a separate topic. It would not be an easy topic, since functional protection could also be provided by States.

41. Mr. Dugard would like draft article 44 to specify that the requirement of nationality did not apply to claims relating to human rights violations. That point was already set forth with regard to claims made by States other than injured States or by international organizations in draft article 48, paragraph 5, which referred only to draft article 44, paragraph 2, and not to draft article 44, paragraph 1. This constituted an improvement on the articles on State responsibility, which drew no such distinction. El Salvador had indicated that the Spanish text of draft article 44 was ambiguous in that regard and the Drafting Committee should therefore review the text from that standpoint.

42. Sir Michael Wood had suggested the deletion of draft article 60 (Responsibility of a member State seeking to avoid compliance) because it had no equivalent in the articles on State responsibility, despite the fact that the same situation might arise in relations between one State and another. While it was true that a similar situation might occur in relations between States, it was far from being the same, since in the case contemplated in draft article 60 a State might take advantage of the separate legal personality of the international organization of which it was a member. In that capacity it could directly influence the organization, while the organization was unlikely to be under the same obligations as the member State.

43. Although the wording of draft article 60 had been well received by States, it could no doubt be improved. In paragraph 106 of his eighth report he had listed various proposals from States that should be examined by the Drafting Committee. The Committee should likewise study Sir Michael's proposal to replace the word "prompting" with "causing" in paragraph 1 of the draft article.

44. He appreciated Mr. Wisnumurti's support for retaining draft articles 65 and 66 and developing the commentary. In general, Commission members seemed to be in favour of enriching the commentaries. He would therefore welcome any suggested additions, especially texts that would show how certain principles established in the articles on State responsibility were also applicable to international organizations.

45. By way of conclusion, he proposed that all draft articles that had not yet been sent to the Drafting Committee should be referred to it.

Mr. Kamto resumed the Chair.

46. The CHAIRPERSON said he took it that the members of the Commission wished to refer draft articles 19 to 66 to the Drafting Committee.

It was so decided.

The meeting rose at 11.05 a.m.

3086th MEETING

Tuesday, 10 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction⁴² (A/CN.4/638, sect. F, A/CN.4/646⁴³)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR⁴⁴

1. The CHAIRPERSON invited Mr. Kolodkin (Special Rapporteur) to present his second report.

2. Mr. KOLODKIN (Special Rapporteur), presenting his second report on the immunity of State officials from foreign criminal jurisdiction, said that the report, which should have been considered at the previous session, but which had not been examined because its presentation had been delayed, concerned a fundamental aspect of the topic, that of the scope of that immunity. Three reports, the preliminary report,⁴⁵ the second report and a third report (A/CN.4/646) dealing with the procedural aspects of immunity, which would be presented during the second part of the current session, covered almost all the issues that needed to be studied at the preliminary stage of work on the topic.

3. As almost three years had elapsed since the preliminary report had been examined in 2008, the second report outlined

⁴² At its fifty-ninth session (2007), the Commission decided to include the topic in its programme of work and named Mr. Roman Kolodkin Special Rapporteur (*Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376). At its sixtieth session (2008), it discussed the preliminary report of the Special Rapporteur (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601) and also examined a memorandum by the Secretariat (A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session)). The Commission could not discuss the topic at its sixty-first or sixty-second sessions, in 2009 and 2010, respectively (*Yearbook ... 2010*, vol. II (Part Two), chap. IX).

⁴³ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

⁴⁴ Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

⁴⁵ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

the history of the consideration of the topic and summarized the contents of the first and second parts of the preliminary report. A summary of the second report was to be found in its last paragraph. In order to put Commission members completely in the picture, he had taken the liberty of having a summary of the third report distributed informally to them exclusively for their information. Members would thus have a comprehensive view of the key issues and of the Special Rapporteur's approach to them.

4. The second report drew extensively on the Secretariat memorandum.⁴⁶ In most cases, the citations of legal writings and court decisions contained in the memorandum were mentioned, but not reproduced *in extenso*. Since the second report had been drafted, some additional court decisions had been delivered and new strands of legal opinion of relevance to the topic had appeared. For example, the Supreme Court of the United States had delivered a decision in the *Samantar v. Yousuf et al.* case which was of interest not only in itself but also, and to a greater extent, on account of the position adopted by the Government of the United States on the case. A British court had recently issued a decision in the *Gorbachev* case. Unfortunately, the *Yearbook* of the Institute of International Law containing the preparatory work leading up to the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted by the Institute at its session in Naples in 2009,⁴⁷ had not been published before the second report had been written. Those documents and the resolution itself were of interest in the context of the questions examined in that report.

5. He would pick out only the most important points of his report. It analysed the scope of immunity *de lege lata*. His starting point had been the notion of immunity in positive international law, as reflected in the decisions delivered by the ICJ in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases.

6. The report was premised on the idea that the personal or functional immunity of State officials from foreign criminal jurisdiction was a rule of general international law requiring no proof, whereas it was necessary to prove that there were exceptions to that immunity.

7. The report also proceeded on the assumption that functional immunity was in essence State immunity. It covered all the official's acts performed in an official capacity. Those acts encompassed all illegal acts, however serious they might be, *ultra vires* acts and non-public acts. The category of acts performed by officials in their official capacity was broader than that of acts falling within official functions. As all those acts were official, they were attributed to both the official and the State. In his view, the attribution of conduct for the purposes of immunity was no different from the attribution of conduct

⁴⁶ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

⁴⁷ Institute of International Law, *Yearbook*, vol. 73 (2010), Session of Naples (2009), Parts I and II, Third Commission, "The fundamental rights of the person and the immunity from jurisdiction in international law", pp. 3 *et seq.*, and resolution on "The immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", p. 226 (available from www.idi-iiil.org, resolutions).

for the purposes of State responsibility. The functional immunity of a serving or former official protected that person only in respect of acts performed in an official capacity and therefore solely while he or she was in office. Hence, functional immunity was limited.

8. The personal immunity enjoyed by the “threesome”, and probably some other senior State officials, covered acts performed in both an official and a private capacity. It protected those persons solely while they were in office for acts carried out during and before that period. Immunity linked to a post ceased as soon as its holder left it and once that person became a former official, he or she enjoyed only functional immunity in respect of acts performed in his or her official capacity while still in office; thus personal immunity was absolute.

9. The report examined the question of which acts of a State exercising jurisdiction were precluded by immunity, in other words, which acts would constitute a violation of immunity. It was suggested that the criteria for defining all acts of that kind should be those identified in the judgments rendered in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases. In the latter judgment, the Court had found that “the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection to the latter to a constraining act of authority” (para. 170).

10. If the criterion formulated by the Court were to be adopted, immunity would obviously not preclude all criminal procedure measures against a foreign official—far from it—but only those that imposed a legal obligation on the person, in other words those that might be accompanied by penalties or measures of constraint in the event of non-fulfilment. For example, the commencement of a preliminary investigation or the institution of criminal proceedings not only in respect of the alleged fact of a crime, but also against a specific person, could not be regarded as a violation of immunity if they did not impose any obligation on that person under the applicable national law.

11. For that reason, a State which had grounds to believe that a foreign official had committed an act that was punishable under its criminal law could begin to gather evidence for the case (in other words, to collect witnesses’ testimony, documents and exhibits) by measures which were not binding or constraining on the foreign official. After that stage, it would be possible to judge with greater or lesser certainty whether (and to what extent) the person concerned had participated in the commission of the alleged crime and whether his or her acts should be deemed official, *inter alia*. If there was sufficient evidence to infer that the foreign official had participated in the crime, depending on the circumstances, it was up to the State exercising jurisdiction to choose other measures that did not violate that person’s immunity. For example, the State concerned could be notified of the circumstances of the case with the suggestion that it should waive the official’s immunity, a request for mutual judicial assistance with the case could be submitted or the evidence gathered during the preliminary investigation or initial criminal proceedings could be forwarded to that State with the proposal that it

should bring an action against the person in question. If the alleged crime fell within the jurisdiction of an international criminal tribunal, or the International Criminal Court, that approach would make it possible to hand over the body of evidence to the appropriate international criminal judicial body. Finally, after the evidence had been gathered, while refraining from any measures precluded by immunity, criminal action could be initiated against the State official once he or she left office (if persons enjoying personal immunity had committed the acts prior to their taking office, or in a private capacity while in office).

12. With regard to the territorial scope of immunity, the opinion expressed in the report was that immunity did not apply solely during an official’s stay abroad. In his opinion, criminal procedure measures imposing an obligation on a foreign official violated his or her immunity irrespective of whether he or she was in the territory of a particular State. The obligation not to take such a measure against a foreign official was breached as soon as the measure was adopted and not only when the person in question was abroad.

13. As for possible exceptions to immunity, the prevailing view was that the personal immunity of the “threesome” was absolute and was subject to no exceptions.

14. Any discussion of exceptions generally revolved around exceptions to immunity *ratione materiae*, but the more radically minded held that functional immunity was arguably non-existent if an official had committed crimes under international law, or international crimes.

15. The report examined a number of rationales for exceptions to immunity that had been put forward in legal writings or national courts’ decisions. They constituted attempts to base the waiving of immunity on references to *jus cogens* norms, universal criminal jurisdiction or the emergence of a rule of customary international law establishing an exception to immunity, for example.

16. Since he had completed the second report, it had unfortunately become clear that it did not cover all the rationales for exceptions. For example, the report did not examine the contention that the State exercising jurisdiction was entitled to refuse to recognize immunity as a countermeasure to a breach of international law committed by the official’s State of nationality. That rationale was discussed in an article by Andrea Gattini, which had been published in 2011 in the *Leiden Journal of International Law*.⁴⁸

17. In his opinion, none of the rationales for an exception to immunity, or for the absence of immunity, that had been discussed in the report was sufficiently convincing and none could be regarded as an established rule of international law.

18. In that connection, it should be noted that arguments in favour of an absence of immunity were frequently buttressed by references to a wide range of national court

⁴⁸ A. Gattini, “The dispute on jurisdictional immunities of the State before the ICJ: is the time ripe for a change of the law?”, *Leiden Journal of International Law*, vol. 24, No. 1 (March 2011), pp. 173–200.

judgments. A submission along those lines addressed to the European Court of Human Rights by a group of non-governmental organizations (NGOs)⁴⁹ in the cases *Jones v. the United Kingdom* and *Mitchell and Others v. the United Kingdom* was briefly mentioned in the report. On closer inspection, it was plain that not everything in those cases militated against immunity. Other examples could be quoted. The *Guatemalan Genocide* case heard by the Supreme Court of Spain in 2003, or the *Xuncax v. Gramajo* case heard by a district court in the United States in 1995, were sometimes cited in support of the principle that exceptions could be made to immunity. Ms. Escobar Hernández would correct him if he was wrong, but it seemed that, in the decision rendered by the Supreme Court of Spain, the question of jurisdiction had been studied in depth, whereas the subject of immunity had not been broached (perhaps one of the reasons was that the Government of Guatemala had not raised it). The decision in the *Gramajo* case bluntly stated that neither the past nor the current Governments of Guatemala had characterized the actions of their former official as officially authorized. Moreover, it had been found that the former Guatemalan official had no immunity, since the acts of which he was accused could not be regarded as having been committed within the scope of his official capacity.

19. Generally speaking, not all judicial decisions of that nature directly granted former officials immunity in respect of international crimes of which they were charged on the grounds that the acts in question had been performed by them in an official capacity. Yet there were some well-known examples of such decisions, such as the decisions taken by the German and French authorities in 2005 and 2008 (in Germany by the Federal Prosecutor's Office and in France by the Public Prosecutor's Office and the Ministry of Justice) when a request had been made to open criminal proceedings against American former officials, in particular the former Defense Secretary Donald Rumsfeld, and the decision of American district and appeal courts in the *Belhas et al. v. Ya'alon* case in 2008. One commentator, Jason Morgan Foster,⁵⁰ had stated that this decision was significant for several reasons. First, by granting immunity to a former head of military intelligence, *Belhas et al. v. Ya'alon* had provided further support for the increasingly accepted proposition that under customary international law, immunities *ratione materiae* covered activities performed by every State official in the exercise of his functions. Secondly, that decision had concluded (albeit on the basis of the text of a law entitled the Foreign Sovereign Immunities Act and not on the customary law of immunity of State officials) that a violation of a *jus cogens* norm did not necessarily remove immunity.⁵¹ Those well-known decisions supporting the argument that no exceptions could be made to immunity had inadvertently not been mentioned in the second report, which was why he was drawing attention to them at that point.

⁴⁹ “*Jones v. United Kingdom* (application number 34356/06), *Mitchell and Others v. United Kingdom* (application number 40528/06): Written comments by Redress, Amnesty International, Interights and Justice”, letters of 14 and 25 January 2010 (available from www.redress.org).

⁵⁰ J. Morgan Foster, “United States Court of Appeals for the District of Columbia: *Belhas v. Ya'Alon*: Introductory note”, ILM, vol. 47 (2008), pp. 141–143.

⁵¹ *Ibid.*, p. 142.

20. A separate examination was made in the report of a situation where criminal jurisdiction was exercised by the State in whose territory the alleged crime had been committed, when that State had not consented to the conduct in its territory of the activity which had led to the crime and had not agreed to the presence in its territory of the foreign official who had committed the alleged crime. In those circumstances there seemed to be sufficient grounds for postulating an absence of immunity.

21. On the other hand, in his opinion, criminal proceedings against members of the armed forces and their immunity in respect of crimes committed during an armed conflict in the territory of the State exercising jurisdiction was a special case that should not be examined within the framework of the topic.

22. Generally speaking, the question of exceptions to the rule of functional immunity after international crimes had been committed was certainly a crucial and highly controversial issue when considering the scope of immunity. In that connection, it was necessary to point out that the 2009 resolution of the Institute of International Law, which he had already mentioned, to whose drafting some of the members present in the room had contributed, contained a provision which read: “No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes”⁵² (Art. III, para. 1). If he was not mistaken, that provision had been proposed by Mr. Gaja.

23. On the other hand, the preparatory work contained in the Institute's *Yearbook* did not fully explain the bases on which that provision rested. In addition, the preamble to the resolution referred to *de lege lata* and *de lege ferenda* provisions of international law. That being so, the provisions forming the foundation of the provision which he had just mentioned were to be found in the sections of draft resolutions that concerned positive international law.

24. It was fairly widely held that while exceptions to immunity in the case of international crimes did not form part of positive international law, they had to be accepted in consequence of its progressive development. The report examined the question of the extent to which such development of international law was desirable. He was not entirely convinced that such development might be a sign of progress; one case in point being the status of relations between certain developed and developing countries, which had resulted from attempts to introduce universal jurisdiction and to restrict the immunity of foreign officials.

25. As a general rule, without the consent of their State of nationality, attempts to prosecute foreign officials for crimes committed in their country and not in the State exercising jurisdiction would lead nowhere, or would end in decisions delivered *in absentia*. Without the cooperation of the official's State of nationality, it was difficult to gain access to evidence of the alleged crime. That fact, together with the likelihood of a sentence passed *in absentia*, hardly made the spread of that kind of justice desirable. The possibility of initiating the criminal

⁵² Institute of International Law, *Yearbook*, vol. 73 (see footnote 47 above), p. 227.

prosecution of State officials in another State for acts performed in their official capacity could potentially lead to the spread of selective, politically motivated justice.

26. The Commission's primary task was to codify international law on the topic. The immunity of State officials from foreign criminal jurisdiction was a matter of international law. The Commission could contribute to the uniform application by various national courts of international legal standards relating to the officials' immunity. That would enable it to abandon attempts to devise what were sometimes rather dubious foundations for the immunity of State officials, or the absence thereof.

27. He hoped to present a third report (A/CN.4/646) on the subject for the Commission's consideration during the second part of the session and thus to complete the preliminary stage of work on the topic. That report would deal, broadly speaking, with procedural aspects such as the validity of immunity and the refusal of immunity. It would also examine the link between the validity or the refusal of immunity and the potential responsibility of the official's State of nationality. In that connection, he wished to provide the Commission with a summary of the third report, which might, of course, be subject to some small amendments.

28. The contents of the third report could be summarized in the following manner:

(a) The question of the immunity of a State official from foreign criminal jurisdiction should in principle be considered at the beginning of judicial proceedings, or even prior to that, at the pretrial phase, when the State exercising jurisdiction was contemplating criminal proceedings which were precluded by the immunity of the person concerned.

(b) Failure to examine the question of immunity *in limine litis* might be regarded as a violation by the State of its obligations under rules on immunity. That also applied to the pretrial phase, when criminal proceedings precluded by immunity were being envisaged.

(c) Reliance on immunity was permissible, in other words it was capable of producing legal effects, only if such immunity was claimed by the foreign State concerned and not by the official.

(d) In order for a foreign State to claim immunity on behalf of its official, it had to be aware that criminal proceedings had commenced, or could commence. Consequently, a State that was planning to initiate such measures against a foreign State official must inform the State concerned.

(e) When the foreign State official was a Head of State, a Head of Government or a Minister for Foreign Affairs, the State exercising criminal jurisdiction must raise the question of that person's immunity *proprio motu* and then determine the course of action to be taken. In that case, the only appropriate course of action would be to ask the foreign State to waive immunity, with the result that the foreign State would not bear the burden of invoking the immunity of its official before the authorities of the State exercising jurisdiction.

(f) When the official of a foreign State enjoyed functional immunity, it was incumbent upon the State concerned to invoke immunity. If that State was willing to protect its official from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction first, that the person concerned was its official and, secondly, that he or she enjoyed immunity because the acts ascribed to him or her had been performed in an official capacity. In the absence of such notification, the State exercising jurisdiction was not bound to raise or examine the question of immunity *proprio motu* and could therefore initiate criminal proceedings.

(g) When the official of the foreign State enjoyed personal immunity but was not one of the above-mentioned "threesome", it was incumbent upon the State of which he or she was an official to invoke immunity. If that State was willing to protect its official from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person was its official and that he or she enjoyed personal immunity, because he or she held a high-level position encompassing foreign relations and other functions essential to ensuring the sovereignty of that State.

(h) The foreign State, irrespective of the position held by its official, was not bound to notify the foreign court of immunity directly in order that it might examine that issue. That State could notify the State exercising jurisdiction by invoking the immunity of its official through diplomatic channels and that would be a sufficient basis for the court to examine the issue of immunity. The lack of any obligation on the part of the State directly to inform the foreign court flowed from the principle of sovereignty and the sovereign equality of States.

(i) The State which invoked the immunity of its officials was not bound to substantiate its claim, apart from conveying the information referred to in subparagraphs (f) and (g) above. While the State exercising jurisdiction (or the court in question) was not obliged blindly to accept any statement by the foreign State regarding the immunity of its official, it could not ignore such a statement, unless the circumstances of the case clearly disproved it. The qualification of the acts performed by the person concerned as official, or the assessment of the importance of the duties of a high-level official for ensuring the sovereignty of the State was the prerogative of the foreign State and not of the State exercising jurisdiction.

(j) The right to waive the immunity of the official lay with the foreign State of which he or she was the representative and not with the official.

(k) When the Head of State, Head of Government or Minister for Foreign Affairs waived the immunity of one of the other two high-level representatives of the State, the State exercising jurisdiction might consider that he or she was expressing the will of the foreign State concerned, unless it had received notification from the latter to the contrary.

(l) A waiver of the immunity of a Head of State, Head of Government or Minister for Foreign Affairs had to be express. The only possible exception that could be made

was when the State concerned asked a foreign State to initiate criminal proceedings against that official. Any request of that kind was fully equivalent to and implied a waiver of immunity, which had the same implications as the measures requested.

(m) The waiver of the immunity of a State official who was not one of the “threesome”, but who enjoyed personal immunity, or of a State official who enjoyed functional immunity, or of former State officials who enjoyed functional immunity, could be express or implied. When it was implied, it could take the form of the non-invocation of immunity by the State of which the person concerned was an official.

(n) When immunity had been expressly waived, it could no longer be invoked legitimately. In some cases, the express waiving of immunity could apply only to certain specific measures.

(o) When the implicit waiving of immunity took the form of the non-invocation of the functional immunity of a State official, or of the personal immunity of a State official who was not one of the “threesome”, it seemed that immunity could still be invoked at a later stage of criminal proceedings (especially when the case was referred to a court). It was, however, doubtful that a State that had not invoked immunity before a court of first instance could do so at the appeal stage. In any event, procedural measures taken against the official by the State exercising jurisdiction before that person’s immunity had been invoked should not be deemed unlawful.

(p) A State’s waiver of its official’s immunity cleared the way for foreign criminal jurisdiction to be exercised against that person. That was also true of acts performed by that person in an official capacity.

(q) Even if a foreign State had waived its official’s immunity, it was not relieved of its international responsibility for acts performed by that person in an official capacity.

(r) The State which invoked the immunity of its official on the grounds that the acts ascribed to him or her were official thereby recognized that the acts in question were its own acts. It thus established the basis for any actor who was entitled to do so to invoke its international responsibility.

29. Mr. DUGARD said that, although the Special Rapporteur had presented a wealth of evidence of State practice in his second report, he had omitted any reference to the decision delivered in 2009 by the United States Court of Appeals for the Second Circuit in the case concerning *Matar and Others v. Dichter*. He personally would have done the same if he had held the same brief. Mr. Dichter, a former head of the Israeli Security Agency, had been responsible for bombing a residential district in Gaza. The target had been hit, but 14 innocent people had been killed and more than 50 had been injured. The court of appeal had held that the bombing had been committed “in the course of [Mr. Dichter’s] official duties”, which were not covered by the American Foreign Sovereign Immunities Act, but

which were covered by the common law of the United States. Thus a former foreign official, who had not even been a minister, had been granted immunity.

30. He was mentioning that case at the outset because he wanted to inject some facts into the Commission’s debate. The Special Rapporteur had examined the law, but he had failed to examine the facts of the cases involved, which had not been concerned with traffic accidents or petty theft, but mostly with crimes of the utmost gravity, such as torture, genocide, war crimes, crimes against humanity and other crimes committed by the worthy successors of Hitler, Eichmann, Idi Amin Dada or Pol Pot. That was therefore the first criticism which he wished to level at the Special Rapporteur. First, it was clear that the serious, gruesome crimes in question had been mainly directed at innocent civilians and had been committed by State officials in violation of *jus cogens* norms. Secondly, when faced with those situations, the territorial State had refused to prosecute the officials involved, because it had supported their acts. In paragraph 76 of his second report, the Special Rapporteur wrote that attempts to exercise universal criminal jurisdiction were, in the absolute majority of cases, undertaken in developed countries with respect to serving or former officials of developing States. That was nonsense, because it was well known that most of the current cases of that kind were being brought against Israeli officials who had committed crimes in Gaza in 2008 and 2009 which Israel, backed by the United States, refused to prosecute. There was no reason why torturers from the developing world, the likes of Al-Qadhafi and Mugabe, should be given immunity simply because they came from a developing country. He resented such a very patronizing attitude. Thirdly, the International Criminal Court was not an option in those circumstances, because the rogue States were not parties to the Rome Statute of the International Criminal Court. Nor was it possible to count on a referral of those situations to the Court by the United Nations Security Council because, in the case of the crimes committed in Gaza, for example, Israeli officials were protected by the veto of the United States.

31. The crucial question was therefore whether accountability or impunity should prevail and what role the Commission should play. As the American judge Felix Frankfurter had written, law-making was “not an exercise in logic or dialectic”,⁵³ but an exercise in choice.⁵⁴ The Commission therefore had to choose between accountability and impunity. In either case, it would be engaging in progressive development, for it could not hide behind the fig leaf of codification as an excuse for retaining the old law which had existed before the International Criminal Court, before the human rights movement and before current demands for accountability.

32. The Commission was not examining that difficult subject for the first time. In 1950, it had rejected immunity when it had formulated the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal

⁵³ F. Frankfurter, “Some reflections on the reading of statutes”, *Columbia Law Review*, vol. 47, No. 4 (May 1947), pp. 527–546, at p. 529.

⁵⁴ *Ibid.*, p. 532.

and in the Judgment of the Tribunal⁵⁵ (Nuremberg Principles). It had done so again in 1954 in its draft code of offences against the peace and security of mankind⁵⁶ and in article 7 of the 1996 draft code of crimes against the peace and security of mankind.⁵⁷ Lastly, in 1999, its Working Group on jurisdictional immunities of States and their property had emphasized that developments relating to immunity as a result of the *Pinochet* case should not be ignored.⁵⁸ He was therefore somewhat dismayed that the Special Rapporteur was proposing to wipe out history and to depart from the position consistently adopted by the Commission.

33. As Judges Higgins, Kooijmans and Buergenthal had written in paragraph 75 of their joint separate opinion in the *Arrest Warrant* case,

On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.

34. He did not wish to become embroiled in a debate on whether the refusal to grant immunity for serious crimes was the rule or the exception. A clear distinction had to be drawn between two arguments; the first was that immunity extended to Ministers for Foreign Affairs and other State officials, the second was that there was no immunity for Heads of State or Heads of Government in cases of serious international crimes. In the former case, the crucial question was whether there was a new rule because, before the *Arrest Warrant* case, it had generally been accepted that Ministers for Foreign Affairs and other ministers were not entitled to immunity. He was not convinced that the decision of the ICJ in that case had been correct. The Court had provided absolutely no evidence of State practice in support of its view that Ministers for Foreign Affairs should be afforded immunity. Furthermore, at its session in Vancouver in 2001, the Institute of International Law had stated that no such immunity should be granted.⁵⁹ In 1991, the Commission had reached the same conclusion in its work on the jurisdictional immunities of States⁶⁰ and, as the Special Rapporteur acknowledged in his second report, many legal writers had been very critical of that particular judgment. Judge Van den Wyngaert had also expressed a strongly dissenting opinion on that case.⁶¹ At that point, it was necessary to mention that the ICJ did

not include many international criminal law specialists, which meant that there was all the more reason to listen to those who were.

35. The real question, however, was whether State officials were immune from foreign criminal jurisdiction in national courts or, in other words, whether there was an exception to the rule of immunity in cases involving grave crimes where *jus cogens* norms had been violated.

36. There were two possible narratives, each supported by sources. The first, in favour of immunity, was proposed by the Special Rapporteur. First, it postulated that immunity was absolute except where there was a clear exception, as in the case of *acta gestionis* (commercial acts); secondly, that immunity applied to Heads of State, Heads of Government, Ministers for Foreign Affairs and, possibly, other officials; thirdly, that immunity embraced immunity *ratione materiae*, or functional immunity and immunity *ratione personae*, or personal immunity; fourthly, as the Special Rapporteur had stressed, that immunity from jurisdiction did not mean impunity for crimes committed, since immunity from criminal jurisdiction and individual responsibility were two different concepts, the first being procedural in nature, whereas the second was a question of substantive law. Jurisdictional immunity might bar prosecution, but did not exonerate the person from criminal responsibility, at least in theory, for in practice everyone knew that this person would never be prosecuted, because he would never be tried before a national court and could not be tried before an international criminal court; and fifthly, that none of the exceptions to immunity was valid, in other words, immunity applied to acts that were so heinous that they could not be regarded as official acts, to acts which constituted violations of *jus cogens* norms and to acts which were subject to universal jurisdiction.

37. The other narrative against immunity postulated that, first, immunity was not absolute, as was shown by the development of international law in respect of commercial acts. Immunity was continually evolving in accordance with the values of the international community as a whole. Secondly, that while it did apply in the case of serious international crimes, it certainly did not apply to Ministers for Foreign Affairs. Thirdly, that advocates of accountability generally accepted that immunity *ratione personae* continued to apply to Heads of State and Heads of Government while they were in office, because State practice and judicial decisions were very clear on the subject. However, as the Special Rapporteur clearly pointed out in paragraphs 67 and 77 of his second report, where he rightly relied on the literature and certain judicial decisions, that position was illogical, because if *jus cogens* trumped immunity, it must trump both functional and personal immunity. He agreed with that view, even if the proponents of accountability were generally opposed to it. Fourthly, the narrative postulated that the argument that immunity was procedural and therefore did not remove criminal responsibility was without substance. The consequence of immunity, whether it was termed procedural or anything else, was that it removed criminal responsibility, because in practice there was no national or international forum to try such a person, who would go free. Of course, that theory, which was endorsed

⁵⁵ *Yearbook ... 1950*, vol. II, p. 374.

⁵⁶ *Yearbook ... 1954*, vol. II, pp. 151–152.

⁵⁷ *Yearbook ... 1996*, vol. II (Part Two), pp. 26–27.

⁵⁸ *Yearbook ... 1999*, vol. II (Part Two), annex, p. 172 (paragraphs 11–13 of the appendix).

⁵⁹ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 743.

⁶⁰ *Yearbook ... 1991*, vol. II (Part Two), p. 22 (paragraph (7) of the commentary to draft article 3).

⁶¹ *I.C.J. Reports 2002*, pp. 142–151.

by the Special Rapporteur, was supported by the ICJ, but there was very little reasoning behind that opinion which contradicted the 1996 draft code of crimes against the peace and security of mankind. In the commentary thereto, the Commission had stated that

The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position in order to avoid responsibility for a crime, only to permit him to invoke this same consideration to avoid the consequences of this responsibility.⁶²

In that case, there was a very clear difference of opinion between the ICJ and the Commission. Fifthly, logic, practice, judicial decisions and literature supported the view that there was an exception to immunity in the case of serious international crimes. The Special Rapporteur was therefore wrong in suggesting in paragraph 80 of his second report that proponents of exceptions raised several arguments to support that view because each of them was so weak, for in reality those arguments were all closely related. Essentially, there were two arguments in favour of exceptions. The first was that serious crimes fell outside the functions of the State—it was not the function of the State or of its officials to commit torture or genocide. While that argument did have some support in judicial opinions, he did not find it very persuasive because, as Lord Steyn had observed in the *Pinochet* case, “when Hitler ordered the ‘final solution’ his act must be regarded as an official act deriving from the exercise of his functions as head of state”.⁶³ The main argument in favour of exceptions to immunity rested on the principle that *jus cogens* norms were hierarchically superior to immunity and trumped it. The Special Rapporteur listed other arguments all of which were offshoots of the *jus cogens* argument. For example, he contended that crimes which were subject to universal jurisdiction were not subject to immunity, or that crimes which were subject to the principle of *aut dedere aut judicare* were not subject to immunity, or that grave crimes were not subject to immunity. But essentially all those arguments confirmed that there was tension between immunity and *jus cogens* norms and that the latter must prevail.

38. The question that had to be addressed was whether the sources supported the existence of those exceptions. No one could say that those sources were absolutely clear on the subject. Some treaties rejected immunity. That was true of the treaties setting up the *ad hoc* tribunals and the International Criminal Court, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. There was no logical reason why the principle asserted in those international treaties—some of which applied to international tribunals and

others to all tribunals—should not extend to national jurisdictions. As far as he knew, no treaty provided for immunity in respect of international crimes. None of the anti-terrorism or anti-corruption conventions referred to immunity and it could certainly not be inferred from their silence that there should be immunity. The picture was not clear with regard to legislation. Some States, including Burkina Faso, Congo, Niger, Panama, the Philippines, South Africa, Uruguay and, probably, New Zealand, expressly excluded immunity before national courts, whereas others, such as the Netherlands, not surprisingly, were in favour of immunity. In paragraph 74 of his second report, the Special Rapporteur had referred to the case of Belgium, which had amended its universal jurisdiction statute in 2003, and he suggested that it had taken that decision in the wake of the judgment in the *Arrest Warrant* case, but everyone knew that Belgium had not deferred to principle and that it had changed its legislation because the United States had resorted to blackmail by threatening to move NATO headquarters from Belgium if it did not do so. As for case law, in paragraphs 69 and 70 of his second report, the Special Rapporteur listed many cases in which immunity was neither pleaded nor considered. While it was unclear exactly what inference could be drawn from the decisions in those cases, it was certainly not that immunity had to be recognized. There were also cases where the judges had been divided: in *Pinochet No. 3*, the majority of judges had been opposed to immunity, whereas in the *Arrest Warrant* case the majority had been in favour of immunity and a strong minority had been against it. That had been one of the bad decisions of the ICJ, which was to human rights and accountability what the 1966 advisory opinion on the *South West Africa* case had been to non-discrimination. In *Al-Adsani v. the United Kingdom*, which had been heard by the European Court of Human Rights, of the 17 judges, 8, 1 of whom had been Mr. Caffisch, had held in dissenting opinions that *jus cogens* trumped immunity. The decision delivered in the *Ferrini v. the Federal Republic of Germany* case by the Supreme Court of Italy was currently being contested by Germany at the ICJ and, in the United Kingdom, in the case *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya*, the Court of Appeal had issued a different ruling from that of the House of Lords.

39. There had been a tendency to dismiss civil society, although it had substantially influenced developments by promoting the adoption of the Rome Statute of the International Criminal Court and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. For that reason, NGOs and their positions with regard to the development of the law could not be ignored. Very cautious NGOs, such as the International Law Association or the Institute of International Law which had debated the subject at its session in Naples for more than a week, and more radical NGOs, such as Amnesty International or Human Rights Watch, were all opposed to the principle of immunity. The Special Rapporteur had been very dismissive of universal jurisdiction, but it had to be appreciated that, although universal jurisdiction, or the threat thereof, which was called “lawfare” in the United States, did not necessarily bring persons before a court, it was a very effective means of publicizing

⁶² *Yearbook ... 1996*, vol. II (Part Two), p. 27 (paragraph (6) of the commentary to article 7).

⁶³ *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Nos. 1, 2 and 3)*, England, House of Lords, 25 November 1998, and 15 January and 24 March 1999, ILR, vol. 119 (2002), p. 104.

atrocities and preventing criminals from travelling. That was what had led to restraints being placed on the travel plans of Tzipi Livni.⁶⁴

40. The authorities themselves were divided. The Special Rapporteur was wrong to conclude in paragraph 78 of his second report that there were no satisfactory arguments in favour of exceptions to immunity, that they were insufficiently convincing and that they were undesirable. The truth was that, as the Special Rapporteur admitted in paragraph 90 of his second report, “[t]he practice of States is also far from being uniform in this respect”. The Commission therefore had a choice. It could endorse immunity and therefore impunity in accordance with the expectations of rogue States, dictators and torturers, or it could choose accountability in accordance with the values of the international community and its own history. At the risk of being unpopular, he wished to point out that two opposing cultures met head on in the approach to immunity: the culture of State officials, in other words the culture of seeing legal issues through the spectacles of State interest, and the culture of practising and academic lawyers and of NGOs, who were not blinded by the interests of States. In what was perhaps a Freudian slip, the Special Rapporteur complained in paragraph 80 of his report that “[t]he question of exceptions to immunity *ratione materiae* in cases of grave crimes under international law continues to be raised by lawyers and non-governmental organizations”. He hoped that he was wrong, but it did seem that the Special Rapporteur was placing himself in the camp of State officials rather than in that of lawyers, whereas the members of the Commission were first and foremost lawyers and not State officials. The American school of legal realism had argued that, when exercising their choice in law-making, judges should be aware of their inarticulate premises. That was a very important point. He personally was openly in favour of accountability and against immunity. In other words, since the law was uncertain, the Commission could be faithful to its history and incline towards accountability, or it could favour State interests.

41. The Special Rapporteur had suggested that the Commission might consider drafting an optional protocol precluding immunity. But everyone knew what would happen to that protocol. It would not be signed by any State and, like the Rome Statute of the International Criminal Court, it would certainly not be signed by any of the rogue States. That was not therefore a serious option. The Commission had to make a choice. It was to be hoped that the Commission would decide substantially to limit immunity when State officials had committed international crimes against *jus cogens*. Obviously, that decision would not be taken at the current session and neither he nor Mr. Kolodkin would be present at the following session. The Commission would therefore have to show wisdom in appointing a new Special Rapporteur.

⁶⁴ In December 2009, the magistrates court of Westminster (United Kingdom) issued an arrest warrant against Tzipi Livni, head of the Israeli opposition, accused of war crimes in Gaza. At the time of the alleged war crimes, Tzipi Livni was the Minister for Foreign Affairs of Israel. The warrant was quickly withdrawn, according to the media, after it was established that she was not in the territory of the United Kingdom (Ian Black, “Tzipi Livni arrest warrant prompts Israeli government travel ‘ban’”, *The Guardian*, 15 December 2009).

It would be wrong to appoint an activist—which was unlikely, since Ms. Paula Escarameia had been the only activist on the Commission—but it would be equally wrong to give the topic to a State official.

42. The Special Rapporteur had referred to the presentation of his next report, but the presentation of the next report presupposed the Commission’s acceptance of the report currently under examination. The Special Rapporteur had not submitted any draft articles. He therefore wished to know if the members were required to express a preference for or against the principles expounded by the Special Rapporteur. Of course, it was for the Chairperson to decide, but he personally failed to see how the Commission could move on to the following report without having accepted the current report. Speaking for himself and, he hoped, some of his colleagues, he could not accept the current report.

43. Sir Michael WOOD said that members of the Commission obviously did not sit on the latter as serving or former State officials, or as representatives of NGOs. It would be unwise to adopt an emotive approach to the topic and it would not be helpful to focus on the example of Gaza. In addition, the Commission was not a lawmaker; its role was to propose texts. Others would take them up and decide whether to turn them into law. As for its past practice, apart from the fact that its choices in the past did not necessarily bind it, on most if not all of the occasions when it had dealt with international crimes it was looking at the international jurisdiction of courts, with the result that those examples were irrelevant.

44. Mr. DUGARD accepted that his approach had been “emotive” and said that he had intended it to be emotive, because it was an emotional topic. Everyone was the captive of his own history and his was unfortunate, since he had grown up in South Africa at the time of apartheid. If a lawyer criticized the regime, his fellow lawyers called him emotive and urged him to get down to the law. That was where the problem lay in the topic under examination. It was an emotive issue, because the key question with regard to the very serious crimes in question, which had been committed by very nasty people, was whether the latter should be allowed to escape prosecution simply because they were State officials. As far as the Commission’s history was concerned, in 1950 and 1954, in the days of hope, there had been an expectation that an international criminal court would be established. But in 1996, when the Commission had adopted its draft code of crimes against the peace and security of mankind, there had been no such expectation and, at that stage, the Commission had quite clearly been talking about national and international jurisdictions.

45. Mr. MELESCANU congratulated the Special Rapporteur on his second report. It was well drafted and clear and it offered a detailed analysis of legal theory, State practice and the decisions of national and international judicial bodies on the subject. The topic was far from easy or purely technical, for it plainly had a political and emotional impact, as well as implications for current international relations, as was evidenced by the large number of cases which had been referred to national courts and international judicial bodies.

46. Against that background, the Commission first had to determine what approach to adopt and, above all, to commence work as soon as possible on drawing up draft articles. In that respect, the second report was extremely useful, especially paragraph 94, which summarized some arguments which, if they were accepted by the majority of the Commission's members, would form the cornerstone of the drafting process.

47. The first argument was that, “[o]n the whole, the immunity of a State official, like that of the State itself, from foreign jurisdiction is the general rule, and its absence in a particular case is the exception to this rule” (para. 94 (a)). Furthermore, the Special Rapporteur emphasized that the “immunity of officials from foreign criminal jurisdiction is a rule of international law ... [which] is an obstacle to criminal liability but does not in principle preclude it” (para. 17). He then added that “[d]espite the existence in the doctrine of a different point of view, it is fairly widely recognized that immunity from foreign jurisdiction is the norm, i.e. the general rule, the normal state of affairs, and its absence in particular cases is the exception to this rule” (para. 18). The Special Rapporteur also explained that the rationale for the immunity comprised “some ... principles of international law concerning sovereign equality of States and non-interference in internal affairs [as well as the] need to ensure the stability of international relations and the independent performance of States’ activities” (para. 17).

48. Immunity plainly played an important role when it came to stabilizing international relations and exercising State prerogatives. It was a recognized principle that had been clearly codified in diplomatic law. The fact that the principle of the immunity of diplomatic and consular officials and special missions had been accepted in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on special missions proved that that was a customary rule of public international law that had been very clearly codified in diplomatic law. That rule of diplomatic law should not, however, be turned into a general rule applying to all State officials. That was the first fallacy in the report. The Special Rapporteur used specific rules on the immunity of diplomatic and consular officials, specifically belonging to diplomatic law, to lay down a general rule of public international law on the responsibility of State officials.

49. The contents of the principle of non-intervention in the internal affairs of other States had undergone some very interesting developments in recent years, to the extent that the point had been reached of there being talk of a right, or even a duty, to intervene. In addition, after the establishment of the Nuremberg Tribunal, the International Military Tribunal for the Far East and the International Criminal Court, a theory had grown up that there were international crimes, such as genocide, crimes against humanity, war crimes and aggression, which were matters for international justice.

50. With reference to the argument set out in paragraph 94 (a) of the report, it would be clearer to speak not of a customary rule on the immunity of State officials, but of a principle whose contents the Commission would endeavour to define. That approach would also have

the advantage of allowing the Commission to examine the “exceptions to immunity” mentioned by the Special Rapporteur in subparagraphs (n) and (o) of the same paragraph, with which Mr. Melescanu did not agree. The idea that there was a customary rule on immunity and that exceptions to that rule did not exist, or had to be proved before a court, seemed to be going too far and was highly debatable. It was impossible to accept that the principle of immunity *ratione materiae* and *ratione temporis* could not be limited in certain cases involving the most serious international crimes, crimes against the *jus cogens* norms of public international law, acts performed in a private capacity or certain other acts. The idea that Heads of State, Prime Ministers or Ministers for Foreign Affairs enjoyed absolute immunity for acts committed before, during and after their term of office seemed to be taking matters too far and could not be justified by the need to preserve harmonious inter-State relations.

51. The argument set out in paragraph 94 (j) that “[i]mmunity *ratione personae* is affected neither by the fact that acts in connection with which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his [or her] stay abroad, including in the territory of the State exercising jurisdiction”, was also extremely debatable, because it did not rest on either codified or customary provisions. In such cases, it was possible to speak of rules of protocol or of international courtesy, but not of legal rules. In addition, when extremely serious criminal offences had been committed, such acts should not be regarded as falling within the functions of a Head of State, as had been made clear in the decision of the Court of Appeal of Amsterdam in the *Bouterse* case and as had been found by Lord Steyn and Lord Nicholls in the *Pinochet No. 1* case and by Lord Hutton and Lord Phillips in the *Pinochet No. 3* case.

52. The second main fallacy in the report, with which he absolutely disagreed, consisted in the recommendation which was to be found in paragraph 94 (c) and (d) of the second report that the rules on State responsibility for internationally wrongful acts should be applied to the immunity of State officials. The provisions concerning the attribution of conduct of State officials for the purposes of responsibility were necessarily very wide-ranging and encompassed *ultra vires* acts so that State responsibility might be invoked, since the responsibility in question was for wrongful acts and not responsibility arising out of personal fault. Without such provisions, the institution of State responsibility would be weakened or rendered inoperative, since the wrongful acts were not perpetrated by the State itself, which was an abstract entity, but by State officials. Adopting the same approach for the immunity of State officials was questionable because it would not be based on international practice and the responsibility of State officials might be greatly restricted. It was important not to conflate two separate questions: on the one hand, the attribution of officials’ conduct for the purpose of invoking State responsibility for internationally wrongful acts and, on the other, the immunity of State officials. The arguments put forward in paragraphs 25, 26 and 27 of the report, which tended to attribute the acts of State officials to the State itself, rested on examples which could not be applied to immunity.

53. Paragraph 94 (*k*) and (*l*) were also problematical on account of their categorical wording. A statement such as “[a]ll serving officials enjoy immunity in respect of acts performed in an official capacity” (subpara. (*k*)), could be formulated only after debate within the Commission and could not serve as a premise for its debates. On the other hand, he endorsed the arguments set out in subparagraphs (*m*) and (*p*) which seemed to be sensible and based on practice in diplomatic and consular law. They might provide a basis for work in respect of codification and progressive development.

54. Lastly, he drew attention to the link between immunity and the *aut dedere aut judicare* clause. He shared the misgivings of the Special Rapporteur on the obligation to extradite or prosecute. In his preliminary report in 2006, Mr. Galicki had included immunities among the “numerous obstacles to the effectiveness of prosecution” for crimes under international law.⁶⁵ Although the Special Rapporteur on the immunity of State officials said that he did not have “at his disposal evidence of any widespread practice of States, including judicial practice, or their *opinio juris*, which would confirm the existence of exceptions to the immunity of foreign officials where the exercise of national criminal jurisdiction over them on the basis of the *aut dedere aut judicare* rule is concerned” (para. 79 of the second report), he personally considered that Mr. Galicki’s concern was still valid. In its work on both subjects, the Commission might contemplate the introduction in draft articles on immunity of a “without prejudice” clause covering rules on the application of the *aut dedere aut judicare* rule.

55. In conclusion, he agreed with Mr. Dugard that it was unwise to think about the examination of a third report when the Commission had not yet reached any conclusions about the second report which was currently under consideration.

The meeting rose at 11.45 a.m.

3087th MEETING

Thursday, 12 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)⁶⁶

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the second report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/631).

2. Ms. JACOBSSON said that before expressing her views on the Special Rapporteur’s second report, she wished to welcome the new member of the Commission, Ms. Concepción Escobar Hernández, of Spain. The nomination by Spain of a woman as a candidate for membership of the International Law Commission set an example that other States ought to follow, as the composition of the Commission should reflect that of the legal community, where there was no lack of qualified women who were experienced international lawyers.

3. The immunity of State officials from foreign criminal jurisdiction was an important topic, as evidenced by the consensus in the Sixth Committee of the General Assembly that the Commission should give high priority to its consideration. The views expressed by the Special Rapporteur in his report were clear and consistent; in addition, the report was well researched and provided a valuable update on relevant case law.

4. The fact that the question of immunity was a sensitive one could be seen from the Special Rapporteur’s passionate defence of the logic of his report and the Commission’s animated debate on the topic. In fact, no lawyer could claim to apply the law free from any ideological or emotional predisposition, for neither the law nor its application was value-free. She therefore disagreed that greater justification could be claimed for a particular legal position if it was held to be devoid of emotion. While the Special Rapporteur’s conclusions might be purely logical, as he maintained, they merely followed from his stated hypothesis. Consequently, an assessment of that hypothesis was more important than whether the conclusions derived from it were purely logical, and the Commission must decide whether or not to accept it.

5. The Special Rapporteur’s starting point was the principle of State sovereignty and its effects, one of which was the immunity of State officials from foreign criminal jurisdiction. In essence, the Special Rapporteur took the view that immunity was absolute. While State sovereignty clearly lay at the heart of international law, the way in which that principle was viewed had evolved over the past several decades. The question, then, was whether its effects had also evolved and, if so, to what extent.

6. She concurred with the argument that immunity was procedural in nature; however, its consequences were not. Accordingly, the Commission had to address those

⁶⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, pp. 262–263, para. 14.

⁶⁶ Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

consequences, as it would be not only naive but also irresponsible for it to hide behind a mere clinical reference to the procedural nature of immunity.

7. As to the Special Rapporteur's claim that there was necessarily a link between immunity as derived from the principle of State sovereignty on the one hand and State responsibility on the other, she was not entirely convinced that such was always the case. That issue had also been raised by Mr. Melescanu at the previous meeting. She wished to cite two examples of how the Special Rapporteur's argument was problematic and could be challenged.

8. The first example was derived from the judgment of the ICJ of 26 February 2007 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court had clearly found that a State could be in breach of an international obligation despite the fact that individual responsibility had not been established prior to the establishment of State responsibility (para. 180 of the judgment). The Court had rejected the respondent's argument that it was a *sine qua non* condition that State responsibility should be predicated on individual responsibility, concluding that "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one" (para. 182).

9. The Court's formulation in that judgment had relevance for the Commission's work in two ways. First, it showed that the institution of criminal proceedings against State officials and the establishment of State responsibility were not necessarily procedurally linked. In fact, the Court had concluded that the reverse also applied. For example, war criminals who had acted as representatives of a State were increasingly being brought to justice without there being a parallel process by which State responsibility was established. The second aspect of relevance to the Commission's work was the categorical nature of the language used by the Court in its decision, when it stated that "[a]ny other interpretation could entail that there would be no legal recourse available under the [Convention on the Prevention and Punishment of the Crime of Genocide] in some readily conceivable circumstances" (*ibid.*).

10. If it could be shown that there was no procedural link between State responsibility and individual responsibility, then the question arose as to whether the link between the immunity of State officials from foreign criminal jurisdiction and State responsibility was as strong as the Special Rapporteur claimed it was. She did not believe so.

11. The second example of the problematic nature of the Special Rapporteur's argument came from the latter's statement that the State in which the official served could waive immunity, thereby allowing the court of another State to exercise criminal jurisdiction over the official in relation to an act of *jure imperii*, or sovereign authority. If immunity was necessarily linked to State responsibility, then there was the risk that a waiver of immunity by the State in which the official served could be used as a tool by that State to exonerate itself from its responsibility at the expense of the official.

12. The question was whether to approach the problem of the relationship between immunity and State responsibility as one involving a hierarchy of norms or as an exception to a rule or principle, or both. The Special Rapporteur had answered that question by focusing the discussion on exceptions to immunity and, in so doing, setting aside the issue of the hierarchy of norms and its relevance to the topic. It had been claimed by some, albeit not by the Special Rapporteur, that a hierarchy of norms could not be applied to the problem because State responsibility was governed by substantive rules, whereas immunity was governed by procedural rules. Whether or not one shared that view—and she did not—the issue of the hierarchy of norms was one that had to be addressed and analysed, and not simply dismissed.

13. It was unclear why the Special Rapporteur had indicated in his oral presentation that immunity for war crimes, or breaches of international humanitarian law, lay outside the scope of his report. To exclude that aspect from the Commission's work on the topic would be most unfortunate, since it was precisely in the field of international humanitarian law where the most substantive obligation to prosecute or extradite existed, and where the issue of exemption on grounds of immunity from the obligation to prosecute or extradite had been extensively analysed. The obligation to prosecute or extradite in cases of alleged war crimes could have a direct bearing on the immunity of State officials from foreign criminal prosecution. A military officer who was a suspected war criminal and who was present in the territory of a foreign country was not necessarily immune from prosecution in that country, particularly if his own country had not brought proceedings against him. The Commission should therefore not exclude such cases from its consideration.

14. Although the Commission had agreed that it would not address diplomatic or consular immunity because those forms of immunity were governed by existing international conventions, there might be some areas of overlap with jurisdictional immunity that made it necessary to consider them. For example, according to news reports, the United Kingdom had waived the "diplomatic immunity" of the Libyan leader Muammar Al-Qadhafi and members of his family. That raised the question of whether, given a hypothetical situation in which Mr. Al-Qadhafi was arrested in the United Kingdom for war crimes and crimes against humanity, he would be entitled to jurisdictional immunity on the ground that he was an acting Head of State and that the United Kingdom had waived only his diplomatic immunity.

15. One of the problems with the topic of immunity, if the Commission accepted the view of the Special Rapporteur, was that it was applicable to a wide range of acts. During the consideration of the topic at the Commission's sixtieth session, Ms. Jacobsson had stated that the Commission should address issues relating to acts carried out in the territory of a foreign State such as kidnapping, murder committed by a foreign secret service agent and illegal intelligence-gathering or espionage, since such acts could be performed by State officials who were not accredited diplomatic agents in the foreign State, thereby precluding the use of the *persona non grata* option.

That issue was addressed briefly in paragraphs 155 to 165 of the memorandum by the Secretariat⁶⁷ and merited further discussion by the Commission.

16. The way that sources were referenced in the second report of the Special Rapporteur was occasionally confusing. For example, the last footnote to paragraph 70 (a), which was intended to support the assertion that the case in France against Rose Kabuye, the Chief of Protocol of the President of Rwanda, had been stopped, redirected the reader to the footnote to paragraph 12, yet when the reader arrived there, the Special Rapporteur merely indicated that “[a]ccording to press reports, the case has been abandoned”. The Internet link provided in substantiation of that fact led not to a specific article but rather to the home page of the Rwandan newspaper *The New Times*.⁶⁸ Such referencing of sources undermined the credibility of the report, as it made it difficult for the reader to check sources.

17. She also had a problem with the first footnote to paragraph 10, which referred to a report by the African Union–European Union Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction. The footnote gave the impression that the report reflected the official view of both the African Union and the European Union, which was certainly not the case, as the terms of reference of the Expert Group had made it clear that the outcome of its work was not binding on either of those organizations. Given that that report had been highly contentious, it was misleading to refer, as the Special Rapporteur had done in the conclusions set out in paragraph 91 of his second report, to the “recommendations” of the experts, since that gave the impression that the European Union and the African Union endorsed the report.

18. The most important step for the Commission at present was to decide how it intended to continue its work on the topic. It had before it a comprehensive memorandum by the Secretariat, two extensive reports by the Special Rapporteur⁶⁹ and an instruction from the General Assembly, in its resolution 65/26 of 6 December 2010, to give priority to its consideration of the topic. The Special Rapporteur had refrained from recommending how the Commission might proceed, except to suggest in paragraph 93 that the Commission could consider the question of drawing up an optional protocol or model clauses on restricting or precluding the immunity of State officials from foreign criminal jurisdiction. In her view, the Commission should decide more specifically how it planned to develop the topic, and to that end it might be useful to establish a working group. While she agreed with the Special Rapporteur that the Commission should consider the topic from the perspective of *de lege lata*, its consideration must not stop short of another part of its mandate, namely the progressive development of international law.

⁶⁷ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

⁶⁸ The reference was made more specific when the report was edited in view of its inclusion in *Yearbook ... 2010*, vol. II (Part One): Kennedy Ndahiro, “Judicial restrictions on Rose Kabuye lifted”, *The New Times*, 26 September 2009.

⁶⁹ The preliminary report is reproduced in *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601, and the second report in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

19. Mr. KOLODKIN (Special Rapporteur) said that he wished to confirm that he had correctly understood Ms. Jacobsson’s characterization of what he had said in his second report and in his introductory presentation regarding the necessary link between State responsibility and immunity. Had she understood him to say that the link between State responsibility and immunity was such that when a State granted immunity to protect its representatives from criminal responsibility the question of its own responsibility for an internationally wrongful act committed by one of its representatives was no longer at issue?

20. Ms. JACOBSSON said that she had understood the Special Rapporteur to claim in his report that there must always be a link between State responsibility and immunity. In her statement, she had provided two examples to show that there could be cases in which no such link existed, and that the Commission should therefore examine the issue further.

21. Mr. KOLODKIN (Special Rapporteur) said that what he had meant to convey was that the same criterion, namely, the attribution to the State of the conduct of the official, should apply when asserting immunity *ratione materiae* as was applied when invoking the responsibility of a State for an internationally wrongful act. That was the point that Mr. Melescanu had contested at the previous meeting.

22. As he had indicated in his second report, if the same criterion of attribution was used, neither the invocation nor the waiver of immunity by the State or the State official exonerated the State from responsibility for an internationally wrongful act. That was very different from the position presented by Ms. Jacobsson in her comments on his report. Essentially, if the same criterion was used for the purposes of both State responsibility and the immunity of a State official from foreign criminal jurisdiction, then the responsibility of the State and the criminal responsibility of the State official could be invoked simultaneously. Conversely, a situation could arise in which immunity from foreign criminal jurisdiction was both asserted and recognized, yet the victim of the offence or other actors entitled to do so could still invoke State responsibility in respect of the wrongful act simply—or precisely—because the same criterion of attribution was applicable. The last two paragraphs of the summary of his third report (A/CN.4/646), which he had circulated to Commission members, dealt specifically with that particular issue.

23. Ms. JACOBSSON said that the question of whether immunity and State responsibility should be linked in the manner suggested by the Special Rapporteur was a sensitive one. How it was resolved would have an impact on the Commission’s work, especially if it decided to extend immunity from foreign criminal jurisdiction to all State officials. She was not entirely convinced that such a link always existed, and that view appeared to be shared by Mr. Melescanu. In citing the example of a State that used the waiver of immunity as a political tool to exonerate itself from responsibility, she had simply sought to stress that such a waiver might be used as a legal argument or for purposes of political manoeuvring. It was for that reason that the Special Rapporteur’s argument should be examined carefully before the Commission formulated any draft articles on the basis thereof.

24. Mr. VARGAS CARREÑO said that the Special Rapporteur's second report was well researched and that his proposals were, for the most part, realistic and based on current international jurisprudence and practice. While certain members were unable to endorse some of the Special Rapporteur's proposals which, in their view, failed to take into account the most recent trends in international law, that did not mean that they discounted the Special Rapporteur's notable achievements in addressing what was a difficult, complex and important topic.

25. In order to advance its work on the topic, the Commission should decide what its next step should be in the light of three important considerations. The first was that because the current quinquennium was drawing to a close, the Commission had very little time to devote to the topic, as it would have to deal with other, more urgent matters in the second part of the session. The second consideration was the fact that, since the start of the Commission's consideration of the topic, several seemingly irreconcilable differences had arisen between some members on certain points. The third consideration was the concern expressed by many delegations in the Sixth Committee at the meagre progress made on the topic to date and their conclusion that the topic should be given priority consideration at the current session. Accordingly, he endorsed Ms. Jacobsson's proposal to establish a Working Group on immunity of State officials from foreign criminal jurisdiction.

26. The proposed Working Group could meet during the first part of the session with the single aim of identifying a range of issues that the Commission might consider and that would be included in its annual report to the General Assembly. During the second part of the session, the Working Group could formulate general principles relating to those issues and submit them to a plenary meeting of the Commission for adoption. The proposed principles should be brief, referring only to essential aspects of the topic, such as the grounds for foreign criminal jurisdiction of State officials, the scope and content of immunity *ratione materiae* and immunity *ratione personae* and, in particular, the effects that the commission of particular offences had on the immunity of State officials from foreign criminal jurisdiction. The Working Group could also identify those offences defined under international law in respect of which immunity from jurisdiction could not be invoked.

27. The Working Group should obviously base its discussions on the Special Rapporteur's second report, but it might also usefully refer to his preliminary report, the summary of his third report and the most significant decisions of the ICJ, such as the judgment in the *Arrest Warrant* case and the judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. The assenting and dissenting opinions of judges in those decisions should also be considered by the Working Group.

28. In addition, the Working Group might wish to consider the decisions of national courts, noteworthy among which were the judgment of March 1999 of the United Kingdom House of Lords on the appeal against the entitlement to immunity of the former dictator of Chile, Augusto Pinochet (*Pinochet No. 3*), including some of the opinions of the seven judges who had intervened in the case; and the November 2000 decision of the

Court of Appeal of Amsterdam in the *Bouterse* case. Important contributions to the topic of immunity from foreign criminal jurisdiction were also to be found in the scholarly literature, one example of which was a study by the Institute of International Law entitled "Fundamental rights of the person and the immunity from jurisdiction in international law".⁷⁰ There was thus sufficient background material to enable the Commission to make progress on the topic and to comply with the General Assembly's instruction to give it high priority. The Commission could then expect to adopt a draft text at its sixty-fourth session and could aim to conclude its work on the topic during the next quinquennium.

29. Most of the main points that the Commission should take up at the current session were contained in the Special Rapporteur's second report. However, the first of those points, the rationale for immunity, was dealt with primarily in the preliminary report. With regard to the Special Rapporteur's conclusions, which were contained in paragraphs 102 and 103 of that report,⁷¹ it should be pointed out that the immunity of State officials from foreign criminal jurisdiction had various complementary and interrelated grounds, such as the principles of international law relating to the sovereign equality of States, non-interference in the internal affairs of States and the need to ensure stability in international relations and the independence of States in the conduct of their activities. Although jurisdictional immunity often served as an obstacle to the attribution of criminal responsibility, that was not always the case. The Commission's conclusions should explicitly indicate that immunity from jurisdiction should never be aimed at facilitating the impunity of officials for the commission of grave violations of international law. The conclusions should deal primarily with the immunity *ratione materiae* and *ratione personae* of State officials. With the exception of some details that might be taken up in the proposed Working Group, the Special Rapporteur's proposals and conclusions appeared to provide a suitable basis for the Commission's future consideration of the topic.

30. Immunity *ratione materiae* should apply only to acts carried out by officials in the discharge of their duties and should not cover any acts they had committed prior to taking office. As for immunity *ratione personae*, it should be limited to high-ranking State officials and acts committed while the persons concerned were holding such office, irrespective of whether the acts had been committed in a personal or official capacity. Such personal immunity ceased when the officials in question no longer held office.

31. The list of officials enjoying such personal immunity should be as short as possible. Under international customary law it should include only the "threesome" of Heads of State, Heads of Government and Ministers for Foreign Affairs; however, it could also include persons temporarily performing those functions, such as a crown prince or deputy foreign minister. Also covered by personal immunity were officials such as diplomats, consuls and members of special missions under the 1961 Vienna Convention on

⁷⁰ Institute of International Law, *Yearbook*, vol. 73 (2010), Session of Naples (2009), pp. 3 *et seq.* (available from www.idi-iil.org/resolutions).

⁷¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601, pp. 184–185.

Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on special missions. Nevertheless, immunity *ratione personae* should be applied restrictively, in view of the important role played by officials in international relations.

32. The main problem currently posed by the topic was the possibility that the various forms of immunity from jurisdiction might protect the perpetrators of grave crimes, especially those punishable under international law, as Mr. Dugard had pointed out. Immunity *ratione materiae* seemed to be less problematic. With the development of international law in recent years, no one could claim that one of the duties of high-ranking officials was to commit crimes. In that connection, the Special Rapporteur referred in his report to the views of various members of the House of Lords Appeal Committee in the *Pinochet No. 3* case. He himself wished to cite the view of the President of the Appeal Committee, Lord Browne-Wilkinson, who had concluded:

If, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile.⁷²

The Home Secretary had subsequently given the authority to proceed to the extradition of General Pinochet for crimes of torture and conspiracy committed after 8 December 1988.

33. The Special Rapporteur also referred to other court decisions providing for an exception to immunity *ratione materiae*, such as the judgment of the Court of Appeal of Amsterdam in November 2000 in the *Bouterse* case concerning the dictator Desiré Delano Bouterse, the perpetrator of various assassinations, in which the Court noted that “the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State”.⁷³

34. The Working Group might in fact wish to consider which offences could under no circumstances be considered as official acts, including acts defined as crimes under international law. Perhaps the best solution would be to use the definitions contained in the Rome Statute of the International Criminal Court of crimes falling within the Court’s jurisdiction, such as genocide, crimes against humanity and war crimes. Admittedly, the types of situation the Commission had to consider under the topic were different, but the definitions contained in the Rome Statute had the advantage of having already met with consensus. There was a practical reason, too: in order to ratify the Rome Statute, several States had been obliged to amend their own criminal legislation.

35. It was more difficult to find a solution to the problem of officials who committed offences while enjoying immunity *ratione personae*, and he had several comments

to make regarding the position of the Special Rapporteur in that connection. He did not share the Special Rapporteur’s view that high-ranking officials enjoyed such immunity before assuming their functions. It was not advisable to state in such categorical terms that such immunity should always be regarded as absolute; the Statute did not consider it to be so for Heads of State or Government.

36. It was true that it was hard to find examples in practice where immunity *ratione personae* had not been granted in respect of the commission of international crimes. The only example cited by the Special Rapporteur came from an article by Professor Brigitte Stern, who had noted that in 2000 a court in Belgrade had sentenced 14 Western leaders, including Bill Clinton, Tony Blair and Jacques Chirac, to 20 years’ imprisonment for acts carried out in Yugoslavia by NATO; the author had gone on to state that that example demonstrated the possible counterproductive consequences of lifting the impunity of former officials.⁷⁴

37. Although there was consensus that immunity *ratione materiae* could not be granted for grave international crimes, there was no consensus regarding the possibility of immunity *ratione personae* being granted for all types of offences. That question could be taken up by the Commission with a view to finding a solution that reconciled the established rules of international law with the need to discourage impunity. Perhaps a useful working basis might be article III, paragraph 1, of the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted by the International Law Institute at its session in Naples in 2009, which stated: “No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.”⁷⁵ That position was not so categorical as the Special Rapporteur’s statement that immunity *ratione personae* was always absolute, and it might be more acceptable, since it had been adopted at the Naples session by a clear majority of participants.

38. In conclusion, he commended the Special Rapporteur for his efforts, since, despite the diverging views among members, his report would serve as a useful basis for the Commission’s future work on the topic. Mr. Vargas Carreño strongly endorsed the proposal to establish a Working Group, with the active participation of the Special Rapporteur, to draft a brief report dealing with the grounds for immunity of State officials from foreign criminal jurisdiction as well as the characteristics of immunity *ratione materiae* and immunity *ratione personae*, and which would explain whether such forms of immunity were affected by the commission of certain crimes. The report should be included in the Commission’s annual report to the General Assembly and serve as the point of departure for consideration of the topic at the Commission’s sixty-fourth session.

⁷⁴ B. Stern, “Vers une limitation de l’irresponsabilité souveraine des États et des chefs d’État en cas de crime de droit international?”, in M. G. Cohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Liber Amicorum Lucius Caflisch, Leiden, Martinus Nijhoff, 2007, pp. 513–549, at p. 526.

⁷⁵ Institute of International Law, *Yearbook*, vol. 73 (see footnote 47 above), p. 227.

⁷² ILR, vol. 119 (2002), p. 157.

⁷³ *Netherlands Yearbook of International Law*, vol. 32 (2001), p. 277, para. 4.2.

39. Mr. PELLET said that it was difficult to be brief on an important topic that had given rise to a debate of such a high standard. The questions of principle raised had considerable implications that should not be overlooked. It would be hard to make progress with the topic until agreement was reached on those questions of principle as well as on the procedural approach outlined by the Special Rapporteur in the summary of his third report.

40. The Special Rapporteur's second report was a good report on account of its impressive scientific documentation, although he shared Ms. Jacobsson's reservations regarding the footnotes, a further example being the footnote to paragraph 79 which referred to the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session,⁷⁶ which reflected the view not of the Sixth Committee of the General Assembly but only of some of its delegations. While the analysis of the materials discussed in the second report seemed rigorous, it was in fact quite biased. His only criticism concerning the form of the report was the plethora of footnotes containing important information that could have been incorporated in the body of the report.

41. It was truly unfortunate, then, that the report was such a good one, since it was based on erroneous premises. The Special Rapporteur drew highly questionable conclusions, making the report seem like a kind of special pleading rather than an impartial exposé of the facts, which a preliminary report ought to be. Indeed, the so-called second report was in fact a follow-up to the preliminary report that had been considered at the sixtieth session in 2008. At that time, he and several other members had expressed surprise that the preliminary report did not draw a distinction between problems relating to immunity associated with "ordinary" offences and those relating to "grave" crimes. The Special Rapporteur had replied that such matters would be taken up in the second report, which they had—albeit far from convincingly.

42. While he was not in total agreement with Mr. Dugard, the latter had pinpointed the problem with the topic clearly and convincingly at the previous meeting. He would not go quite so far as Victor Hugo to say that it was "a battle between night and day"; nevertheless, he saw two conflicting concepts regarding the role of the Commission and even of international law itself coexisting. The Special Rapporteur's approach—the special pleading—was based on an absolute concept of sovereignty, which precluded the possibility of any exception to the absolute immunity of State leaders when they enjoyed immunity *ratione personae*.

43. He was well aware that the Special Rapporteur recognized the need to distinguish immunity *ratione materiae* from immunity *ratione personae*; moreover, on the whole, he had no problem with the Special Rapporteur's analysis of immunity *ratione materiae* or with the bulk of the conclusions drawn in paragraph 94 (a) to (m) of the second report. However, the crux of the current debate was the hyper-Westphalian concept which the report conveyed. As Ms. Jacobsson

had noted, it took the Commission back to the times when the State alone was the subject of international law and nothing it did could incur its responsibility. For, unlike some other members of the Commission, he shared the Special Rapporteur's view that the immunity of State leaders was the consequence of State immunity. Yet just as State sovereignty was not an absolute principle according to which States could do whatever they liked, so State leaders could not escape the consequences of their acts, whatever they might be, on the pretext that they were representing the State. Such representation did not confer all rights on them, just as sovereignty did not give the State the right to do whatever it liked. As one member of the Commission had so aptly put it, such a position was untenable in 2011.

44. At the previous meeting, Mr. Dugard had said that he did not want to enter into a debate on what constituted the rule and the exception for the granting of immunity, but he agreed with Mr. Melescanu that this issue was central to the debate. He firmly believed that the issue should not be treated as the Special Rapporteur had done. The Special Rapporteur posited that the basic principle was the absolute immunity of State leaders, or at least of Heads of State, Heads of Government and Ministers for Foreign Affairs, but he himself, like Mr. Vargas Carreño, wondered who else might enjoy such absolute immunity, as the Special Rapporteur had left the question open.

45. The absence of immunity from criminal jurisdiction was merely an exception, of which the Special Rapporteur found no trace in positive law. However, that simple assumption was unacceptable, because it was tantamount to denying all the progress that had been made in international law since the end of the First World War and, in particular, since the Second World War with the advent of the idea of the international community and the awareness, albeit limited, that there were higher interests that prevailed over the interests of the individual members of that community. Those higher interests were reflected in the notion of *jus cogens* in general international law.

46. Those interests of the international community were still limited and rudimentary, yet they did exist and were of fundamental importance to the Commission's approach to the topic: from that international public order it had emerged that the important principle was not immunity but responsibility of both the State and of its representatives for a few very grave crimes, and that the perpetrators of such crimes, be they the State, international organizations or individuals, could be tried without the benefit of immunity.

47. Referring to the earlier exchange between Ms. Jacobsson and the Special Rapporteur on the link between the responsibility of the individual and that of the State, he said that he did not share the view of Ms. Jacobsson and Mr. Melescanu, but rather that of the Special Rapporteur. While it was true that in some exceptional situations there could be a disjunct between the responsibility of the State and that of its leaders, in virtually all cases the leaders were responsible on account of their functions, even if they had acted *ultra vires*. It could also be held that the responsibility of the State was incurred on account of the actions of its representatives.

⁷⁶ A/CN.4/588, para. 161.

48. However, the Commission was considering only grave crimes that constituted serious breaches of obligations under peremptory norms of general international law. As he had often said when discussing the draft articles on State responsibility for internationally wrongful acts,⁷⁷ in particular articles 40 and 41, one of the main consequences arising from that particular category of internationally wrongful acts was that in such situations the State became transparent. Moreover, it was precisely in such cases that one could investigate the individual responsibility of leaders, including Heads of State, who could not hide behind the veil of the State and be exonerated from such responsibility.

49. In such cases, and as the Nuremberg Tribunal had observed in its judgment, “[c]rimes against international law are committed by men, not by abstract entities”;⁷⁸ thus the State, which was also responsible, became transparent and its personality could not hold the criminal responsibility of the individual in check. That had been proclaimed in many international treaties, including some that were the outcome of the Commission’s *travaux*, such as the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal⁷⁹ and others mentioned by Mr. Dugard at the previous meeting.

50. It was likewise important not to confuse a rule of substance with a rule of competence, as the dissenting judges seem to have done in the *Al-Adsani v. the United Kingdom* case, also referred to by Mr. Dugard. In other words, unlike the dissenting judges in that case, he would not assert that the *jus cogens* norms that the applicants had been accused of violating, which included the prohibition against torture, took precedence over the rules governing competence any more than the ICJ could have exercised jurisdiction that it did not have in the *Armed Activities on the Territory of the Congo* case on the pretext that the applicant had claimed that the defendant was responsible for a breach of a *jus cogens* norm. To reason in that way was to confuse the rules of substance with the rules of competence, and thus he could not endorse the views expressed by Ms. Jacobsson in that regard.

51. That being said, he would have drawn the same conclusion as the dissenting judges by observing that, in such a case, there was quite simply no immunity; the outcome was the same, but the reasoning was very different and, with all due respect, it was more accurate. In broader terms, it went without saying that it was not because an individual was accused of the crimes of genocide or aggression that the ICJ would be competent to try that individual, since the Court was not competent to rule on individual responsibility. That situation—the fact that the Court was not competent—was not a consequence of the immunity of the individual in question but a consequence of the rules of the competence of the Court. On the other

hand, if a national or international criminal court was competent to try the perpetrator of certain international crimes whose punishment was sought by the international community, the individual had no grounds for pleading immunity, simply because such immunity did not exist. There again, a different reasoning was used, based on the competence of the court concerned, yet the outcome was the same.

52. Once the basic principle of responsibility—and thus absence of immunity—had been established, two questions arose. First, when did such responsibility towards the international community prevail? Secondly, were there exceptions to such responsibility in the form of immunity from criminal jurisdiction and, if so, before which courts?

53. Concerning the first question, in a society such as the international community in which there was so little unity and solidarity there would be very few cases of absolute responsibility, and they would likely involve genocide, crimes against humanity, aggression, torture and war crimes, although only if committed on a systematic and large scale. Some prudence was called for with regard to *jus cogens* norms lest they be trivialized.

54. His answer to the second question was a categorical no: there could be no exceptions in those rare cases of absolute responsibility where the State became transparent and the individuals acting on its behalf had no possibility of immunity, unless the court’s lack of competence was considered to constitute an exception. That, however, was another issue altogether.

55. The second report of the Special Rapporteur was thus a good example of a *pro domo* appeal, but since its underlying premise was wrong or incomplete, it could not possibly arrive at the right conclusions. To echo Blaise Pascal, who had once spoken of “a strange justice that is bounded by a river”,⁸⁰ it was a strange science that was blind to a century of developments in that area of the law while focusing solely on authorities all of whom looked resolutely towards the past.

56. He did not intend to examine the Special Rapporteur’s arguments one by one, since Mr. Dugard had already demonstrated that they could be countered. Admittedly, if one looked at the situation strictly from the standpoint of positive law, all arguments did not necessarily point in that direction. The unfortunate judgment of the ICJ in the *Arrest Warrant* case had undoubtedly strengthened the argument in favour of absolute immunity. He had often taken issue with what he regarded as one of the most regrettable decisions of the Court since 1923, not so much because of the untenable reasoning, but because the Court could have quite well reached the same findings, of which he approved, by basing itself on completely different grounds, namely those relating to the Belgian courts’ jurisdiction. The Court had thus chosen to deal a blow to the felicitous developments that had resulted from the *Pinochet* cases before the House of Lords and the *Gaddafi* [Qadhafi] case before the French Court of Cassation.

⁷⁷ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁷⁸ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, Nuremberg, 1948, vol. XXII, p. 466.

⁷⁹ *Yearbook ... 1950*, vol. II, p. 374.

⁸⁰ B. Pascal, *Pensées, lettres et opuscules divers*, Paris, Napoléon Chaix et Cie, 1864, chap. III, p. 83 (available from <http://gallica.bnf.fr>).

57. Although the Commission had to pay careful attention to the case law of the ICJ, it was not obliged to endorse all its tortuous reasoning, including its mistakes; first, because there was no hierarchical relationship between the two institutions and, secondly, because they did not perform the same functions. The Court had to base its decisions on positive law, *lex lata* (although it was unclear whether in the case to which he had referred the law had already existed), whereas the Commission's first duty was the progressive development of international law. The Commission had more than enough material at its disposal to strike out in the right direction—in other words, to consolidate the trend which the ICJ had so clumsily interrupted in its judgment in 2002 in the *Arrest Warrant* case.

58. It was chiefly for those reasons that, notwithstanding his esteem for the Special Rapporteur, his conscience led him to endorse the comments of Mr. Dugard, Ms. Jacobsson, Mr. Melescanu and Mr. Vargas Carreño and to urge the Commission not to consider the topic any further until it had considered the general direction in which the Special Rapporteur wished to steer it. He agreed with Ms. Jacobsson and Mr. Vargas Carreño that this question should be taken up in a Working Group which, he hoped, would be chaired by the Special Rapporteur or by a member whom he trusted. He also hoped that the Working Group would point the Commission's work in a direction that was more likely to fulfil the hopes that many members, as well as human rights organizations and activists, placed in the judicious refocusing of international law on the interests of the international community as a whole.

59. Mr. PETRIČ said that the Special Rapporteur's second report on immunity of State officials from criminal jurisdiction would form a good basis for discussion, since it was the product of substantial research into the practice of States, the case law of international and national courts and the relevant doctrine.

60. Some of the views and conclusions reached by the Special Rapporteur as a result of his research, especially those concerning exceptions to immunity, were bound to provoke a reaction and prompt an exchange of views, thereby furthering the Commission's discussion of that sensitive but important topic. In paragraphs 90 to 93 and paragraph 94 (*n*) and (*o*) of the second report, the Special Rapporteur was probably expressing his own views rather than proposing a position for adoption by the Commission. In fact, several previous speakers had used largely the same material—State practice, jurisprudence and doctrine—to reach conclusions quite different from those of the Special Rapporteur.

61. The Commission was authorized by the Charter of the United Nations to progressively develop and codify international law—in other words, to draft multilateral legal instruments for submission to States. That was the Commission's goal in considering the current topic. The essence of codification was to turn existing customary law into a draft treaty. The existence of customary rules, which were to be found in State practice and *opinio juris*, was a *sine qua non* for any codification exercise. Progressive development should go hand in hand with codification and should transcend existing

customary law. That did not, however, mean that such an exercise should be wilful or have no limits. It must be relevant and take account of trends in international law, developing human values and the realities of the international community. Progressive development could be one step ahead of existing international customary law, but it had to be a cautious step that accommodated the need to regulate some new aspect of relevance to the international community and to individual States, while at the same time furthering cooperation between them, their coexistence and their common interests.

62. In most cases, the Commission's work combined codification and progressive development, and the same should hold true of the topic under consideration. Accordingly, the Commission should look not only at existing rules of customary law on the immunity of State officials but also at the needs and expectations of the international community, at values and trends in legal science and at the needs of human society. While codification of the topic was tied to existing State practice, progressive development should be forward-looking and anticipate problems that might arise in the future. All in all, the Special Rapporteur's second report seemed to be too closely tied to *lex lata* which was ripe for codification, without giving adequate consideration to possibilities for progressive development.

63. The extent to which it should engage in progressive development was the main dilemma facing the Commission in its work on the topic. On the one hand, the principle of immunity *ratione personae* and *ratione materiae* of State officials from foreign criminal jurisdiction was well established in customary international law. That principle had been discussed in the Special Rapporteur's preliminary report⁸¹ and in the first part of his second report. On the other hand, recent trends in State practice, case law, the dissenting views of judges at international courts and legal writings centred on the vital principle of non-impunity for crimes under international law. That notion was rooted in the decisions of the Nuremberg Tribunal, the International Military Tribunal for the Far East, the International Criminal Court and a number of *ad hoc* international courts. Its corollary was the idea of universal jurisdiction for the most serious crimes.

64. There was no denying that the immunity of State officials was recognized in international law. That well-established principle stemmed from the need for cooperation among States and, like diplomatic immunity, it was of great value. However, there was also no denying that in the contemporary world there was an expectation and indeed a need to ensure that the perpetrators of crimes under international law did not go unpunished. It might be possible to bridge both sets of demands by permitting exceptions to immunity for crimes against *jus cogens*. The Commission would have to consider how far it could go in building that bridge. That would be the main responsibility of any working group that might be established on the topic. Since half of the Special Rapporteur's second report was devoted to exceptions to immunity, it was clear that he regarded the question of how to deal with the immunity of State officials from foreign jurisdiction in the event of

⁸¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

crimes against international law as the crucial issue in the Commission's deliberations. He himself disagreed with the Special Rapporteur's opinion that only one exception could be allowed.

65. He had reservations about the Special Rapporteur's views regarding *ultra vires* conduct of State officials. State officials who engaged in *ultra vires* conduct were no longer acting under the instructions of the State or within their official functions. An official's immunity *ratione materiae* was a continuation of State immunity. Since *ultra vires* conduct did not constitute an act performed in the context of official functions and was not authorized by the State, immunity *ratione materiae* should not therefore extend to *ultra vires* acts.

66. He also had some reservations concerning paragraphs 35 to 37 of the second report. His own research had led him to the conclusion that immunity *ratione personae* was a reflection of State sovereignty and ought therefore to be restricted to State officials who represented the sovereign State. No high-ranking officials other than a Head of State, a Head of Government or a Minister for Foreign Affairs were entitled to immunity *ratione personae*. The "high-ranking State officials" and "other possible holders" referred to in paragraphs 35 and 36 of the report, respectively, enjoyed immunity *ratione materiae* which enabled them to perform their functions unhindered.

67. Furthermore, immunity was a logical necessity only in respect of official acts; it should not apply to acts performed in a private capacity. In short, immunity *ratione personae*, whose historical origins lay in the nineteenth century or even earlier, should not be extended to other State officials who already enjoyed immunity *ratione materiae*.

68. Turning to the crucial part of the second report, which dealt with exceptions to the rules of immunity, he noted that the Special Rapporteur stated in paragraph 54 that "we are dealing here with such exceptions to immunity as are founded in customary international law". That limitation was significant. The Special Rapporteur further stated that "[t]here can be no doubt that it is possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty". That finding was even more significant. While in customary law there were indeed some clearly established exceptions to immunity, they could equally well be established in bilateral or multilateral treaties. It was precisely the task of the Commission to produce a draft multilateral treaty on the immunity of State officials that would establish exceptions to immunity and constitute progressive development of international law. It must reflect the contemporary international community's values and needs by incorporating the principle of non-impunity for crimes covered by rules of *jus cogens*.

69. In paragraph 56 of his second report, the Special Rapporteur set forth several possible rationales for exceptions to immunity, which were drawn from the case law of international and national courts, the legal writings of the Institute of International Law and the positions of NGOs. In the paragraphs that followed, he elaborated on those rationales and concluded that "the

various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing" (para. 94 (n)). The Commission should, however, look for more exceptions than the sole example accepted by the Special Rapporteur, and it should endeavour to find convincing arguments in support of them. The Special Rapporteur's choice of wording in his conclusions was rightly cautious, given his analysis in paragraphs 57 to 59 of the report. He did not entirely rule out the possibility that other exceptions to the immunity of State officials might exist. In several places in the report he presented differing, contradictory views, including the opinions of the dissenting judges in the *Arrest Warrant* case. He spoke of "widespread" views in support of exceptions to immunity but noted that it was "not fully clear why the gravity of a criminal act" might be grounds for such an exception (para. 61). His conclusion, however, was clear: that no rule on exceptions to immunity could be found in customary international law. He made no mention of progressive development.

70. The Commission did not have enough time to examine in detail all the well-documented arguments presented by the Special Rapporteur. The Special Rapporteur contended in paragraph 61 of his second report that it was not clear why the gravest crimes might cease to be attributed to the State and lose their official character, thereby constituting a rationale for exemption from immunity. The answer was simply that it was because of the particular gravity of the crimes: such criminal acts would not lose their official character and would remain an act of the State, but because of their gravity as violations of peremptory norms of international law, their perpetrators should not benefit from immunity. In any conflict between the rules of immunity and the rules of *jus cogens*, it was reasonable that the latter should prevail. There was significant support in the literature for that position.

71. In paragraph 64, the Special Rapporteur argued that the norm concerning immunity was procedural and did not affect the criminalization of acts against *jus cogens*. While that was true, there was nothing to prevent the introduction of exceptions to immunity in order to safeguard the principle of non-impunity. It was also difficult to accept the conclusions set forth in paragraphs 68 and 69 of the report. The norms of international law concerning the punishment of war criminals that had been established in the Nuremberg Charter and the Charter of the International Military Tribunal for the Far East, the Rome Statute of the International Criminal Court and the Statute of the International Tribunal for the Former Yugoslavia had had a significant impact on *opinio juris*. The fact that the Axis Powers had not asserted immunity was irrelevant, since they had not been in a position to do so.

72. In paragraph 72 of his second report, the Special Rapporteur took issue with the view that the immunity *ratione materiae* of an official did not operate in cases where the crime concerned was one in respect of which universal criminal jurisdiction was exercised by a foreign State. On the other hand, he held that "at first sight" the possibility of exercising universal jurisdiction in respect of grave international crimes was enshrined in the legislation of many States. In cases of grave crimes

over which international jurisdiction existed, there were obviously grounds for arguing that exemptions to immunity from foreign criminal jurisdiction also existed. The fact that a State had not acceded to the Rome Statute of the International Criminal Court should not make it possible for the officials of that State to claim immunity from foreign jurisdiction in respect of grave crimes for which they would have been held answerable by the International Criminal Court if their State had been a party to the Rome Statute.

73. Immunity, whether diplomatic immunity or the immunity of State officials, was a great asset in international relations. On the other hand, there was a need in the contemporary international community to ensure that the gravest crimes under international law did not go unpunished. The Commission would have to strike a proper balance in its endeavours to codify and progressively develop the topic under consideration. While customary law contained no rules establishing exceptions to immunity, he believed that the Commission should bear progressive development in mind when it drafted a future instrument on the immunity of State officials from foreign criminal jurisdiction. The extent of that progressive development would depend on further discussions within the Commission and on States' reactions to its reports in the Sixth Committee.

74. While the Commission should not undermine the valuable concept of immunity, it should ensure that perpetrators of crimes against *jus cogens* did not go unpunished, because such crimes harmed thousands of people and destroyed entire communities and countries. The punishment of those individuals was in the common interest of all humanity.

75. No draft articles should be formulated at the present juncture, for the Commission must first hold a substantive debate to see how far it could go in the progressive development of the topic. The establishment of a special Working Group was therefore a good idea.

76. Mr. GAJA said that although the Special Rapporteur's second report on immunity of State officials from foreign criminal jurisdiction was underpinned by a wealth of references to cases and legal writings, its arguments were frustratingly one-sided. That was particularly true of the assertion that there was a general principle providing for the immunity of foreign officials *ratione materiae* and that there could be no exceptions to that principle because practice was either divided or insufficient.

77. The Special Rapporteur's views on the question of the relationship between functional immunity and the exercise of jurisdiction over international crimes had to be considered against the background of the outline of his third report, which he had presented at the previous meeting. In his third report, the Special Rapporteur intended to demonstrate that functional immunity would operate only when the official's State invoked it. Thus if the official's State did not raise the question of immunity, judicial decisions concerning offences could not be regarded as a significant element of practice restricting immunity. That approach tended to limit the relevance of

some decisions concerning international crimes committed by foreign officials. While it was probably premature to discuss the Special Rapporteur's assumption, one would have to take it into account.

78. The evidence provided by treaties on the suppression of international crimes showed that the Special Rapporteur's description of the position with regard to *lex lata* was not entirely correct. While treaties could derogate from a rule of general international law concerning functional immunity, immunity *ratione materiae*, they also presented elements that demonstrated that such a rule did not apply when the State official's alleged offence constituted an international crime.

79. Most treaties relating to the suppression of international crimes contained no provisions on immunity. That silence could not be regarded as an implicit recognition that immunity applied. As suggested in the *Arrest Warrant* judgment, there was one implicit exception that made it possible to exempt from criminal jurisdiction the few persons who enjoyed personal immunity while they held office. If a similar exception was made with regard to functional immunity, thousands of people would be exempt from prosecution for an indefinite period, and many treaties concerning the suppression of international crimes would become meaningless.

80. For example, States parties to the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation were under an obligation to suppress the crimes defined in article 1, make those offences punishable by severe penalties and exercise their jurisdiction under certain conditions. He wondered whether the Convention could be interpreted to mean that a State party's obligation to exercise jurisdiction over a crime such as placing a bomb on an aircraft could be restricted by the functional immunity of the alleged offender. Would the Convention thus exempt foreign officials from prosecution? If it turned out that the alleged offender was someone working for the secret service of a State, should another State refrain from prosecution because of that person's immunity? Would it not be more reasonable to understand this Convention, like other similar treaties, as requiring prosecution, irrespective of whether the alleged offender was a State official? The silence of treaties concerning the suppression of international crimes on the matter of immunity should generally be interpreted to mean that there were no exceptions.

81. No distinction appeared to be made in the Convention for the suppression of unlawful acts against the safety of civil aviation according to whether or not the State in question was a party to the Convention. The Convention and similar treaties suggested that States parties were entitled to punish the conduct of offenders whether or not they were State officials. In other words, when an international crime was committed, functional immunity could not be invoked. Given the number of treaties on the suppression of international crimes, that was a significant body of opinion.

82. Paragraph 59 of the *Arrest Warrant* judgment quoted in paragraph 77 of the second report, which apparently conflicted with the above-mentioned view,

stated that jurisdiction under international conventions on the prevention and punishment of certain serious crimes did not affect immunities under customary international law, and that those immunities remained opposable before the courts of a foreign State even when those courts exercised such jurisdiction under those conventions. However, the Court had not said that, under customary international law, immunity *ratione materiae* also covered international crimes. In view of the attitude of most of the States that were parties to the numerous conventions on the suppression of international crimes, it seemed highly unlikely that customary international law established a general rule to the effect that immunity *ratione materiae* applied irrespective of the alleged offender's conduct.

83. Mr. VASCIANNIE congratulated the Special Rapporteur on his challenging and lucid report which, as a statement of *lex lata*, was generally convincing. In the main, he agreed with the legal propositions set out in paragraph 94—first, that immunity of State officials was the general rule and its absence in a particular case was an exception to the general rule (para. 94 (a)).

84. Secondly, it was also correct to suggest that State officials enjoyed immunity *ratione materiae* from foreign criminal jurisdiction: they were immune as long as they had performed an act “in an official capacity”. It was sometimes difficult to distinguish acts performed in an official capacity from other acts, but such uncertainty did not invalidate the distinction. Whether or not an act was official could be determined not only by reference to the law of State responsibility, the Rome Statute of the International Criminal Court and other international instruments; guidance could also be obtained from those municipal systems in which the distinction was a familiar one. Indeed, at a later stage in the project, the Special Rapporteur might wish to consider giving clearer indications of what constituted an official act for the purposes of immunity.

85. Thirdly, the Special Rapporteur rightly regarded the distinction between immunity *ratione materiae* and immunity *ratione personae* as an important element of the law. Immunity *ratione personae* not only applied to illegal acts performed in an official capacity but also extended to illegal acts undertaken in a private capacity before or during the official's term of office. Such full or absolute immunity, however, was confined to a relatively small group of State officials, arguably only Heads of State, Heads of Government and Ministers for Foreign Affairs. What the Special Rapporteur called the “troika” or “threesome” for the purposes of immunity *ratione personae* seemed correct as part of the prevailing law, notwithstanding reservations expressed in the joint separate opinion of Judges Higgins, Kooijmans and Buergethal in the *Arrest Warrant* decision. His own view on that point was that the majority view in the *Arrest Warrant* case should not be lightly dismissed.

86. Fourthly, and perhaps most controversially, the Special Rapporteur indicated in his second report that “the various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing” (para. 94 (n)). However, in paragraphs 54 to 93 the Special Rapporteur carefully reviewed various perspectives on exceptions to the general

rule of immunity. Possible exceptions included the notion that illegal acts could not be official acts; the idea that the same act ought not to be attributed to the individual and to the State; *jus cogens*; the emergence of a new customary rule barring immunity; universal jurisdiction; and the notion of *aut dedere aut judicare*. The Special Rapporteur assessed each of those ideas in the context of immunity and dismissed them, but according to his own reading of the law, the *jus cogens* exception could benefit from more detailed treatment. Although the Special Rapporteur reviewed judicial approaches to that argument, he did not establish exactly why a *jus cogens* norm against torture, for example, could not trump procedural immunity for State officials. In paragraph 65, the Special Rapporteur referred to Lord Hoffman's remarks in the House of Lords judgment of 2006 in the *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* case, but those remarks seemed to address the problem by assertion rather than by analysis of why the *jus cogens* norm should not prevail. If one started from the easy premise that the rules of *jus cogens* were preemptory, then it was a short step to the conclusion that the violation of a *jus cogens* rule should be recognized by a foreign court, even *vis-à-vis* an individual with procedural immunity. In that connection, the minority approach in the *Al-Adsani* case heard by the European Court of Human Rights had much to recommend it (mentioned in paragraph 63 of his second report).

87. The Special Rapporteur's approach required the Commission to go back to first principles insofar as the nature of the project was concerned. It could be perceived essentially as an exercise in codification, designed to formulate the law on State immunity as it currently existed. Judicial decisions and scholarly writings pointed in different directions, and States might appreciate guidance as to what international law allowed and what it required in respect of immunity for State officials. That was especially true in view of the inevitably high profile that would be acquired by cases in which foreign State officials were taken to court in another jurisdiction.

88. However, the project could also be viewed through the lens of progressive development. From that standpoint, he would support the Special Rapporteur if he reoriented the project to take more fully into account various policy considerations that were becoming increasingly pervasive in that area of the law. The law on State immunity had developed on the basis of sound policy presumptions. It had traditionally been assumed that immunity for State officials promoted positive relations between States *inter se* and thus encouraged order, security and stability in international relations. The law had also been built on the idea that comity and reciprocity were important considerations, so if the foreign minister of State X was subject to a criminal charge in State Y, would it be long before State X initiated “tit-for-tat” prosecutions? The idea that one man's freedom fighter was another man's terrorist should not encourage State inactivity in the face of evil but should highlight the risks inherent in having one State prosecute leaders of other States on matters of policy that might well have a subjective component.

89. There were two other policy arguments in favour of the current legal arrangements. One was based on the notion of territoriality. It had often been said that extraterritorial

legislation was problematic and arguably contrary to the rules of international law: from that perspective, one might say that a State should not overreach itself by trying to convict State officials for alleged crimes not committed on its territory. Prosecution with an extraterritorial component could be bad policy, not only because it represented an attempt by a State to stretch its sovereignty into other countries, but also because difficulties could be encountered in collecting and assessing evidence against the accused.

90. The other policy argument was more overtly political: there was reason to believe that in a world without immunity for State officials, politically motivated trials would occur far too often; trials might become a major way of seeking to resolve what were essentially political disputes. That would be a good thing if all those concerned accepted a system of extraterritorial courts, but given the political division that existed within the international community, it was doubtful that any such system of national court trials for alleged criminals from other countries would be accepted. Moreover, any system in which national courts could disregard the immunity of foreign officials would be open to the accusation that more powerful States had the right to try officials of less powerful States, but not vice versa—an accusation that ought not to be ignored when assessing the viability of the rules concerning immunity.

91. On the other hand, there were also strong policy reasons in favour of removing immunity for State officials in some instances. For example, with increasing emphasis placed on human rights promotion and protection, it seemed anomalous to maintain that State officials could escape prosecution for heinous crimes at the national level simply because they were State officials. That was particularly true with respect to the grave crimes that had come to be accepted as international crimes. Furthermore, it was becoming increasingly apparent that the International Criminal Court would not enjoy the full jurisdictional range that had originally been anticipated. Although optimists might still hope that the Court would be able to bring to trial persons from all jurisdictions, that prospect remained uncertain in the light of well-known political and diplomatic realities. Accordingly, the argument ran, there should be alternative means of bringing to justice State officials who committed certain grave crimes: the international system would then be able to promote justice and reduce the likelihood of impunity.

92. His final thought was that the policy arguments were finely balanced, and the Special Rapporteur should be encouraged to develop them more fully with a view to making recommendations on whether the project should seek to codify the law gradually or whether it should try to describe in greater detail how the law might look if it was open to a significant degree of progressive development. The latter approach might meet with resistance from States, but that was no reason to discount it. The Special Rapporteur might also wish to take into account certain trends in the Commission, particularly in relation to human rights, in preparing his next report.

93. In conclusion, he observed that the Special Rapporteur's outstanding second report had given the Commission much to think about.

94. Mr. McRAE thanked the Special Rapporteur for a second report that continued the high standard of scholarship and analysis demonstrated in his preliminary report and said that he had also appreciated Mr. Dugard's spirited rebuttal of the report. Mr. Dugard had put forward views that were the polar opposite of the Special Rapporteur's positions; between the two, they had framed the debate very well.

95. While he himself agreed with much of the content of the second report, there were certain key questions over which controversy continued to reign, the central question being whether there ought to be exceptions to immunity in cases of serious international crimes. The Special Rapporteur argued that there should be no exceptions to immunity, or least that the case had not been made for them. He did that, however, by setting a very high standard for determining whether such exceptions ought to exist: they must be "founded in customary international law" (paragraph 54 of the report). He then looked at practice and *opinio juris* and found it lacking. Cases had been brought before domestic and international courts, by and large unsuccessfully; the views of writers were seen by the Special Rapporteur as *lex ferenda*, and he was not convinced on policy grounds that exceptions to immunity were a good idea.

96. Mr. Dugard's approach was quite the opposite—rather than base itself on a customary rule of international law, traditionally viewed as the *sine qua non* for any action by the Commission, he believed that the Commission should take a stand on a matter of fundamental principle: was it for impunity or for accountability? In Mr. Dugard's view, the Commission should not look at that matter in a static way; it should follow the trend in that area, given that the international community had moved beyond the *status quo* and sought to focus on accountability and reject impunity.

97. The debate, then, was about policy, but he was not sure that the essential policy question could be answered by saying that one approach was right as a matter of law and one was wrong. Neither could the problem be solved by trying to achieve consensus on what the law was, although Mr. Gaja had just said some very interesting things about customary international law in that connection.

98. If one reasoned, as the Special Rapporteur did, that exceptions should be seen to exist only if a rule of customary international law could be found by applying traditional modes of analysis—such as State practice and decisions of international tribunals—then his position was more plausible. As the Special Rapporteur pointed out, there were very few decisions supporting the idea of an exception to immunity, and the *Arrest Warrant* case was a rejection of that idea. There was no conventional State practice supporting an exception to immunity or what traditionally might be regarded as necessary to establish *opinio juris*. In other words, if one accepted the Special Rapporteur's premise, then his conclusions followed more readily; his analysis of the evidence was certainly thorough, though he himself would not go so far as to say that the Special Rapporteur was correct as a matter of *lex lata*, as Mr. Vasciannie had just done.

99. However, there was another way of looking at the matter: Mr. Dugard's alternative narrative. There were many instances of individuals being prosecuted in domestic courts for serious international crimes even though they had immunity, and such prosecutions reflected the view that there must be exceptions. There were judges who dissented from the view that there were no exceptions, and there was academic literature that supported the idea of exceptions. In Canada, legislative bills had been introduced to enable domestic courts to entertain suits by victims against foreign State officials for serious international crimes, notwithstanding their immunity. In short, the issue was not clear-cut.

100. For that reason, he had difficulty with the implications of the Special Rapporteur's conclusions in paragraph 94 (*n*) and (*o*), which seemed to be that the Commission should not accept that there should be exceptions to immunity.

101. In his own view, whether or not there was a rule of international law recognizing exceptions was partly a matter of perspective. The premise from which the Special Rapporteur started seemed to make that the inevitable conclusion, but he privileged some of the evidence for the existence of customary international law while putting other evidence aside. It was a mistake to say that the issue was whether the Commission followed customary international law or engaged in progressive development. Mr. Gaja had just raised some questions about whether the analysis had been completed. As Mr. Pellet had just pointed out, the Commission was dealing with different conceptions of international law, and the whole issue could be viewed not as one of exceptions to immunity but of exceptions to a rule of absolute responsibility for serious international crimes.

102. Even if the Commission endorsed the position that there was no customary norm of international law, however, that should not preclude it from accepting the notion that there should be exceptions: it could engage in progressive development, as Mr. Petrič had strongly argued. He was not sure, however, that at the present stage the Commission could concede the point that there was no basis in customary international law for exceptions to immunity. More thorough consideration needed to be given to the matter.

103. But what about the policy arguments or the rationales for exceptions to immunity, which the Special Rapporteur said were "not sufficiently convincing"? There were two paradigms for considering the issue of foreign courts prosecuting individuals for serious international crimes. One, articulated by Mr. Dugard, was that bad people who had committed horrendous crimes were enjoying immunity and would not be brought before an international tribunal or a domestic tribunal within their own State. Thus, a foreign court, exercising all the procedural safeguards of a properly functioning judicial system, should be able to make them accountable and not be barred by a claim to immunity. That was a very appealing image.

104. There was an alternative paradigm, however: that politically motivated prosecutions might be brought against prominent individuals, notwithstanding their immunity,

and without any guarantee of procedural or substantive safeguards. That, of course, was a serious concern, especially if it resulted in manifest injustice, hampered the conduct of foreign relations or undermined the very thing that the institution of immunity sought to protect.

105. What, then, was the Commission to do, faced with competing views of the consequences of establishing exceptions to immunity? The Special Rapporteur had indicated that he would submit a third report and would not propose draft articles on the topic. The Commission would have to decide at some point how it wished to move ahead—with the preparation of draft articles or the submission of additional reports. It had been suggested that a Working Group should be established to deal with the matter, but he was not convinced that decisions on the future direction of work could be taken at the current session; that was essentially a matter for the next quinquennium. Nevertheless, he wished to set out some views on the general direction of future work.

106. First, work on the topic should not be abandoned. If the fundamental issues could be resolved, it was an ideal topic for the production by the Commission of draft articles.

107. Secondly, he did not think that the Commission should let the Special Rapporteur's position that there should be no exceptions to immunity stand. More analysis of the question was required. The Special Rapporteur tended to contrast what he saw as "legal" arguments with those he described as based on logic or expediency, but his legal arguments were often just a different policy perspective. Why, he asked, should attribution of the acts of an individual to a State be different for acts constituting serious international crimes than it was for other acts? Why should the gravity of an act suspend the principle of equality of States on which immunity was based? He treated the argument that acts constituting serious international crimes were not acts of the State as "an artificial and not entirely legal attempt" to support exceptions to immunity. In essence, that argument was just a policy argument that invoked legal concepts. How did the equality of States justify protecting State officials who had committed serious international crimes? Why was it that the policy rationale for immunity required that individuals who had committed serious international crimes should be shielded from prosecution? The basic problem, as Mr. Vasciannie had pointed out, was the lack of an effective international jurisdiction for punishing serious international crimes, and that was why prosecution by foreign States was being contemplated.

108. In any event, the Commission would be expected to do more than simply reach the conclusion that there could be no exceptions in respect of immunity. If the Commission adopted the view that there were no exceptions, that would be seen as contrary to its approach on other issues. Further analysis of the subject of exceptions to immunity was needed, perhaps through further reports by the Special Rapporteur's successor or through a Working Group to be set up in the next quinquennium.

The meeting rose at 1 p.m.

3088th MEETING

Friday, 13 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR⁸² (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the second report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/631).

2. Mr. CAFLISCH said that many comments had already been made and he would therefore confine himself to five remarks. First, the status of the individual as a subject of international law had made great strides since the Second World War, and for that reason individuals today had rights which they could assert at the international level, but they also bore international obligations. Those obligations applied to all individuals, even those who served the State and who acted, or claimed to act, on its behalf. The fact that such an individual could incur criminal responsibility at the international level for certain types of acts did not mean that the State could elude its responsibility for the illegal act perpetrated by the individual. It could not be said that, insofar as responsibility was incumbent on the State, the agent did not bear any responsibility and thus could take shelter behind the protective shield of criminal immunity. The opposite was not true either: if an official was criminally responsible for his act at the international level, that did not mean that the State on whose behalf he claimed to be acting was not. In other words, the international responsibility of a State did not replace the international criminal responsibility of the individual, and the international criminal responsibility of the individual did not exclude the international responsibility of the State. Thus, the two types of responsibility were not mutually exclusive when a State official committed a particularly serious criminal act: the two responsibilities—that of the State and that of the individual—were superimposed.

3. Secondly, the rules relating to jurisdiction should not be confused with those on immunity. The absence of immunity in a given case did not mean that an individual

could be freely prosecuted: the conditions of domestic law and international law with regard to jurisdiction must be met. Otherwise, the court hearing the case would not have jurisdiction, and the question of immunity in the case of international crimes would not arise, even after the advent of universal jurisdiction. Following the line of reasoning of the Institute of International Law in article 3, paragraph (b), of the resolution adopted on 26 August 2005 on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes,⁸³ the exercise of that jurisdiction “requires the presence of the alleged offender in the territory of the prosecuting State”.⁸⁴ Clearly, that condition prevented the immunity of a State official accused of an international crime from leading to multiple, uncontrolled or abusive prosecution.

4. Thirdly, the past 20 years had seen the emergence of international criminal jurisdictions. The international community had been very dedicated to that idea, and it was worth asking whether it really would have been if there was a risk that the counterargument of immunity might be raised at any time.

5. His fourth remark related to the case concerning *Al-Adsani v. the United Kingdom*, which was referred to in the Special Rapporteur’s report and during the debate. Having taken part in that procedure as a judge, he said that in its judgment, the European Court of Human Rights had found that the prohibition of torture set out in article 3 of the European Convention on Human Rights had the character of a *jus cogens* norm. Access to domestic courts, which was guaranteed under article 6 of the Convention, thus also had that character, because at issue was a complaint of a violation of a rule of *jus cogens* on the basis of article 6, which guaranteed access to the courts. Clearly, the Court would have ruled out the criminal immunity of the State in question and its leaders, except that the case concerned a civil claim, and not criminal charges. The majority had then argued that in international law, the exception to immunity was valid solely for criminal matters and not in cases in which “only” civil claims were involved. As he saw it, the majority view had been mistaken, since such a distinction had never been made in practice. In any event, if the Commission’s assumption had been at issue, namely that of a criminal act based on the prohibition of torture, he was convinced that the European Court would not have hesitated to rule out the immunity of the official. Consequently, the *Al-Adsani v. the United Kingdom* case did not substantiate the argument of a continuation of immunity; indeed, it was just the opposite.

6. Mr. Dugard had said that the Commission must choose between a solution that was no longer entirely accepted and one that was not yet entirely accepted. In his own view, that stage had already been reached, or had been more or less, and in contemporary international law, an official who argued that he was acting on behalf of his State and who committed an act contrary to the most elementary precepts of humanity could no longer take refuge in immunity. In any event, even if the law had not yet progressed to that stage, the Commission

⁸² Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

⁸³ Institute of International Law, *Yearbook*, vol. 71 (2005), Session of Krakow (2005), Part II, Seventeenth Commission, p. 297.

⁸⁴ *Ibid.*, p. 299.

would be duty-bound to develop it in that direction. That said, although he did not agree entirely with the Special Rapporteur, he recognized the great quality of his work and agreed that the report was stimulating, interesting, well documented and well structured.

7. Mr. VALENCIA-OSPINA said that the report contained much with which one could agree as well as disagree. In particular, with reference to the Special Rapporteur's conclusions concerning exceptions, he agreed with the conclusion in paragraph 90 regarding the lack of uniformity and the impossibility of identifying a dominant trend towards the emergence of exceptions to the general customary rule of State immunity. He also agreed that, as indicated in paragraphs 91 and 92, the desirability *de lege ferenda* of exceptions to the customary principle should be examined, to which the separate question of displacement by *jus cogens* should be added. The drafting of articles in that area would fall completely within the Commission's mandate of both codification and progressive development. Concerning the suggestion in paragraph 93 to consider elaborating a treaty mechanism, such work might well prove superfluous due to the abolition of the immunity of high officials pursuant to article 27, paragraph 1, of the Rome Statute of the International Criminal Court.

8. On the substance, he directed his remarks to three general points of principle that the area of work was intended to address: the rationales for State immunity; the distinction between "private acts" and "official acts"; and the rationales for exceptions to State immunity for grave international crimes. The basic element that must be borne in mind when considering the question of State immunity was that the legal and practical interests of the State were engaged, not those of the individual. Although the interests of the State might well be practically indistinguishable from those of a particular leader, political grouping or Government, from the legal point of view the interests of an individual official were distinct from those of the State, notwithstanding Louis XIV's famous pronouncement "*L'État, c'est moi*". As was generally acknowledged, that distinction was fundamental when addressing the nuanced problem of State immunity.

9. The core rationale of State immunity was to protect State interests. The practical function of government was protected by ensuring that senior officials could generally travel or otherwise perform their official duties without fear of criminal proceedings instituted by other States. Furthermore, the prohibition on States adjudicating the responsibility of other States derived from the basic principle of State equality. The rationale for that ban was no doubt closely linked to the right of States to impartial judicial or arbitral proceedings to adjudicate their legal rights and duties. In that connection, it must be admitted that a clear doctrine concerning judicial integrity or a "right" to a fair trial for a party had not yet emerged in international jurisprudence. That was unsurprising, given that such a procedural right did not exist in the Statutes of the International Court of Justice, the European Court of Human Rights, the Dispute Settlement Body of the World Trade Organization, the International Centre for Settlement of Investment Disputes or the International Tribunal for the Law of the Sea. However, the ICJ had had occasion to refer to the duty to preserve judicial integrity towards the

parties in its judgment of 2 December 1963 in the *Northern Cameroons* case, and thus State immunity was designed to protect two material interests: the functional capacity of the Government of the State, and the legal interest of the State in impartial judicial proceedings concerning its international responsibilities. In that respect, although the Special Rapporteur acknowledged, in paragraphs 36 and 37, the functional rationale for immunity *ratione personae*, he did not provide an equally clear rationale for immunity *ratione materiae*. Rather, he primarily addressed, in paragraphs 22 to 34, the scope of such immunity and devoted much attention to the distinction between "official" and "private" acts. Nor, it must be recognized, did the jurisprudence provide much assistance in determining the rationale for that type of immunity. It was merely assumed that the principle existed in positive law but that it did not extend to "private" acts. Significant in that regard was the contrast between the rationales for *ratione personae* and *ratione materiae* immunity in the 2002 judgment of the ICJ in the *Arrest Warrant* case.

10. One possible rationale, which was not a normative one as such but rather a legal one, was attribution. Under that approach, international responsibility was posited as exclusive in nature: it could either be attributable to an individual at the level of individual criminal responsibility or it could be attributable to a State at the level of State responsibility, but not both. For example, Antonio Cassese, quoted in the footnote to paragraph 33 of the report, stated that "the reason [is] that the act is legally attributed to the State, hence any legal liability for it may only be incurred by the State".⁸⁵ The logical consequence was that a Head of State (for example) who tortured pursuant to what amounted, albeit in disguised form, to an official policy of torture could not be held individually accountable for the act. The result was that the "I was only following orders" argument, which of course was not a substantive defence for torture, was in effect a procedural defence. That line of reasoning was questionable on both legal and normative lines. With regard to the law, it seemed generally accepted that individual and State levels of responsibility not only dualistically coexisted but also overlapped to cover the same conduct, as Olivier de Frouville noted in Crawford's 2010 book on the law of international responsibility.⁸⁶ Thus, it seemed evident that there were parallel and overlapping levels of responsibility in the shared unlawfulness of the act. At the normative level, that dualistic conception had the clear advantage of avoiding the unsatisfactory outcome of individuals evading criminal responsibility by attributing their acts to the State.

11. The elimination of the principle of attribution from the law of State immunity would, however, be a clear departure from the (admittedly inconsistent) jurisprudence, which had struggled greatly with the concept. It seemed counter-intuitive to conceive that an act need not be proved attributable to the State in order to engage State immunity. He proposed to address that problem briefly in

⁸⁵ A. Cassese, "When may senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium* case", *European Journal of International Law*, vol. 13, No. 4 (2002), pp. 853-875, p. 863.

⁸⁶ See D. Momtaz, G. Cahin and O. de Frouville, "Attribution of conduct to the State", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press (2010).

order to outline how that might be achieved. Before doing so, he wished to point out that his preceding remarks were intended to show that a convincing rationale for immunity *ratione materiae* was yet to be presented.

12. He would seek to demonstrate why the invocation of immunity *ratione materiae* by a former official concerning acts that were both international crimes and internationally wrongful acts was actually contrary to the State's legal interests. As State immunity essentially existed to protect State interests, it was arguable that the entire attribution issue could be usefully eliminated from the law on State immunity *ratione materiae* with respect to those unlawful acts.

13. The issue of whether a particular act of a State official generally entitled to invoke State immunity was an "official" act or a "private" act was prominent in the jurisprudence. It not only underpinned one of the arguments raised for the existence of an exception to immunity, but was also considered as a preliminary matter of attribution. In that respect, paragraph 24 of the second report was particularly apposite: "At the same time, the Special Rapporteur does not see objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other." That categorical assertion notwithstanding, it might be useful to explore further whether there might be grounds for such a distinction. The problem was essentially one of metaphysical overlap between State responsibility and individual responsibility. It might be helpful to consider the problem from the perspective of litigation to better identify their differences.

14. The Commission was not concerned in the current instance with State responsibility. When a national jurisdiction sought to prosecute a State official for grave international crimes, it was seeking to adjudicate on the official's individual responsibility. In principle, the determination of an individual's international criminal responsibility by a national jurisdiction had no legal bearing on the separate question of the international responsibility of that individual's State. Of course, the court's factual and legal findings might be persuasive authority in separate litigation to determine the responsibility of that State, as illustrated in paragraphs 209, 210 and 214 to 224 of the ICJ judgment on the merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. However, as a procedural matter, the State did not sustain *ipso jure* prejudice from individual criminal litigation.

15. That procedural difference was highlighted in the treatment by the ICJ of the jurisprudence of the International Tribunal for the Former Yugoslavia in paragraphs 223 and 227 of the merits judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. The burden of proof, standard of proof and methods of proof between individual and State responsibility differed significantly and had a direct impact on the evidentiary value of the jurisprudence of the Tribunal before the Court, for example concerning the requirement of specific intent in the internationally wrongful act of genocide. Thus, that case demonstrated the litigious distinction between individual and State responsibility.

16. As indicated in article 2 (a) of the Commission's 2001 final draft on responsibility of States for internationally wrongful acts,⁸⁷ attribution was the *sine qua non* of State responsibility. Therefore, private acts did not engage State responsibility. However, attribution was substantively immaterial to individual criminal responsibility. That was an important difference when considering the scenario of a State official being convicted by a national court of a grave international crime as concerning any parallel or subsequent proceedings against that State. Put simply, a new substantive issue, namely attribution, would arise in the latter proceedings that would not have been litigated in the former. Consequently, it was arguable that there was an objective distinction between State responsibility and State immunity when the latter was pleaded in criminal proceedings that concerned individual, not State, responsibility.

17. Paradoxically, the invocation by a State official of State immunity in that context had the greater propensity to prejudice the State in proceedings concerning its own separate responsibility. That was because, attribution of conduct being material to State responsibility but not to individual responsibility, the factual and legal findings of the national court in question concerning attribution could be subsequently invoked against the State. That was a scenario in which the interests of the individual official and those of the State (which must be carefully distinguished) were in direct conflict. It was in the individual's interest to prove that his actions were attributable to the State so that he could benefit from State immunity, and it was in the State's interest to prove that his actions were not attributable to it so as to avoid international responsibility for them.

18. That distinction was important because States were not individuals but, in John Austin's definition, "independent political societ[ies]"⁸⁸ or, as James Crawford put it, independent "territorial units".⁸⁹ An individual might rule a State for decades and, in less than a month, be deposed and subjected to criminal proceedings by a successor Government. Consequently, it was necessary to acknowledge the existence of a convincing normative rationale for State immunity *ratione materiae*. He had offered one possibility, namely to protect States from being prejudiced by having their responsibility adjudicated before the jurisdiction of other States. However, he hoped that the preceding comments had shown that it was arguable that this rationale was not engaged by litigation concerning individual responsibility for grave international crimes committed by State officials. That reasoning might ultimately prove to be wrong, but it might be useful for the Commission to consider it more closely.

19. The distinction between State and individual responsibility was also pertinent for identifying the rationales for an exception to State immunity for grave

⁸⁷ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁸⁸ J. Austin, *The Province of Jurisprudence Determined*, "Lecture VI", London, John Murray, 1832, pp. 198 *et seq.*

⁸⁹ J. R. Crawford, "The criteria for statehood in international law", *BYBIL 1976–77*, vol. 48, No. 1, pp. 93–182, at p. 111.

international crimes. As noted in paragraph 57 of the second report, “[t]he viewpoint, whereby grave crimes under international law cannot be considered as acts performed in an official capacity, and immunity *ratione materiae* does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes, has become fairly widespread”. However, it was worth examining that view in greater detail.

20. The main argument for exceptions to *ratione personae* and *ratione materiae* immunity was that the most serious international crimes should be prosecuted regardless of individual status. In that context, the “most serious international crimes” could be usefully designated, following Cherif Bassiouni,⁹⁰ as the *jus cogens* or *erga omnes* crimes of genocide, torture, aggression, piracy, slavery, war crimes and crimes against humanity. That was not only, as the second report explained in paragraph 56, because *jus cogens* was invoked as one of the principal bases for the existence of an exception to immunity itself, but also because it was the foundation for the exercise of universal jurisdiction.

21. However, the rationales for exceptions to immunity should be considered according to the type of immunity, which raised quite different issues. For immunity *ratione personae*, the argument could be made that there ought to be an exception on the ground that the need for senior State officials to operate without fear of criminal proceedings by another State against them was overridden by the gravity of those norms. In particular, the debate concerning the pre-eminence of *jus cogens* norms over procedural customary norms such as State immunity was well known. Additionally, the lack of State practice might be attributed not to widespread satisfaction with the *status quo* but rather to the fear of violating the current law.

22. On the other hand, there were compelling arguments for the recognition of an absolute right to immunity *ratione personae*. As a juridical matter, it could be argued that that would entail progressive development of international law since, as noted in paragraph 15 of the report, the existing State practice exclusively or virtually exclusively entailed criminal proceedings against former officials. Furthermore, according to paragraph 37, there was no evidence of substantial support among States or in the jurisprudence for any change to the existing consensus on immunity *ratione personae*. Paragraph 64 recalled the argument that had been made that *jus cogens* overrode only substantive norms, not procedural norms. Incidentally, he agreed with the Special Rapporteur’s comment, in paragraph 67 of his second report, that the debate concerning the dispositive effect of *jus cogens* norms impacted upon both *ratione materiae* and *ratione personae* forms of State immunity.

23. On the policy issues, it was arguable that the prejudice sustained by a State suddenly deprived of one of its three senior officials could be immense and, in certain circumstances, irreversible, for example a Minister for Foreign Affairs subjected to criminal proceedings during

important negotiations, or a Head of State or Government in a post-civil war State whose stability depended upon the individual’s leadership. The perspective of, for example, dispute settlement negotiations with an enemy State being disrupted or of civil war emerging from the fall of a Government must be recognized as vital interests of the State. With respect to immunity *ratione personae*, he would not necessarily adopt the prevailing orthodoxy wholesale without examining in detail the competing rationales for derogating from such immunity. It could be that there existed a nuanced solution that reconciled those normative and practical conflicts. For example, it might be possible to prescribe a partial exception to immunity *ratione personae* to allow for State officials to be subjected to proceedings for grave international crimes where the State would not suffer serious and irreparable harm as a consequence.

24. In closing, he wished to address two specific points. The first point was that, regardless of the changes that might be made to immunity *ratione personae*, or lack thereof, uniformity should be ensured between immunity *ratione personae* in general and immunity *ratione personae* from subpoena orders. If a high official broadly had the former, then he should also have the latter. In the *Prosecutor v. Blaškić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia had found, regarding a subpoena order addressed to a Head of State, that high officials were mere agents of a State and their official action could only be attributed to the State, that they could not be the subject of sanctions or penalties for conduct that was not private but undertaken on behalf of a State (para. 38 of the decision), and that, in other words, State officials could not suffer the consequences of wrongful acts which were not attributable to them personally but to the State on whose behalf they acted. As pointed out in the footnote to paragraph 51 of the second report, the Appeals Chamber had noted that exercises of judicial authority of the Tribunal followed similar rules to those of a national court. That position was grounded in both the general immunity *ratione personae* of high officials and the immunity *ratione materiae* of other State officials. The purpose behind the immunity *ratione personae* of the so-called “troika” was both a respect for the principle of sovereign equality—of *par in parem non habet imperium*—and the acknowledgment that any gaps in the immunity of the troika might result in *de facto* subjugation of the official’s home State by preventing the high officials from performing their duties.

25. The same concerns were present in the case of a subpoena to produce evidence or give oral testimony. If a high official could be forced to produce documents, those documents would presumably be State documents which were properly under the control of the sovereign State. With regard to oral testimony, it was a fundamental principle of sovereignty that the Head of State and other officials of the executive branch must be able to communicate freely with subordinates in order to effectively coordinate government affairs. Members of the troika in particular must be able to communicate with their counterparts in other States in order to conduct foreign affairs. While it was possible that one’s own judicial branch—as a coequal branch of government—might be able to subpoena an official of the executive branch, that power could not lie in the hands of the judicial officers

⁹⁰ C. Bassiouni, “International crimes: *Jus cogens* and *obligatio erga omnes*”, *Law and Contemporary Problems*, vol. 59, No. 4 (Autumn 1996), pp. 63–74.

of a foreign State. Moreover, the power to subpoena presupposed a power to enforce the subpoena by means of contempt proceedings. Insofar as the latter power was incident to the former, the former was in violation of immunity *ratione personae*. As pointed out by the Special Rapporteur in paragraph 41 of the second report, no criminal procedures could be initiated against a foreign official that would hamper the exercise of the functions of that official by imposing obligations upon him. It should also be noted that even though the immunity applied to actions that had occurred during the official's service, that immunity was not extinguished upon the official's leaving office. If the official could expect to be called to testify upon stepping down, that would no doubt interfere with his ability to conduct State affairs while in office. Little must be added in order to explain why immunity *ratione materiae* likewise protected other State officials from the subpoena power of foreign courts. As noted by the Special Rapporteur in paragraph 48 of the report, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it had been held that an official who had immunity *ratione materiae* must also have immunity from being summoned to give testimony concerning acts performed by him within the scope of his duties as a State official. The power to subpoena implied a power to sanction, and any cases in which immunity *ratione materiae* applied to other criminal proceedings logically must also apply to subpoena and contempt proceedings.

26. Finally, it appeared that immunity *ratione personae* might apply to high officials beyond the troika. That privilege must extend to other high officials who travelled and conducted foreign affairs in ways comparable to that of a Minister for Foreign Affairs. A minister of defence, for instance, should certainly fall under such a category because, as noted by the Bow Street Court in the *General Shaul Mofaz* judgment, it was a fact that many States maintained troops overseas, and there were many United Nations missions to visit in which military issues played a prominent role. Furthermore, as cited in the last footnote to paragraph 15 of the second report, the French prosecutor had been of the opinion that former United States Secretary of Defense Donald Rumsfeld was immune because he had performed duties that had overlapped with those of a Minister for Foreign Affairs. The precise scope of such immunity deserved continued investigation by the Commission. While it could not be extended to every minor official who travelled abroad, it must be able to cover those whose essential business was to travel and conduct the international affairs of their State.

27. Sir Michael WOOD expressed appreciation to the Special Rapporteur for the high quality of his second report, despite a few omissions, particularly with regard to case law, as the Special Rapporteur himself had noted. He looked forward to his third report on procedural matters, which were a vital part of the topic. The Commission would then have a complete picture of the Special Rapporteur's views on the topic.

28. He also thanked the Secretariat for its excellent 2008 memorandum.⁹¹ Both the preliminary report of the Special

Rapporteur⁹² and the memorandum were valuable sources of information. Perhaps it would be possible to update the memorandum, such as by way of an addendum.

29. He did not agree with most of the criticisms of the second report made during the debate. It was perfectly natural that there were differences of opinion among the members of the Commission, but it hardly assisted the debate to speak, in Manichean terms, of good and evil, responsibility or impunity. Moreover, it was unfair to equate support for immunity with support for impunity or to imply that those supporting *lex lata* were somehow living in the past. As pointed out by Mr. Dugard, the members of the Commission were lawyers, not activists for a particular cause.

30. For the most part, he agreed with the thoughtful comments made the day before by Mr. McRae and Mr. Vasciannie. They, together with Mr. Petrič and Mr. Valencia-Ospina, had indicated agreement with much of what was in the report and had then addressed certain specific points. It went without saying that the subject warranted additional, in-depth study. For example, it might be useful to have a further analysis of past Commission work of relevance to the topic, and other studies on exceptions to immunity, focusing on the practice of States and the decisions of their courts. Such studies should distinguish clearly between *lex lata* and proposals *de lege ferenda*, a distinction highlighted so well by Mr. Vasciannie at the previous meeting. The views of campaigning organizations, private institutions and writers were of course of interest, but needed to be viewed for what they were.

31. The topic under consideration was, unfortunately, one of the areas of international law in which there was a certain amount of wishful thinking. For those who engaged in it, minority judges were right, whatever the court's decision had actually been. In that connection, he fully shared Mr. Pellet's view on the reasoning of the minority in the *Al-Adsani v. the United Kingdom* case. Some would say that the lower court had been right in the *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* case, notwithstanding that it had been overruled by the House of Lords.

32. If the Commission were to choose the option *de lege ferenda*, as Mr. Dugard urged, it must focus, if its work was to be of value, on the practical aspects of the matter, in view of the importance of immunities for relations between States, as already pointed out by Mr. McRae, Mr. Valencia-Ospina and Mr. Vasciannie. Any exception to the customary immunities brought with it the potential for abuse and the potential for serious disruption of international relations, by encouraging "lawfare".

33. The Commission must examine the available materials carefully and critically, as the Special Rapporteur had done in his reports. *Dicta* from case law should not be taken out of context. The *Pinochet* case, for example, was not authority for any general propositions about international law. It concerned the interpretation and application of a specific treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

⁹¹ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

⁹² *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

to which Chile and the United Kingdom, as well as Spain, were parties, and it turned on the effect of the Convention on the immunities of a former Head of State.

34. The Commission must bear in mind a number of important distinctions and precisions. First, immunity from civil jurisdiction and immunity from criminal jurisdiction raised fundamentally different issues. The distinction was neither arbitrary nor artificial; indeed, it was inherent in the topic. The Commission was concerned only with immunity from criminal jurisdiction. Secondly, it needed to distinguish clearly between immunity before international criminal courts and immunity from national criminal jurisdiction. There again, the Commission was concerned only with the latter; the former was usually governed by treaties or by Security Council resolutions. Thirdly, references to “international crimes”, “crimes under international law”, “grave crimes under international law” or crimes that were breaches of *ius cogens* were not particularly helpful, unless the terms were defined.

35. He had several brief comments on three important points arising from the work of the Special Rapporteur and the Secretariat memorandum. First, the Commission should not lose sight of the law on special missions, both the conventional law and especially the customary international law in that field, on which there were a number of interesting domestic court judgments. The law on special missions was of great practical importance in connection with the immunity of State officials, since it was apt to protect at least high-level visitors on official business in a foreign State.

36. Secondly, there seemed to be widespread, although not unanimous, agreement among States and courts on the immunity *ratione personae* of the troika. The judgment in the *Arrest Warrant* case had been strongly criticized by some, but in practice it was accepted as reflecting the current state of the law. In that connection, he drew attention to article 21, paragraph 2, of the 1969 Convention on special missions, which referred to the immunities accorded by international law to the troika as well as “other persons of high rank”. The main question was how to determine what categories of persons were entitled to immunity *ratione personae* in addition to the troika. To do so, it was necessary to consider the rationale of the immunity. It seemed to him, and that was borne out by a number of court decisions, that immunity should at least extend to those members of a Government for whom travel overseas was central to their functions and important if the State was to be represented *vis-à-vis* other States by persons of its choice. In today’s world, a State could not be represented internationally by persons of its choice unless a wider group than the troika was free to travel. He was thinking, for example, of ministers of overseas trade and defence, as well as deputy ministers in the fields concerned.

37. His third point concerned the scope of immunity *ratione materiae* (functional immunity), which seemed to be the most difficult issue under the topic. Which officials, and former officials, had such immunity, and what was its scope? It included those who had been entitled to immunity *ratione personae* once they left

office, as well as those who had been entitled to immunity *ratione materiae*. Functional immunity did not include private acts and omissions. It covered acts performed in their official capacity that were attributable to the State, whether or not they were *intra vires* or lawful under the internal law of the State. At the previous meeting, Mr. Gaja had mentioned an example in which the State concerned had apparently not claimed immunity in respect of the actions of its officials, but that was presumably because it had not wished to acknowledge those actions as its own. That example illustrated the close connection between attribution for the purposes of State responsibility and for the purposes of immunity.

38. Before concluding, he wished to clarify a matter raised earlier in the debate concerning a strange BBC report about the immunity of the Libyan leader and members of his family. Under United Kingdom immigration law, persons entitled to immunity were normally exempt from immigration control upon entering the country. Pursuant to the State Immunity Act of 1978, however, that exemption could be removed. On 26 February 2011, it had been decided to lift the exemption from immigration control that had been conferred upon Mr. Al-Qadhafi and members of his family. Clearly, that had nothing to do with immunity from criminal jurisdiction.

39. With regard to the future work of the Commission on the topic, he agreed with Mr. McRae that the creation of a working group would be premature. Time was needed for reflection. A working group at the current session would simply repeat and entrench the different points of view. It was important to avoid pre-empting decisions which it would be more appropriate for the Commission to take in its new composition at the start of the next quinquennium. The right course would be to see what States had to say on the topic in the Sixth Committee in the autumn, in the light of both the Special Rapporteur’s reports and the current debate. It went without saying that the Commission would be interested in what others had to say, be they NGOs, practitioners or academics. The Commission’s report would fully reflect the debate, thanks to the efforts of the Rapporteur of the Commission and the excellent work of its secretariat. Perhaps some way should be found of putting the summary records of the Commission’s work on its website in time for the debate.

40. Mr. WISNUMURTI expressed appreciation to the Special Rapporteur for his second report, which focused on a number of specific questions, including the important issue of exceptions to the rule on immunity. He shared the view expressed several days earlier by Mr. Dugard that the members of the Commission were independent lawyers who must decide for each topic the best way to proceed in order to produce results. Accordingly, it was essential to bear in mind that the product that the Commission decided to present to the Member States of the United Nations, whether as draft articles or in another form, must be practical for its users and really serve the interests of the international community. That remark applied to the topic under consideration. The Commission should keep all options addressed in the second report open and hold an in-depth debate in order to reach a common ground.

41. The report contained a vast amount of information on State practice, judicial decisions and *opinio juris* on various aspects of the topic, including the scope of immunity *ratione materiae* and of immunity *ratione personae*, relations between immunity and universal jurisdiction and between immunity and the principle of *aut dedere aut judicare*, and exceptions to the rule on immunity, to which the Special Rapporteur had devoted a large part of his report, thereby directing the Commission's attention from the outset to a particular point of view. He hoped that the Special Rapporteur would keep an open mind for different standpoints expressed by members of the Commission.

42. He was in agreement with many of the Special Rapporteur's arguments, which were carefully summarized in paragraph 94 of the second report, and he wished to make a few comments on some of the issues discussed.

43. First, he agreed that the immunity of a State official from foreign criminal jurisdiction in respect of acts performed in an official capacity was the general rule and that its absence in a particular case was the exception to that rule, as noted in paragraph 94 (a). He also endorsed the conclusion in paragraph 94 (b) that State officials enjoyed immunity *ratione materiae* from foreign criminal jurisdiction in respect of acts performed in an official capacity, since those acts were acts of the State which they served itself. That immunity emanated from the sovereignty of the State, which had the right to invoke or to revoke it before the criminal jurisdiction of another State. During the debate, the principle of sovereignty had evolved and continued to do so. Indeed, it had been shaped by State practice and by new values and principles focusing on the need to protect human rights and humanitarian law. The Commission must take that development into consideration in its debates.

44. In his report, the Special Rapporteur had further elaborated the issues of immunity *ratione materiae* and immunity *ratione personae*, which had been discussed in his preliminary report, but the major portion of his report focused on the exception to immunity, which would ultimately affect the scope of immunity. In that connection, he had taken note of the point made by the Special Rapporteur in paragraph 18 of the report that in cases in which former State officials were subjected to or were to be subjected to foreign criminal jurisdiction for acts performed in an official capacity when they had been in office, it was the absence of immunity that had to be proven, and not the existence of immunity. From that flowed the Special Rapporteur's opinion that immunity was a rule existing in general customary international law, while the existence of exceptions had to be proven. That approach was a good starting point for considering the essence of exception to the rule on immunity.

45. After carefully reviewing State practice, judicial decisions and *opinio juris* to determine whether exceptions to the rule on immunity were grounded in customary international law, the Special Rapporteur concluded, in paragraph 94 (n) and (o), that the rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction were not convincing, and he rejected the notion that exceptions to immunity were an emerging

norm of international law. As he saw it, the Special Rapporteur's conclusions were a bit too categorical. The review of State practice, case law and *opinio juris* was a good starting point, but the Commission should bear in mind that its collective responsibility was to go beyond those conclusions. It should overcome its conceptual and ideological differences, especially those concerning the scope and extent of immunity *ratione materiae* and immunity *ratione personae*, in order to strike a balance between immunity flowing from State sovereignty, on the one hand, and the need to prevent impunity, on the other.

46. The Commission agreed that State officials performing acts in an official capacity enjoyed immunity *ratione materiae* from foreign criminal jurisdiction. That immunity extended to acts performed by State officials in their official capacity during the time they held office and also to acts of former officials performed when they had been in office, but it did not extend to acts performed by officials before taking office. However, he did not agree with the view expressed by the Special Rapporteur in paragraph 94 (f) of the report that immunity *ratione materiae* extended to *ultra vires* acts of officials and to their illegal acts. It should be understood that, as immunity emanated from the sovereignty of the State that the official served, the moment an official committed acts that fell outside his mandate, the immunity must cease to exist. He also had doubts regarding the Special Rapporteur's argument in paragraph 94 (e) that an official performing an act of a commercial nature enjoyed immunity from foreign criminal jurisdiction if that act was attributed to the State. It would be useful if the Special Rapporteur could clarify what he meant by "act of a commercial nature".

47. He fully agreed that immunity *ratione personae* applied to highest-ranking officials, namely the President, the Prime Minister and the Minister for Foreign Affairs, but did not believe that it should also apply to other senior officials. The Special Rapporteur was of the view that immunity *ratione personae* was absolute and that it extended to illegal acts committed both in an official and in a private capacity, including prior to taking office. Personally, he had stressed the need to achieve a balance between the principle of immunity, which emanated from national sovereignty, and the prevention of impunity. To do so, the Commission should explore the possibility of subjecting immunity *ratione personae* to certain limitations that reflected the need for justice and accountability in today's world. It should examine the feasibility, from a legal and political perspective, of elaborating norms on those possible limitations as part of the progressive development of international law, norms that provided that immunity *ratione personae* should not extend to crimes which violated peremptory norms of international law, including crimes of genocide, crimes against humanity, war crimes and crimes of aggression committed by high officials in their official or private capacity. It was, however, imperative that immunity *ratione personae* should cease to exist only after the high officials were no longer in office. In that connection, the Commission should always bear in mind the importance of maintaining stability in international relations. Given the highly sensitive nature of the issues involved, the Commission must proceed with extreme caution.

48. The proposal to establish a working group was interesting, but not opportune at the current time. The Commission should hold more discussions in plenary before establishing a working group, in order to be able to provide it with guidelines for its work.

49. Ms. ESCOBAR HERNÁNDEZ acknowledged the coherence and thoroughness of the Special Rapporteur's reports, but did not necessarily agree with their arguments. The debate had highlighted the sensitivities and different approaches of the members of the Commission with regard to the topic, which was not surprising, given the important questions that it raised, including State sovereignty and its scope; the procedural and/or substantive nature of immunity; its absolute or limited nature; the definition of the concept of "official act"; the designation of the high State officials to which immunity applied; the link between international responsibility and impunity; and the distinction between immunity and impunity.

50. The importance of the topic stemmed not only from the essential questions of international law that it raised, but also from two other aspects which needed to be taken into consideration: it was of great interest to States, and it permitted an in-depth analysis of the two pillars of the Commission's mandate, namely codification and the progressive development of international law. In sum, the Commission should have a dual perspective and should take both *lex lata* and *lex ferenda* into account.

51. Given the interest of the topic for the Sixth Committee and for many States, she agreed with other members of the Commission that it might be useful to establish a working group to elaborate a method for examining the question that might also serve as a basis for the Commission's future work in its new composition. Although the Commission had a heavy workload, the topics whose consideration must be completed during the current quinquennium should move forward at a proper pace. In view of the importance of the topic, its examination should not be delayed. Moreover, the establishment of a working group would not be prejudicial to the independence of the new Commission to be elected in autumn 2011; on the contrary, the new Commission could only benefit from a more precise focus for considering the topic.

52. A good approach to the topic would not be possible without taking into account the *de facto*—and, at times, other—relationship that existed between the concepts of immunity and impunity. That question must constitute a vital aspect of the Commission's work, for two reasons: first, because the analysis of that relationship contrasted two essential elements of international law, namely the need to preserve the institution of immunity as an instrument that served the protection of the functions of State in the framework of international relations (and thus served State sovereignty), and the need to preserve the essential values of the international community, and secondly, because both concepts—immunity and impunity—had to do with the question of the international responsibility of both the State and the individual, which could not be left out of an examination of immunity, because in practice it would result in the impossibility—whether temporary or not, or absolute or not—of inferring the criminal responsibility of high State officials.

53. Consequently, an analysis of the topic should be conducted in a way that did not lead to a recognition of techniques of impunity, not only for reasons of principle, but also because there had been a clear and growing trend in contemporary international law towards combating impunity as a way of protecting the fundamental values of the international community. At the international level, that development had resulted above all in a consolidation of the phenomenon of international criminal tribunals, but there was no reason why it should not also have an impact on the exercise of international criminal jurisdiction.

54. The Commission must be careful to ensure that its treatment of the topic did not result, even indirectly, in a strengthening of impunity. It needed to strike a balance between the treatment of immunity and the treatment of impunity. Although immunity could not be allowed to become a kind of impunity in disguise, the institution of immunity fulfilled a function in contemporary international law which could not be understated. The Commission could not ignore that reality. However, the preservation of the immunity of the State or of its civil servants or senior officials could only be understood from the standpoint of function, which necessarily posed the question of the purpose of recognition of immunity. That functional approach must provide important analytical elements when the time came to define not only the subjective scope of that form of immunity (which senior officials benefited from it in the interest of the State?), but also the scope of immunity *ratione personae* and immunity *ratione materiae*. The functional dimension of immunity could also have consequences for the scope of immunity and the determination of possible exceptions to it.

55. In sum, although immunity was functional, it was clear that it should only be recognized to protect functions specific to the bearer of immunity and thus protect functions specific to the State. The consequences of that reasoning for immunity *ratione materiae* could be easily deduced: an act committed by a senior official that might be deemed an offence, in particular if it was an international crime, could hardly be covered by functional immunity, which was recognized exclusively to preserve the functions of the State, notwithstanding the fact that the act in question could be attributed to the State at the level of responsibility.

56. Secondly, it must be borne in mind that the State had an essential function which it could not abandon: it must maintain international relations. That function of the State must also be protected through immunity, including through immunity from criminal jurisdiction. Accordingly, it was clear that officials who exercised that function or who participated in the international representation of the State must be protected from any kind of coercive measure, even when they had committed certain crimes. That explained the definition of responsibility *ratione personae*, which clearly had a broader scope than responsibility *ratione materiae*. The need to protect that specific function of representation of State required a restrictive interpretation of the subjective dimension of immunity. Thus, leaving aside the immunity of diplomatic agents—including those on special mission—and that of consular officials, the number of persons who could benefit from that type of immunity must be as small as possible, and must basically

be limited to the troika: the Head of State, the Head of Government and the Minister for Foreign Affairs.

57. Thirdly, if immunity was functional, it must be limited to the period during which its beneficiary exercised the function to be protected. That applied to both immunity *ratione materiae* and immunity *ratione personae*, given that in both cases the diversity of functions to be protected made it necessary to qualify the manner in which a temporal limitation was applied.

58. The question of the relationship between responsibility and immunity called for a particular remark. The point had been raised by the Special Rapporteur in order to define the concept of “official act”. Any act performed by an official in that capacity (including *ultra vires*) was, according to the Special Rapporteur, attributable to the State and therefore constituted an “official act” and as such was covered by immunity. In that connection, she did not believe that any objection could be made to the fact that *ultra vires* acts performed by a State official were attributable to the State at the level of responsibility. To affirm the contrary would run counter to the current trend in international law. On the other hand, the idea that such *ultra vires* acts could be considered acts of the State (and therefore “official acts”) at the level of immunity was more debatable. If immunity protected a function, in principle, and except in the highly exceptional cases of immunity *ratione personae*, the only acts that would be considered official acts were those performed in the discharge of a particular function and not acts performed by State officials in the context of that function which, for example, were contrary to norms of international law designed to protect essential values of the international community.

59. In making that assertion, she was not maintaining that no relationship existed between international State responsibility and the immunity of State officials from foreign criminal jurisdiction. In fact, she went further, insofar as she believed that a relationship also existed between that immunity and the criminal responsibility, including international, of the individual. However, that relationship came into play for the very specific purpose of modulating or limiting (even temporarily) the exercise of the competence of the State or international institution in order to establish the criminal responsibility of persons who enjoyed immunity. That said, that relationship could not have any impact on the definition of the international responsibility of the State, which, as indicated in the jurisprudence and recognized, for example, in the Rome Statute of the International Criminal Court, was independent of the criminal responsibility that a physical person might incur for the same acts.

60. In sum, although it was possible to attribute certain acts to a State official, it was only relevant at the level of the international responsibility of the State, but not at the level of immunity, since the consequence of immunity was precisely to limit the effects that might derive from a separate responsibility, namely criminal responsibility, which was attributable exclusively to the individual.

61. In closing, she addressed the question of the scope of immunity, which was probably the one for which her position was furthest from the one set out by the Special

Rapporteur in his report. The Special Rapporteur had chosen an absolute approach to both immunity *ratione personae* and immunity *ratione materiae* and had concluded that it could not be deduced from doctrine, jurisprudence or practice that it was possible to formulate exceptions to the rule on immunity, apart from those which might have been established by treaty.

62. As she saw it, the absolute nature of immunity, precisely because of its functional dimension, could not be understood in identical terms depending on whether immunity *ratione personae* or immunity *ratione materiae* was at issue. Whereas in the first case, she could more readily accept the absolute nature of immunity (provided it was limited in time to the period of official functions), in the case of immunity *ratione materiae*, which was necessarily related to the type of act committed by the official who wished to benefit from it, the element of relativity seemed inevitable.

63. Moreover, a tendency had been noted in international practice to introduce exceptions to the rule on immunity from criminal jurisdiction. Most of those examples arose in the context of international criminal jurisdiction, but some could be found in domestic jurisdictions. Be that as it may, exceptions to the general rule of immunity should be treated *de lege ferenda*.

64. Mr. NOLTE said that he would begin by addressing a number of fundamental issues raised by Mr. Dugard and other members. Mr. Dugard had been very critical of the report and had attacked its very premise, and he had urged members of the Commission to acknowledge their role as lawmakers and not to hide behind the “fig leaf” of codification.

65. He came from a country whose officials had in the past committed horrendous international crimes. Germans of his generation saw the Nuremberg trials as a decisive contribution to the development of international law and actively supported the International Criminal Court. He was deeply affected by the international crimes of the day and wanted to help ensure that they did not go unpunished. He was certain that the common goal was to eliminate impunity, and therefore the Commission should avoid framing the debate as taking place between those who were empathetic and future-oriented, on the one hand, and those who were cold-hearted, backward-looking apologists of an outdated concept of State, sovereignty and international law, on the other.

66. In his view, the real question was how the principle of immunity should be implemented and how it could be made to fit within the international legal system as it stood and was developing. It would be too simple to say that the general trend of international law was to recognize that the most serious crimes should not go unpunished and that the immunity of State officials should therefore be considerably restricted or even, as Mr. Dugard preferred, purely and simply abolished. Mr. Vasciannie had rightly pointed out that undue limitations on immunity could lead to serious friction in international relations. The world was not living in 1999 anymore, a time in which it had been assumed that prosecution of international crimes would be restricted to deposed dictators or overthrown perpetrators

of genocide. Today, efforts to prosecute also concerned more ambiguous cases, for example possible war crimes committed by the military forces of developed countries engaged in peacekeeping operations or other unclear situations in a civil war context. He had no objection to subjecting such situations to an international criminal jurisdiction, but doubted whether the international community had sufficient confidence in national criminal proceedings to accept that they should deal with such cases. If national jurisdictions were not considered to be impartial and reliable, that might lead to tensions, and restricting immunity would become counterproductive. Thus, the Commission must recognize today's realities, which must not be painted over by invoking high moral principles. It must strike a balance between different concerns, which in a sense were already reflected in the law but needed to be reassessed. That would enable the Commission to determine which course to take and to examine the different facets of the topic.

67. The Special Rapporteur's second report addressed many important issues, and many aspects of its analysis were convincing. If the Commission decided in favour of a codification exercise with the use of the traditional methods which it applied, for example, to the consideration of reservations to treaties, he would agree with the Special Rapporteur's general approach. However, he found merit in the analysis of *lex lata* put forward by Mr. Gaja and which militated against the very broad scope of functional sovereignty which the Special Rapporteur espoused, although personally he had not fully understood how that analysis fit in with the current state of customary international law. That said, he was not persuaded by the assertion by Mr. Dugard and others that the Commission would depart from its own practice if it followed the Special Rapporteur's approach, nor did he see a conflict between the Commission and the ICJ on the subject of immunity of State officials. On the other hand, the Special Rapporteur should have distinguished more clearly between the immunity of the State itself and the immunity of its officials, as well as between substantive rules and rules on jurisdiction, as proposed by Mr. Pellet. It was not sufficient to say that rules of *jus cogens* took precedence over rules of immunity. The real question was how far the rules on immunity went in the first place. One need not be "hyper-Westphalian" to find that they went further than what Mr. Pellet postulated. On the other hand, they were not as broad in their scope as the Special Rapporteur proposed.

68. The Commission was currently in a difficult situation, and three approaches were conceivable. The first was the one espoused by the Special Rapporteur, and which could be called the codification approach. That risked to expose the Commission to the criticism that it was arresting an important development in customary international law. The second approach was the one defended by Mr. Dugard, who openly called for a progressive development approach. Such an approach risked creating a rift between, on the one hand, those States that felt justified in being able to rely on *lex lata* and, on the other, certain domestic courts that took the Commission's position as an encouragement to interpret the rules of immunity ever more strictly. That might result in more domestic prosecutions and a loss of authority of

international law as a source of law. The third approach, suggested by Mr. Pellet, might be called the progressive development approach in the guise of *lex lata*, which was astute, but also problematic. Mr. Pellet's *lex lata* was not what the Commission usually referred to as *lex lata*. The Commission usually considered all State and other practice, and it did not postulate a rule as *lex lata* simply on the basis of an abstract principle. However, should the Commission decide to change its position, it would probably be difficult to maintain the consensus, which was the basis of the authority that its work enjoyed.

69. Whichever approach the Commission decided to adopt, it would be very difficult to achieve a satisfactory result. That should give cause for thought, because at issue was not only the best approach with respect to the subject of immunity of State officials, but also the need to resolve a question that was vital to the Commission and its standing. That key question risked involving the Commission in an unpleasant dispute at a time when it should be trying to analyse the different aspects of the problem and to decide how much room there was for interpretation by a traditional approach. Mr. Gaja had made a proposal to that effect. The Commission should only seek to progressively develop certain aspects of the law on a solid basis of *lex lata*. The Commission was not a lawmaker in the sense in which Frankfurter⁹³ or the American realist school had understood the term, because it did not have the unquestioned authority of a national legislature or a national judge. Of course, law and its interpretation involved choices, including of a political nature, but such choices were limited. The law was evolving constantly, but that did not justify taking shortcuts by invoking moral imperatives.

70. It would be presumptuous at the current stage for the members of the Commission to try to resolve all the preliminary questions and leave the details to the members of the Commission in the next quinquennium. It would be more useful to draw the attention of States to the debate at its current stage so that they could help the Commission take a decision on which approach to adopt: traditional codification, progressive development or progressive development in the guise of *lex lata*. Like Mr. McRae, he did not see any point in establishing a working group at the current stage.

71. Mr. PELLET said that Mr. Nolte had posed the problem well and that it was in fact necessary to strike a proper balance between *lex lata* and *lex ferenda*. However, it could not be said that they were as different as night and day: there was also dawn and dusk. In a sense, the world was witnessing the twilight of an old norm, that of immunity and impunity, in favour of a new and perhaps more respectable law which militated against immunity. Although it was not the Commission's job to legislate, it could not fail to take that development into account and could not allow itself to await further events. He was well aware that in 2012 there would be a new quinquennium with new members, but he was convinced that the Commission should offer the General Assembly a real choice of options. The debate had shown

⁹³ F. Frankfurter, "Some reflections on the reading of statutes", *Columbia Law Review*, vol. 47, No. 4 (May 1947), pp. 527-546, at p. 529.

the need for a balance. If the Commission limited itself to the introduction of the topic contained in the Special Rapporteur's report, that balance would not be ensured.

72. Mr. PETRIČ said that the image of the Commission and the message that it wished to convey were at issue. It was not the aim of the Commission to leave States "a space" which they could exploit. The Commission must reaffirm that it upheld justice and that perpetrators of grave crimes of international law must not go unpunished: that should be its message.

73. Mr. DUGARD, raising a point of order, said that the Commission could not possibly exhaust such an important topic in the following 45 minutes; sufficient time should be allowed to continue its consideration.

74. The CHAIRPERSON recalled that, as noted by the Special Rapporteur, consideration of the topic would continue in the second part of the session.

75. Mr. HASSOUNA thanked the Special Rapporteur for his report, which had given rise to a stimulating debate in the Commission. The issues raised in the report were sensitive, complex and controversial, in particular the relation between the concept of immunity and the concept of universal jurisdiction, for which no generally recognized definition existed. The topic also addressed the growing number of political trials, legal and diplomatic aspects of sovereignty, international crimes and human rights and, in a much broader sense, the general approach to international law.

76. In dealing with those interrelated issues, the Special Rapporteur had chosen a traditional, conservative approach. He had concluded that, by and large, immunity existed for State officials and was a bar to criminal proceedings, and that there were no well-established exceptions to that rule, even in the case of grave violations of human rights. However, he had wisely left the door open for alternative approaches, taking into account the views of members of the Commission who favoured a more restrictive definition of immunity and a broader scope of exceptions.

77. He was personally of the view that the Commission must bear in mind two sets of considerations: on the one hand, the need to respect the sovereign equality of States and the principle of non-interference in internal affairs enshrined in the Charter of the United Nations, the aim being to ensure the stability of international relations, and, on the other hand, the requirement to protect against flagrant violations of human rights, combat impunity and prevent international crimes. In other words, the legitimate concerns of States must be reconciled with the vital interests of the international community.

78. The only way of doing so was to adopt a balanced approach, one that was based on traditional sources of international law, such as customary law, combined with contemporary developments in international law, two processes which, after all, were closely interrelated.

79. Regardless of the approach chosen, the subject of immunity was one that would continue to raise many

theoretical issues, which the Commission had already examined in great detail, but also posed a number of practical questions that likewise warranted consideration. He would confine himself to three examples. First, the question of who had the power to waive immunity was of great importance. Could a Government in exile waive the immunity of a *de facto* Government? Did it matter if a State attempting to prosecute officials of a *de facto* Government recognized the Government in exile as the *de jure* Government? Could the United Nations Security Council waive immunity for State officials and allow domestic prosecution?

80. Secondly, who determined whether an act was performed in an official or in a personal capacity, the official's State or the courts of the receiving State?

81. Thirdly, if immunity was extended to all actions taken by national courts that were mandatory, how would extradition hearings in a national court be dealt with? Since extradition was a mandatory order in some States, would not those hearings be precluded by existing immunities?

82. The Commission needed to examine all those questions. Some members had proposed the establishment of a working group to that end. That would allow the Commission to engage in an extensive debate, but it would also require the presence of the Special Rapporteur throughout the exercise, which would not be very practical. As he saw it, the Commission should continue the debate in plenary within the remaining limited time of the current session and should then submit to the General Assembly a summary of its debates on the second and third reports with a view to seeking the views and reactions of Member States to the issues raised in the Commission's report. In its new composition, the Commission could devote the time necessary to a more in-depth consideration of the topic.

83. It had been noted that the debates had revealed the existence of very different conceptual approaches among Commission members. Such cultural, legal and professional diversity was the Commission's greatest asset.

84. Mr. GALICKI said it was paradoxical that the Special Rapporteur should have derived a sole, dangerous and not very optimistic conclusion from the extensive analysis of State practice and jurisprudence on which his second report was primarily based.

85. Apart from the question of the scope of immunity of State officials from foreign criminal jurisdiction, the Commission should decide whether exceptions should be made to the rule of immunity. Only when it answered that question could it reach a consensus on the appropriateness and extent of the exercise of a codification of customary international law applicable to the various aspects of the immunity of State officials. Differences of opinion had emerged in the debates in plenary session. In any event, the Commission must support the Special Rapporteur when he wrote, in paragraph 56 of his second report, that "[t]he need for the existence of exceptions to immunity is explained, above all, by the requirements of protecting human rights from their most flagrant and large-scale violations and of combating impunity".

86. The Special Rapporteur's idea of elaborating an optional protocol or model clauses on the limitation or waiver of the immunity of State officials from foreign criminal jurisdiction was worth considering. He fully understood that the Special Rapporteur had not deemed it wise at the current stage to formulate draft articles. That would have been somewhat premature, because it would be preferable first for the Commission to arrive at a joint position on the fundamental question of whether the traditional rule still prevailed over practice, which gave growing importance to exceptions to that rule. He was fully in favour of the proposal to establish a working group to elaborate that position.

87. He expressed gratitude to the Special Rapporteur for having raised in his second report the question of the connections between the institution of the immunity of State officials from foreign criminal jurisdiction and two other important concepts of international criminal law, namely universal jurisdiction and the obligation to extradite or prosecute. He approved in particular the Special Rapporteur's remarks in paragraphs 56 and 79, which would no doubt be very helpful when the Commission continued its work on the topic of *aut dedere aut judicare*.

88. Mr. PERERA said that he agreed with the general thrust of the comments made earlier in the morning by Mr. Nolte and Sir Michael. With regard to the fundamental point of whether exceptions to the rule on immunity should be allowed, it would first be necessary to decide what crimes would justify such exceptions. Should they consist exclusively in core crimes under international law, such as acts of genocide and crimes against humanity, or, to employ the phrase used in the Rome Statute of the International Criminal Court, should they also include other "crimes of international concern"? A second important issue was whether peremptory norms of international law relating to grave human rights violations prevailed over the principle of sovereign immunity because they were a "hierarchically higher" norm, as had been argued in several opinions cited by the Special Rapporteur in his second report. The diversity of views reflected in the report was quite appreciable, and he was grateful to Mr. Caffisch for shedding light earlier in the morning on the majority opinion. Thirdly, there was the very interesting question raised by Mr. Gaja at the previous meeting with regard to international law enforcement treaties, such as the Convention for the suppression of unlawful acts against the safety of civil aviation: would functional immunity preclude the exercise of extraterritorial jurisdiction, or would such instruments require prosecution, even if a State official enjoyed such immunity? As Mr. Gaja had noted, all law enforcement treaties based on the principle of "extradite or prosecute" were silent on the issue of immunity. The question arose as to how silence was to be interpreted in the context of the underlying rationale of those instruments, namely the denial of safe haven to perpetrators of serious international crimes. On the other hand, there was good reason to ask whether silence could be interpreted so broadly. Those were complex issues, and there might be no easy answers. Nevertheless, they called for a critical analysis and a balanced approach by the Commission.

89. The Commission was thus faced with the challenge of reconciling the need to protect the sovereignty of States, which remained at the core of international

law (although that principle was currently undergoing change), the sovereign equality of States and the stability of international relations, on the one hand, with the need to protect core human rights values by making State officials accountable for any grave international crimes that they might have committed.

90. He also recalled the words of caution of Sir Ian Brownlie during the debates in the Commission on the Special Rapporteur's preliminary report, who stressed that an expansion of exceptions to the rule on immunity risked leading to the very disappearance of the institution of immunity.

91. The Commission must also be aware of the negative impact that politically motivated or "reprisal" prosecutions might have on the stability of international relations. In that connection, he referred to the observation formulated by one member of the Commission during the debate on the Special Rapporteur's preliminary report, namely that stability in inter-State relations and rules on immunity protected not only the sovereign interests of States but also the very community values that were safeguarded by human rights. Thus, the contending interests and principles need not necessarily be viewed as opposing choices.

92. Given that further analysis of those complex issues was required, he supported the proposal to establish a working group, but agreed with Mr. McRae that it would be preferable to wait until the next quinquennium to do so, because that would give the Commission the opportunity to take into consideration the views expressed by States in the Sixth Committee.

93. Mr. FOMBA said that he would make a short statement of a somewhat political nature.

94. Many speakers had rightly referred to the qualities of the Special Rapporteur's second report and to the problems which it raised at the practical and theoretical levels. The basic question which arose was the following: what was, would be or should be the state of international law with regard to the overall logical and rational interpretation and interrelationship of the concepts of sovereignty, State representation, responsibility and immunity, and what consequences could or should be deduced from the point of view of *lex lata* or *lex ferenda*? Interesting ideas and proposals had been formulated in that regard, which he could accept in full or in part, and which in any event deserved to be considered in greater depth. As for the actual approach to be adopted, the options proposed should also be examined. He was certain that the Commission would be able to find a way of making tangible, effective and judicious progress in its work on that important and sensitive topic, whether at the current or the next session.

95. Mr. KOLODKIN (Special Rapporteur) said that he intended to introduce his third report at the current session. With regard to the establishment of a working group, he thought that it would be preferable to wait until the next session, which would mark the beginning of a new quinquennium. The composition of the Commission would then be renewed, a new Special Rapporteur would be appointed for the topic and the views expressed by States in the Sixth Committee would enrich the debate.

96. The CHAIRPERSON, speaking as a member of the Committee, said that despite all its qualities, the Special Rapporteur's second report seemed intent on delivering a particular message. The Special Rapporteur had chosen a position, which he had sought to substantiate scientifically, perhaps too systematically, while ruling out anything that might contradict it or shift its emphasis. That was no doubt an excellent approach from an academic point of view, but it was perhaps less in step with the Commission's working method. He was speaking from experience, having himself dared to attempt a similar approach in his fifth report on expulsion of aliens,⁹⁴ in which he had postulated the existence of a "hard core" of human rights.

97. Such an approach lost sight of nuances. It was blind to exceptions. In the current case, it had resulted in the Special Rapporteur submitting a report in which, apart from the sole hypothesis set out in paragraph 94 (*p*), only the "theories" defended by the Special Rapporteur were summarized. The impression arose that the Special Rapporteur concluded that a rule of total or absolute immunity existed in international law, without exceptions, and was accepted in positive law.

98. As he saw it, that conclusion was debatable, because it was based on an initial erroneous hypothesis, namely that the rule of immunity of State officials from foreign criminal jurisdiction was so well established in customary law that it did not need to be demonstrated and, above all, that it continued to be the cornerstone of inter-State relations. In actual fact, what the Special Rapporteur had done was to suggest that that norm was a logical rule stemming from the sovereignty, equality and independence of States and was thus, as asserted in paragraph 18 of the report, "the normal state of affairs".

99. Even assuming, for the sake of argument, that this was true, there was reason to believe that the Special Rapporteur had neglected to place such a norm in the context of contemporary international law, in which the principle of sovereignty was at odds with other fundamental principles.

100. Consequently, before examining the technical aspects of the topic, the Commission had to make a choice of legal policy in the light of the development of international law.

101. The requirement of the protection of certain essential values of the international community, in particular human rights, had transformed contemporary international law. For example, it was on behalf of elementary considerations of humanity, which had begun to emerge in its jurisprudence in the 1950s, that the ICJ, in its 1970 judgment in the *Barcelona Traction* case, had confirmed the existence of *erga omnes* obligations. The emergence in treaty law, and more specifically in article 53 of the Vienna Convention on the law of treaties (hereinafter "1969 Vienna Convention"), of the category of rules of *jus cogens* was part of that development. The question of immunity of State officials from foreign criminal jurisdiction envisaged in the context of current international law posed the problem of the relationship between immunity as a logical principle

stemming from the fundamental principle of the sovereign equality of States, on the one hand, and, on the other hand, the moral imperative of non-impunity imposed by the memory of the "millions of ... victims of unimaginable atrocities that deeply shock the conscience of humanity", to quote the formulation in the preamble to the Rome Statute of the International Criminal Court. At a legal level, that moral imperative resulted in a category of obligations owed to the international community as a whole, the regime of which was established by articles 40 *et seq.* of the Commission on responsibility of States for internationally wrongful acts.⁹⁵ The phrase "the most serious crimes of concern to the international community as a whole" referred to in the antepenultimate paragraph of the preamble to the Rome Statute of the International Criminal Court (to which, as Mr. Dugard had recalled, 114 States were parties), constituted violations of that category of obligations owed to the international community as a whole.

102. That description clearly showed that in terms of legal policy, the main question raised by the topic under consideration was the need to strike a balance between the requirement of stable relations between States and the imperative of combating impunity for "the most serious crimes". If, at the current stage, the idea was formulated that there existed a norm of immunity of State officials from foreign criminal jurisdiction, it must be concluded that this norm was at odds with another norm, the norm which required every State, and thus its officials, to respect the obligations owed to the international community as a whole. It was not a question of a rule and exceptions to the rule, because the rule was neither the immunity nor the responsibility. Whether the rule of immunity was incorporated into the principle of sovereign equality of States—which, logically speaking, was conceivable—or whether it was regarded as a rule of customary international law, it was an objective norm on the same basis as obligations owed to the international community as a whole, with the particularity that those obligations also included peremptory norms, or *jus cogens*, which was not the case with immunity.

103. The treatment of the topic thus consisted in determining in which cases immunity prevailed and in which other cases responsibility for crimes constituting violations of obligations owed to the international community as a whole must prevail.

104. Turning to technical questions to be considered in the framework of the topic and which for the most part had been dealt with by the Special Rapporteur, although sometimes in a manner on which personally he had a number of reservations, he agreed with the substance of most of the analysis and comments of the Special Rapporteur, in particular those set out in paragraphs 22 to 30 of his report, concerning the criterion of attribution of State responsibility and the use of that criterion to determine whether the State official enjoyed immunity *ratione materiae*, as well as those contained in paragraphs 57, 58, 62 and 63. He endorsed the views of those who contended that the nature of peremptory norms of international law determined the legal regime of those norms, including with regard to jurisdiction.

⁹⁵ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁹⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

105. He agreed with most of what the Special Rapporteur referred to as “statements” in paragraph 94 of the report, but he had difficulties or was in partial or total disagreement with paragraph 94 (*d*), which stated that “[c]lassification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct”, the “determining factor” apparently being whether the official was acting in a capacity as such; with subparagraph (*f*), where it was stated that immunity *ratione materiae* extended to the “illegal acts” of officials; with subparagraph (*g*), the formulation of which gave the impression that immunity *ratione materiae* covered all acts, whatever they might be, performed by a State official while in office; with subparagraph (*n*), in which the Special Rapporteur made the debatable assertion that “[t]he various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing”; and with subparagraph (*o*), where it was stated that “it cannot definitively be asserted that a trend toward the establishment of such a norm exists”. The latter conclusion could only be reached because the Special Rapporteur had only put forward arguments in its support. The Special Rapporteur had postulated a theory which he seemed to want to prove at all costs, including by minimizing any arguments that might have contradicted it. That created an uncomfortable feeling about the second report.

106. The Commission would do well to re-examine five questions in detail. First, the basis of the norm of immunity: was it a logical norm inherent in the principle of the sovereign equality of States, or was it a norm of customary international law? If it was a customary norm, it would need to be set off more clearly by defining its scope. From that point of view, the ICJ had not been entirely convincing when, in the *Arrest Warrant* case, it had declared—one could almost say “proclaimed”—the “complete immunity” of a Minister for Foreign Affairs. The Special Rapporteur could also have examined, more carefully than he had, the criticism levelled against the Court in that regard.

107. Secondly, consideration should be given to the relationship between State responsibility and the waiver of the immunity of State officials from foreign criminal jurisdiction: the idea was that State responsibility, in particular for the violation of an obligation owed to the international community as a whole, entailed the waiver of the immunity of its representatives, who ultimately were the perpetrators of the violation. In that case, the State shield disappeared, and the perpetrators of the crime were left to their fate, in other words their criminal responsibility. Of course, the two types of responsibility were different, but they shared the same factual basis: the initial illegal act which incurred the criminal responsibility of the individual or the international responsibility of the State was exactly the same.

108. Thirdly, the relationship between immunity *ratione materiae* and immunity *ratione personae* needed to be examined. The two types of immunity did not operate in parallel in all cases. In some instances, immunity *ratione materiae* and immunity *ratione personae* went hand in hand. The discontinuation of immunity *ratione personae* on account of official functions ceasing to exist

posed the question of whether immunity *ratione materiae* continued to apply to a State official.

109. That should lead the Commission to address the question of immunity *ratione temporis*: did the latter cover acts performed before a State official took office or was acting in that capacity? If so, did such coverage last solely for the beneficiaries of immunity *ratione personae*, or did it also extend to persons who enjoyed immunity *ratione materiae*? Did the benefit of immunity for acts performed before taking office cease to exist with the departure from office?

110. Fourthly, it would be necessary to consider whether the question of immunity arose even in the pretrial phase of the criminal process, as asserted by the Special Rapporteur in paragraph 7 of the report, or rather in the trial phase.

111. Fifthly, there was the question of the connection between universal jurisdiction and the immunity of a State official from foreign criminal jurisdiction. Given the legitimate reactions of most States to the first laws, notably Belgian and Spanish, relating to universal jurisdiction and the amendments to them, he suggested that the Commission examine the question of the connection between jurisdiction or competence for “the most serious crimes” and the circumstances of the particular case. There might be a link of territoriality (the alleged offences took place in the forum State) or a personal link (the alleged offences concerned nationals of the forum State). That would avoid criticism relating to the imbalance of power, the result of which was that officials of weak States could be prosecuted without regard to their immunity in jurisdictions of powerful nations on the basis of allegations of international crimes committed in any country, whereas in general, the opposite was not the case. The ideal, of course, would be a perfect universality of the International Criminal Court, but for that, all States without exception would have to be parties to the Rome Statute of the International Criminal Court. History always repeated itself, and often for the worse. The absolute immunity of State officials from foreign criminal jurisdiction would inevitably create such a risk.

The meeting rose at 1.15 p.m.

3089th MEETING

Tuesday, 17 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute) (concluded)* (A/CN.4/635 and Add.1–3)

[Agenda item 14]

1. The CHAIRPERSON announced that the Commission was required to fill the seat left vacant by the resignation of Mr. Bayo Ojo. The candidate's *curriculum vitae* was contained in document A/CN.4/635/Add.3, and a related communication was contained in document ILC/LXII/MISC.2.⁹⁶ The election would take place, as was customary, in a private meeting.

The meeting was suspended at 10.05 a.m. and resumed at 10.25 a.m.

2. The CHAIRPERSON announced that the Commission had elected Mr. Mohammed Bello Adoke to fill the seat vacated by Mr. Bayo Ojo. On behalf of the Commission, he would inform the newly elected member and invite him to join the Commission.

Effects of armed conflicts on treaties⁹⁷ (A/CN.4/638, sect. C, A/CN.4/644,⁹⁸ A/CN.4/645,⁹⁹ A/CN.4/L.777¹⁰⁰)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

3. Mr. MELESCANU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles adopted by the Drafting Committee on the effects of armed conflicts on treaties, as contained in document A/CN.4/L.777, which read:

EFFECTS OF ARMED CONFLICTS ON TREATIES

PART ONE

SCOPE AND DEFINITIONS

Article 1. Scope

The present draft articles apply to the effects of armed conflict on the relations of States under a treaty.

Article 2. Definitions

For the purposes of the present draft articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether

* Resumed from the 3084th meeting.

⁹⁶ Distribution limited to the members of the Commission.

⁹⁷ At its sixtieth session in 2008, the Commission adopted on first reading a draft of 18 articles and an annex and the commentary thereto (*Yearbook ... 2008*, vol. II (Part Two), chap. V, p. 45, para. 65). At its sixty-first session in 2009, the Commission named Mr. Lucius Caflisch Special Rapporteur on the topic, following the resignation of Sir Ian Brownlie (*Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 229). At its sixty-second session in 2010, the Commission commenced the second reading of the draft articles based on the Special Rapporteur's first report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/627 and Add.1) and of the comments and information received from Governments (*ibid.*, document A/CN.4/622 and Add.1) and referred all the draft articles and the annex to the Drafting Committee (*ibid.*, vol. II (Part Two), chap. II, para. 16).

⁹⁸ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

⁹⁹ *Idem.*

¹⁰⁰ Mimeographed; available from the Commission's website.

embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties;

(b) "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

PART TWO

PRINCIPLES

CHAPTER I

OPERATION OF TREATIES IN THE
EVENT OF ARMED CONFLICTS

Article 3. General principle

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

- (a) as between States parties to the conflict;
- (b) as between a State party to the conflict and a State that is not.

Article 4. Provisions on the operation of treaties

Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.

Article 5. Application of rules on treaty interpretation

The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.

Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.

Article 7. Continued operation of treaties resulting from their subject matter

An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles.

CHAPTER II

OTHER PROVISIONS RELEVANT TO
THE OPERATION OF TREATIES

Article 8. Conclusion of treaties during armed conflict

1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.

2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.

Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation

1. A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty as a consequence of an armed conflict, shall notify the other State party or States parties to the treaty, or its depositary, of such intention.

2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.

3. Nothing in the preceding paragraphs shall affect the right of a party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation.

4. If an objection has been raised in accordance with paragraph 3, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable.

Article 10. Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 11. Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 13. Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in draft article 6.

PART THREE

MISCELLANEOUS

Article 14. Effect of the exercise of the right to self-defence on a treaty

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right.

Article 15. Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

Article 16. Decisions of the Security Council

The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

Article 17. Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Article 18. Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

ANNEX

INDICATIVE LIST OF TREATIES REFERRED TO IN DRAFT ARTICLE 7

(a) Treaties on the law of armed conflict, including treaties on international humanitarian law;

(b) treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(c) multilateral law-making treaties;

(d) treaties on international criminal justice;

(e) treaties of friendship, commerce and navigation and agreements concerning private rights;

(f) treaties for the international protection of human rights;

(g) treaties relating to the international protection of the environment;

(h) treaties relating to international watercourses and related installations and facilities;

(i) treaties relating to aquifers and related installations and facilities;

(j) treaties which are constituent instruments of international organizations;

(k) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) treaties relating to diplomatic and consular relations.

4. The Drafting Committee had undertaken its task in two parts. It had held six meetings at the Commission's previous session, from 14 to 22 July 2010; most of the work had thus been done under the able guidance of his predecessor, Mr. Vázquez-Bermúdez. The Committee had then held two meetings at the current session, on 29 April and 3 May 2011. It had concluded its work on the 18 draft articles and had decided to report to the plenary Commission with the recommendation that the draft articles be adopted on second reading.

5. He paid tribute to the Special Rapporteur, whose constructive approach and patient guidance had greatly facilitated the Drafting Committee's task, and thanked the members of the Committee for their significant contributions and the secretariat for its valuable assistance.

6. The draft articles were structured into three parts. The first was entitled "Scope and definitions", the second "Principles" and the third "Miscellaneous". The draft articles were followed by an annex linked to draft article 7.

7. Draft article 1 established the scope. The Drafting Committee had considered three proposals for that provision. First, it had discussed the possibility of incorporating other provisions relating to the scope of the draft articles, such as draft article 2, subparagraph (b), defining armed conflict, and draft article 3, subparagraphs (a) and (b), indicating which States were to be covered by the draft articles. That would have rearranged the content of several draft articles but introduced no change whatsoever in substance. The Committee had decided to retain the existing structure, however, since it followed a well-established pattern for instruments codifying international law.

8. The Drafting Committee had then turned to an issue raised during the plenary debate, namely the fact that defining the scope of the draft articles as covering treaties between States seemed to exclude multilateral treaties which, although overwhelmingly acceded to by States, also had international organizations as parties.¹⁰¹ The example given was that of the United Nations Convention on the Law of the Sea. The Drafting Committee was of the view that draft article 1 should be reformulated to make it clear that such treaties were indeed covered by the draft articles. A solution had been found in the formula "relations of States under a treaty", which was based on similar wording in article 3, subparagraph (c), of the 1969 Vienna Convention. Accordingly, the draft articles applied to the treaty relations between States, regardless of whether other subjects of international law, such as international organizations, were also parties to the treaty. The point was further clarified through an addition to the definition of treaties in draft article 2.

9. The third issue related to the proposed inclusion of a reference to the application of the draft articles to non-international armed conflicts which, by their nature or extent, were likely to affect how treaties applied between States parties. The idea was to make it clear that not every conflict of a non-international character would affect treaty relations between States and that only those conflicts which, "by their nature or extent", were likely to affect a treaty or treaties were to be covered by the scope of the draft articles. The Drafting Committee, upon reflection, had decided not to include the proposed reference, as the point was already covered by the use of the adjective "protracted" in the definition of armed conflict in draft article 2, subparagraph (b), as well as by draft article 6. It was agreed that the commentary would make it clear that a typical non-international armed conflict should not call into question treaty relations.

10. As for the text itself, the Drafting Committee had changed the earlier phrase "deal with" to "apply to", which was more appropriate for a legal instrument. In addition, it had replaced the words "in respect of" with "on", so that the phrase now read "effects of armed conflict on the relations of States under a treaty". It had also been decided to delete the former concluding phrase, "where at least one of the States is a party to the armed conflict", because it was not the only scenario covered by the draft articles. Instead, an outline of the different hypotheses of armed conflict that fell within the scope of the draft articles was to be included in the commentary to draft article 1. Draft article 1 should be read in the light of draft article 3, which expressly envisaged such hypotheses.

11. The title of draft article 1 remained "Scope".

12. Draft article 2 provided some definitions of terms used in the draft articles.

13. Subparagraph (a) defined the word "treaty". With one exception, the definition remained that which had been adopted on first reading and which was based on the definition in the 1969 Vienna Convention. The Drafting Committee had also decided, as part of the package solution for covering treaties to which international organizations were also parties, to add the following phrase at the end of the definition of treaties: "and includes treaties between States to which international organizations are also parties". That addition did not mean that the draft articles dealt with international organizations, but rather that the participation of an international organization in a treaty did not *per se* exclude the draft articles from applying to the relations between States under that treaty.

14. Subparagraph (b) contained a definition of "armed conflict" that differed from the one adopted on first reading. In his first report, the Special Rapporteur had proposed replacing the first-reading definition with a modified version of the more contemporary one employed by the International Tribunal for the Former Yugoslavia in the *Tadić* decision.¹⁰² The majority of members had supported that proposal during the plenary debate.¹⁰³ The modification was to delete the final clause of the *Tadić* definition, which referred to resort to armed force between organized armed groups within a State. To leave that clause in would be inappropriate in the context of the draft articles.

15. The title of draft article 2 had been changed to "Definitions" so as to align it with the title of Part One.

16. Draft articles 3 to 7, contained in chapter I of Part Two, were central to the operation of the entire set of draft articles. Draft article 3 established the basic orientation of the draft articles: armed conflict did not, in and of itself, terminate or suspend the operation of treaties. Whether there was continuity therefore depended on the circumstances of each case. Draft articles 4 to 7 sought to guide the determination of whether a treaty survived an armed conflict, and they were arranged in order of priority. The first step was to look at the treaty itself. Under draft

¹⁰¹ *Yearbook ... 2010*, vol. II (Part Two), pp. 168–169, para. 203; see also *ibid.*, p. 168, paras. 199–200.

¹⁰² *Ibid.*, vol. II (Part One), document A/CN.4/627 and Add.1, paras. 21 and 30.

¹⁰³ *Ibid.*, vol. II (Part Two), pp. 169–170, paras. 209 and 213.

article 4, if the treaty contained a provision expressly regulating its continuity in the context of an armed conflict, that provision would govern. In the absence of an express provision, resort would next be had, under draft article 5, to the established international rules on treaty interpretation so as to ascertain the fate of the treaty in the event of an armed conflict. If no conclusive answer were found following the application of those two draft articles, the enquiry would then shift to considerations extraneous to the treaty, and draft article 6 provided a number of contextual factors that might be relevant. Finally, the reader was further assisted by draft article 7, which referred to an indicative list of treaties, contained in the annex, the subject matter of which indicated that they continued in operation, in whole or in part, during armed conflict.

17. Draft article 3 recognized the principle that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. The Drafting Committee had held a preliminary discussion as to whether draft article 3 would be best presented in an affirmative formulation, establishing a principle of continuity so as to emphasize the importance of the stability of treaty relations. The Committee had had before it an alternative proposal along those lines. Following an extensive discussion, the Committee had decided to retain the approach adopted on first reading. The purpose of draft article 3 was to make it clear that the existence of an armed conflict did not, in and of itself, affect treaties: whether a particular conflict affected a treaty would be determined in accordance with the draft articles that followed draft article 3.

18. The Drafting Committee had been of the view that instead of adopting a presumption in favour of continuity and then attempting to list treaties or categories of treaties which presumably did not continue, it was preferable to make a simple statement of principle first, so as to dispel any assumption of discontinuity, and then proceed to describe situations where treaties were assumed to continue. It had been felt that the net effect of the latter approach was to strengthen the stability of treaty relations, and that a change in the orientation of draft article 3 would require a significant redraft of the articles that followed, something that the Committee had not been inclined to undertake at such a late stage in the work and without clear instructions from the plenary Commission.

19. In the *chapeau* of draft article 3, the Drafting Committee had replaced the reference to the “outbreak” of an armed conflict with the word “existence”, so as to make it clear that the scope of the draft articles was not limited to armed conflicts that affected treaties at the time of their outbreak: an effect on a treaty could occur later in time. Furthermore, the reference to “outbreak” suggested armed conflicts of an international character, since it was unusual to speak of the “outbreak” of non-international armed conflicts; hence, the word “existence” accorded more closely with the scope of the draft articles.

20. The Drafting Committee had also had an extensive discussion on the Latin term “*ipso facto*”. While the practice was not to use Latin terms when there was a non-Latin equivalent enjoying general agreement, the Committee had not been able to agree on a suitable non-Latin replacement. Accordingly, it had decided to keep the words “*ipso facto*”.

21. The drafting of subparagraphs (a) and (b) had been simplified, no substantive change being intended thereby. The reference to States “parties to the treaty”, as proposed by the Special Rapporteur, had been deleted because it was implied from draft article 1.

22. Finally, the Drafting Committee had looked at a series of proposals for the title of draft article 3. In the end, it had decided that the best solution was for the title to give an indication of the nature of the provision in relation to the entire set of draft articles. The Committee had considered the formulations “basic principle” or “general principle”, and had settled on the latter.

23. Draft article 4 covered a situation when a treaty contained provisions on its continued operation, or non-operation, in situations of armed conflict. Such provisions would, of course, be applicable; accordingly, the Drafting Committee had focused on the placement of the draft article within the whole text and on whether its formulation might be improved.

24. On first reading, the provision had appeared as draft article 7. The Drafting Committee had accepted the Special Rapporteur’s proposal to relocate it immediately after draft article 3, the logic being that the statement of general principle in draft article 3 was followed by several articles providing guidance on how to ascertain the effect of an armed conflict on the treaty. The first such article, draft article 4, indicated that if the answer lay in a provision within the treaty itself, that provision should be followed.

25. The Drafting Committee had proceeded on the basis of the reformulation proposed in the Special Rapporteur’s report, but had decided not to include any reference to “express” provisions, an adjective that was considered redundant. It had also discussed a proposal to refer to “specific” provisions but had decided against it, since specificity was a contextual concept that could give rise to conflicting interpretations in practice. The title of draft article 4 had been shortened, with the deletion of “express”, so that it now read “Provisions on the operation of treaties”.

26. Draft article 5 was a new provision, focusing on the next stage of inquiry when the treaty did not include an express provision on the effect of an armed conflict: resort would then be had to the rules on treaty interpretation. While the provision restated the obvious to a certain extent, it was nonetheless useful to include it so as to clarify the relationship between articles 3, 4, 6 and 7. In particular, its inclusion had arisen out of the discussion concerning whether draft article 6 should refer to the criterion of intention and cite articles 31 and 32 of the 1969 Vienna Convention. That had been a matter of some debate during the consideration of the draft articles on first reading, and the matter had re-emerged now, following a proposal by the Special Rapporteur to resurrect the reference to the criterion of intention.

27. The Drafting Committee was cognizant of the fact that there was no agreement in the plenary Commission on reintroducing the criterion of intention in draft article 6 and that in his closing statement, the Special Rapporteur had distanced himself from his earlier proposal to do

exactly that. There were also divergent views in the Committee, as there had been in plenary, on whether the criterion of intention was reflected in articles 31 and 32 of the 1969 Vienna Convention. In the final analysis, the sense of the Committee was that the interpretation of the treaty through the application of articles 31 and 32 of the Vienna Convention was an inquiry distinct from the consideration of factors external to the treaty that might give an indication of the treaty's susceptibility to termination, withdrawal or suspension in the event of an armed conflict.

28. The question remained as to whether there ought to be a reference to the criterion of intention, in addition to a reference to the rules of interpretation in articles 31 and 32. Upon reflection, the Committee had decided against such a reference, since the framers of treaties rarely provided an indication of their intentions should the parties to the treaties ever become engaged in an armed conflict. Furthermore, giving a prominent place to intention might diverge from the position adopted at the United Nations Conference on the Law of Treaties, namely to provide other criteria so as to limit the possibility that those who applied treaties might rely solely on assertions of intention. Making reference to intention would amount to reintroducing a subjective approach, focusing on the "intention of the parties", when the 1969 Vienna Convention had adopted an objective approach, focusing on the "meaning of the text".

29. Nonetheless, in order to accommodate both views, it had been decided not to refer to the criterion of intention but to make a more general reference to the "rules of international law on treaty interpretation". It was understood that those rules were reflected in the 1969 Vienna Convention and also existed as a matter of customary international law for States that were not parties to that Convention. The Drafting Committee had considered different ways of expressing the concept and had settled on a formulation that did not envisage treaty interpretation as providing the definitive answer, but rather left the door open for the application of draft articles 6 and 7 in situations when interpreting the meaning of the treaty did not yield a conclusive result.

30. The title of draft article 5 was "Application of rules on treaty interpretation", which suggested that the provision was concerned, not with the question of treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation were to be applied with a view to obtaining a result.

31. Draft article 6 provided several factors to be taken into account—the enumeration was not exhaustive—in determining whether a treaty was susceptible to termination or suspension of operation. Such an exercise would be undertaken after resort to draft articles 4 and 5 proved inconclusive. The Drafting Committee's extensive discussion on draft article 6 had resulted in a number of changes. One of the conceptual shifts involved had just been described: the question of the intention of the parties had been delinked with that of the rules on the interpretation of treaties, which had become the subject of draft article 5. That decision had helped to clear the way to agreement on a reformulated draft article 6.

32. In the text adopted on first reading, the word "indicia" had been used at the suggestion of the then-Special Rapporteur. However, that term had not been favoured by many, including members of the Commission and States that had commented on the draft articles. The Drafting Committee was no exception, which was why it had decided to employ the word "factors".

33. The *chapeau* had in large measure been retained as in the first-reading text, except that at the end, the words "resort shall be had to" had been replaced by "regard shall be had to all relevant factors, including", expressly to confirm that the lists of factors in subparagraphs (a) and (b) were non-exhaustive and were to provide help in determining the effect of the armed conflict on treaties. That was confirmed by the use of the term "relevant factors", which established a relative test in that some of the factors might be more relevant than others, depending on the treaty or conflict, as well as by the word "including", introduced to make the point even clearer.

34. The version considered on first reading had comprised two sets of factors: the first, contained in subparagraph (a), related to the rules on treaty interpretation in the 1969 Vienna Convention, while the second, in subparagraph (b), related to both the conflict and the treaty in question, without the two categories being necessarily interrelated. With the removal of the question of treaty interpretation, the Drafting Committee had been able to redistribute the second set of factors between new subparagraphs (a) and (b), the former listing factors relating to the treaty and the latter, factors pertaining to the armed conflict.

35. Subparagraph (a) placed emphasis on the "nature" of the treaty, in particular the treaty's subject matter, its object and purpose, its content and the number of parties thereto. Subparagraph (b) focused on the characteristics of the armed conflict, with the factors suggested being its territorial extent—for example, whether it was on land or at sea, something that could be relevant in ascertaining its impact on air transportation agreements—and its scale, intensity and duration. In addition, given that the scope of the draft articles included conflicts of a non-international character, the degree of outside involvement was mentioned as one of the factors to be taken into account. That new element was intended as a control factor to favour the stability of treaties. The rationale was that non-international armed conflicts could potentially affect the relationship between parties to a treaty: the greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties would be affected, and vice versa.

36. The title of draft article 6 was "Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension".

37. Draft article 7 dealt with the continued operation of treaties resulting from their subject matter and it took a new approach, one that had emerged from a revised proposal by the Special Rapporteur. That proposal had comprised two paragraphs, the first based on the text adopted on first reading, and the second establishing a link to an annex containing a list of treaties the subject matter of which indicated that they continued in operation, in whole or in part, during armed conflict.

38. The Drafting Committee had generally been of the view that the provision adopted on first reading did not add much and should be reformulated to elaborate on the “subject matter” listed in draft article 6, subparagraph (a), as one of the factors to be taken into account in ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. The linkage between draft articles 6 and 7 helped to explain the basis on which the Commission had developed the list and preserved the Special Rapporteur’s idea of including in the draft articles an explicit cross reference to the annex in draft article 7.

39. The commentary would clarify that the effect of the provision was to establish that the outbreak of an armed conflict involved an implication in favour of the continuation of the treaties identified in the annex.

40. The title of draft article 7 had been aligned with the new formulation and now read: “Continued operation of treaties resulting from their subject matter”.

41. Turning to the annex, which related to draft article 7, he said the Drafting Committee had decided to retain it in the draft articles and to locate it at the end, as had been the case on first reading, contrary to the wishes of the Special Rapporteur, who would have preferred its insertion after draft article 7. The Committee had used the recommendations of the Special Rapporteur, both for refining the wording and for the content of the annex. The Special Rapporteur had done further research into the existing case law and had provided a summary of his findings in a short paper. He himself recommended that the Secretariat should be asked to reproduce the Special Rapporteur’s findings as an official document of the Commission, in order to preserve it for the record (A/CN.4/645).

42. For the contents of the list, the Drafting Committee had decided to retain, in large part, the version adopted on first reading. It had decided against transferring some of the categories of treaties into the draft article as a second paragraph, so as to set them apart as a select set of treaties which, by their very nature and importance, would survive an armed conflict. That would invariably have implied a hierarchy of treaties, something that the Drafting Committee felt was not the purpose of draft article 7 and the annex.

43. In terms of additions, the Drafting Committee had accepted the Special Rapporteur’s proposal to include a new item (d), “treaties on international criminal justice”, as well as a new category (j), “treaties which are constituent instruments of international organizations”. The Drafting Committee had decided to delete the entry “treaties relating to commercial arbitration”. The Special Rapporteur’s additional research had confirmed that the inclusion of such treaties was not always supported by relevant practice. Some practice did exist, but it was considered inconclusive. The Drafting Committee had also been of the opinion that there was insufficient agreement in the Commission for including commercial arbitration treaties by way of progressive development. However, the commentary would explain that the treaties mentioned in paragraph (e), “treaties of friendship, commerce and navigation and agreements concerning private rights”, covered investment protection

treaties to the extent that they dealt with private rights. The Drafting Committee had also decided not to include an entry for “*jus cogens* treaties”, as had been proposed in plenary. It took the view that while it was conceivable that treaties might contain provisions enjoying preemptory status under international law, it was not common to refer to such treaties as a category. Finally, the Drafting Committee had decided to retain an entry for “multilateral law-making treaties” and had relocated it higher in the list, in paragraph (c), for presentation purposes.

44. Aside from the inclusion of the word “international” before the phrases “protection of human rights” and “protection of the environment”, in paragraphs (f) and (g), respectively; the deletion of the word “analogous”, considered obscure, before the phrase “agreements concerning private rights” in paragraph (e); and the merging of the references to diplomatic and consular treaties into a single entry, namely paragraph (l), the only significant redrafting had been in paragraph (k): the phrase “settlement of disputes between States by peaceful means” had been replaced by “international settlement of disputes by peaceful means”. The deletion of the words “between States” broadened the scope of the provision so as to include disputes involving other subjects of international law, particularly international organizations. Since such changes implied the settlement of disputes outside the jurisdiction of the ICJ, the Drafting Committee had replaced the reference to the Court at the end of the paragraph with the more generic phrase “judicial settlement”, which was the terminology used in Article 33 of the Charter of the United Nations. The Drafting Committee was of the view that treaty-based mechanisms for the protection of human rights were covered by paragraph (f).

45. Finally, the Drafting Committee had decided to delete all references to “categories” of treaties, a term not typically used in legal texts, for example the 1969 Vienna Convention. The change had been made in both the title and text of draft article 7. A proposal to refer to the “provisions” of treaties had not been accepted.

46. The commentary would make it clear that the list of treaties was indicative in nature, was not presented in any particular order and did not reflect a “hierarchy” of instruments. Furthermore, no *a contrario* interpretation ought to be drawn from the fact that certain types of treaties had not been included in the list, since their survival in the event of an armed conflict would continue to depend on the application of draft articles 4 to 6.

47. The title of the annex was “Indicative list of treaties referred to in draft article 7”.

48. Turning to chapter II of Part Two, he said that draft article 8 concerned the conclusion of treaties during armed conflict. The Drafting Committee had opted to retain the draft article without major changes to the text adopted on first reading but had recognized that the provision was largely expository in nature and its inclusion was not strictly necessary.

49. Paragraph 1 confirmed that armed conflicts did not affect the capacity of States parties to an armed conflict to conclude treaties. The earlier reference to the “outbreak”

of an armed conflict had been replaced by “existence” so as to accord with the changes made in draft article 3. Furthermore, in line with the general policy of not including references to specific treaties, the reference to the 1969 Vienna Convention had been replaced by the more generic “international law”.

50. Paragraph 2 referred to the specific possibility that States might agree *inter se* during an armed conflict on the termination or suspension of a treaty operative between them. The Drafting Committee had retained the formulation adopted on first reading and had added a reference to the possibility of agreement concerning the amendment or modification of the treaty. In so doing, the Drafting Committee had had in mind the position of third States parties to the treaty but not parties to the armed conflict. Such States could conceivably not be in a position to justify termination or suspension of operation, thus leaving them only the possibility to seek modification or amendment.

51. Another issue discussed was the reference to “lawful” agreements in the text adopted on first reading, a phrase considered infelicitous since it suggested *a contrario* the possibility of concluding “unlawful” agreements. Alternatives considered included simply deleting the word or replacing it with “valid”. The Drafting Committee had settled on the former, as the latter could introduce unnecessary confusion.

52. The Drafting Committee had also considered the possibility of locating draft article 8 earlier in the text, after draft article 4, but had decided against doing so in order not to disrupt the sequence of articles 3, 4, 5, 6 and 7.

53. The title of draft article 8 remained “Conclusion of treaties during armed conflict”.

54. Draft article 9 concerned the requirement of notification of termination of or withdrawal from a treaty, or the suspension of its operation, in the event of an armed conflict. The text adopted on second reading included two additional paragraphs based on recommendations by the Special Rapporteur.

55. Paragraph 1 retained the version adopted on first reading, with some drafting changes. The Drafting Committee had sought to align it more closely with article 65 of the 1969 Vienna Convention by deleting the reference to the State “engaged in armed conflict” and with the addition, after the words “operation of that treaty”, of the clarifying phrase “as a consequence of an armed conflict”.

56. The Drafting Committee had decided to retain the text of paragraph 2 that had been adopted on first reading.

57. The key issue concerning paragraph 3 had been the time period for objection. Various suggestions had been made, but the Drafting Committee had opted for the inclusion, after the phrase “to object”, of the words “within a reasonable time”—a time frame that would be determined through the operation of the procedures envisaged in paragraph 4.

58. The Special Rapporteur had proposed the inclusion of the additional phrase “unless the treaty provides

otherwise”. The Drafting Committee had decided against it, however, since it could imply that the treaty was setting an unreasonable time period.

59. Paragraph 4 was new and was based on the version proposed by the Special Rapporteur in paragraph 96 of his first report, with some slight adjustment, including the insertion of a cross reference to paragraph 3. According to paragraph 4, if an objection was raised under paragraph 3, the States concerned would be required to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations.

60. The Special Rapporteur’s proposal for a new paragraph 5 had proved uncontroversial in the Drafting Committee. The paragraph contained a saving clause to preserve the rights or obligations of States with regard to the settlement of disputes, to the extent that they remained applicable in the event of an armed conflict. The Committee had considered the provision useful in order to counterbalance any interpretation of paragraph 4 as implying that States involved in an armed conflict operated from a clean slate when it came to the peaceful settlement of disputes. The adoption of the provision also accorded with the inclusion in paragraph (k) of the annex of treaties relating to the international settlement of disputes by peaceful means. The wording of the provision was based on a proposal made by the Special Rapporteur in his report, with the deletion of a reference to “the incidence of the armed conflict” that had been considered unnecessary.

61. The title of draft article 9 remained “Notification of intention to terminate or withdraw from a treaty or to suspend its operation”. The Drafting Committee had sought to harmonize the draft articles by employing variations of that formulation in draft article 9, paragraph 3; in the title and *chapeau* of draft article 12; and in the text of draft article 15.

62. The Drafting Committee had decided to retain draft article 10 as adopted on first reading. The provision sought to preserve obligations imposed by international law independently of a treaty, regardless of whether the treaty had been affected by a conflict through the application of the draft articles.

63. The title of draft article 10 remained “Obligations imposed by international law independently of a treaty”.

64. Draft article 11 dealt with the separability of treaty provisions. The Commission had introduced the provision towards the end of the first reading, drawing inspiration from article 44 of the 1969 Vienna Convention. The Drafting Committee had decided to retain draft article 11, since it played a key role in the whole text in moderating the impact of the provisions in chapter I by acknowledging the possibility of differentiated effects on a treaty. Other than a slight amendment to refer to the “operation of a treaty”, as opposed to “operation of the treaty”, the Committee had decided not to change the first-reading formulation. The word “unjust” in subparagraph (c) had been queried in the comments received from Governments. The commentary would clarify that this was language used in article 44 of the 1969 Vienna Convention. The Committee had felt it advisable not to introduce any changes in subparagraph (c).

65. The title of draft article 11 remained “Separability of treaty provisions”.

66. Draft article 12 was also based on the 1969 Vienna Convention and dealt with the loss of the right to terminate or withdraw from a treaty or to suspend its operation. The text was substantially the same as that adopted on first reading, with the following changes.

67. At the end of the *chapeau*, the Drafting Committee had decided to include the phrase “after becoming aware of the facts” so as to align the provision more closely with its counterpart in the 1969 Vienna Convention, namely article 45. For the same reasons, the words “shall have” and “must” had been introduced in subparagraphs (a) and (b).

68. The Drafting Committee understood the qualifying phrase in the *chapeau*, “after becoming aware of the facts”, as relating not only to the existence of an armed conflict, but also to the practical consequences thereof in terms of the possible effect of the armed conflict on a treaty. That point would be further illustrated in the commentary. The Committee had considered making a reference to “relevant facts”, but had decided against it.

69. The title of draft article 12 remained “Loss of the right to terminate or withdraw from a treaty or to suspend its operation”.

70. Draft article 13 dealt with the revival or resumption of treaty relations subsequent to an armed conflict. The text was a combination of draft article 18 as adopted on first reading, the substance of which was now reproduced in paragraph 1, and the first-reading text of draft article 13, which was now to be found in paragraph 2.

71. The Drafting Committee had considered and accepted paragraph 1 on the basis of a proposal made by the Special Rapporteur in his first report (para. 114). It dealt with situations analogous to “novations”, a term from the law of contracts: the revival, subsequent to an armed conflict, of treaties that had been terminated or whose operation had been suspended. It was anticipated that States parties would enter into agreements for that purpose.

72. Paragraph 2 was based on the version adopted on first reading, the only change being the replacement of the word “indicia” with “factors”, by way of aligning the text with draft article 6. The paragraph confirmed that the resumption of the operation of a treaty was to be determined in accordance with the factors listed in draft article 6.

73. The title of draft article 13 was “Revival or resumption of treaty relations subsequent to an armed conflict”.

74. Draft article 14 dealt with the effect of the exercise of the right to individual or collective self-defence on a treaty. The text was substantially the one adopted on first reading, but the Drafting Committee had decided to refine it through the inclusion of the adjective “inherent” before “right”, thereby aligning it with Article 51 of the

Charter of the United Nations. A suggestion that the reference to the Charter of the United Nations should be replaced by a more general formula (“in accordance with international law”) had not been adopted on the grounds that it was the Charter of the United Nations that provided the contemporary legal framework for the exercise of the right of self-defence. The Drafting Committee had further decided to include, after the words “operation of a treaty”, the phrase “to which it is a party insofar as that operation is”, so as to inject an element of relativity, the idea being that a treaty might only be partly incompatible with the exercise of the right.

75. In his report, the Special Rapporteur had proposed the inclusion of an opening phrase to make the provision subject to draft article 7, but he had subsequently distanced himself from his proposal, and the Drafting Committee had decided not to take it up.

76. The title of draft article 14 was “Effect of the exercise of the right to self-defence on a treaty”. The title no longer included the earlier reference to “individual or collective”, which had been deleted by way of streamlining the text, although the Committee considered the concept to be implied in the words “right to self-defence”.

77. Draft article 15 dealt with the prohibition of benefit to an aggressor State from the application of the draft articles. The prohibition had generally been endorsed, and the only matter faced by the Drafting Committee had been whether to keep the text as adopted on first reading, namely with a limited reference to aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974, or to adopt a broader formulation referring to resort to force in violation of Article 2, paragraph 4, of the Charter of the United Nations.

78. Divergent views had been expressed during the plenary debate, but according to the Drafting Committee’s sense of those views, the majority of members had been in favour of retaining the narrower version, or at least, there was insufficient support to deviate from the position taken at first reading. Accordingly, the first-reading formulation of draft article 15 had been adopted, with precision added by the insertion of the phrase “that results from the act of aggression” after “armed conflict”.

79. The title of draft article 15 remained “Prohibition of benefit to an aggressor State”.

80. Draft article 16 sought to preserve the effects of decisions taken by the Security Council under the Charter of the United Nations. In the first-reading text, it had immediately preceded what was now draft article 15, but it had been placed after draft article 15 so as to better group it with the other saving clauses at the end of the draft articles.

81. Several changes had been made to the text adopted on first reading. First, the Drafting Committee had replaced the words “legal effects of” by “relevant”, because not all decisions of the Security Council had legal effects: what was at issue was those decisions that were relevant to the application of the draft articles. The

Drafting Committee had further refined the wording by turning “decisions of the Security Council” into “decisions taken by the Security Council”. Finally, the first-reading text had referred exclusively to decisions taken in accordance with “provisions of Chapter VII” of the Charter of the United Nations: that restriction had been deleted out of recognition that the Security Council acted under other provisions of the Charter of the United Nations, including Article 94 on the enforcement of judgments of the ICJ. It was assumed that decisions concerning an armed conflict taken by the Security Council under Chapter VII would be relevant to the application of the draft articles, but there might be other decisions by the Security Council, taken under other provisions of the Charter of the United Nations, that might also be relevant.

82. The title of draft article 16 remained “Decisions of the Security Council”.

83. The Drafting Committee had adopted draft article 17, which preserved the application of the laws of neutrality, in the form adopted on first reading, without change.

84. The title of draft article 17 remained “Rights and duties arising from the laws of neutrality”.

85. Draft article 18 was the last of the saving clauses. It sought to preserve a number of the grounds for termination, withdrawal from or suspension of treaties provided for in the 1969 Vienna Convention. The formulation adopted on first reading had been restructured into a single paragraph and retained, with one change. On first reading, the Commission had included the agreement of the parties as one of the alternative grounds for termination, withdrawal or suspension, but the Drafting Committee had deleted it in the light of the inclusion of new provisions in draft article 4 on the operation of treaties.

86. The title of draft article 18 remained “Other cases of termination, withdrawal or suspension”.

87. Having concluded his presentation of the first report of the Drafting Committee, he expressed the hope that the Commission would be in a position to adopt the draft articles on the effects of armed conflicts on treaties on second reading.

88. The CHAIRPERSON drew attention to the recommendation by the Chairperson of the Drafting Committee that the supplementary research into existing case law undertaken by the Special Rapporteur in connection with the annex to the draft articles should be reproduced as an official document of the Commission. If he heard no objection, he would take it that the Commission endorsed that recommendation.

It was so decided.

89. The CHAIRPERSON invited the Commission to adopt the draft articles on the effects of armed conflicts on treaties, as contained in document A/CN.4/L.777, on second reading.

PART ONE. SCOPE AND DEFINITIONS

Draft articles 1 and 2

Draft articles 1 and 2 were adopted.

PART TWO. PRINCIPLES

CHAPTER I. OPERATION OF TREATIES IN THE EVENT OF ARMED CONFLICTS

Draft articles 3 to 7

Draft articles 3 to 7 were adopted.

CHAPTER II. OTHER PROVISIONS RELEVANT TO THE OPERATION OF TREATIES

Draft articles 8 and 9

Draft articles 8 and 9 were adopted.

Draft article 10

90. Mr. PELLET said that the translation into French of the phrase “shall not impair in any way the duty of any State” by the words “*ne dégagent en aucune manière un État de son devoir*” was infelicitous. That text should be replaced by the phrase “*n’affectent en aucune manière le devoir d’un État*”.

91. Mr. CAFLISCH (Special Rapporteur) endorsed that proposal.

Draft article 10 was adopted, subject to that editorial amendment to the French text.

Draft articles 11 to 13

Draft articles 11 to 13 were adopted.

PART THREE. MISCELLANEOUS

Draft article 14

Draft article 14 was adopted.

Draft article 15

92. Mr. SABOIA said that the Chairperson of the Drafting Committee had reported that, for the wording of draft article 15, the Drafting Committee had favoured a narrow reference to aggression as defined in General Assembly resolution 3314 (XXIX). In his own view, draft article 15 was quite broad in scope, referring as it did to both General Assembly resolution 3314 (XXIX) and to the provisions of the Charter of the United Nations on the prohibition of the use of force.

93. Mr. NOLTE said that he had always understood the term “aggression” to be somewhat narrower than the prohibition of the use of force in Article 2, paragraph 4, of the Charter of the United Nations.

94. Mr. MELESCANU (Chairperson of the Drafting Committee), speaking as a member of the Commission, said that his interpretation of the text adopted for draft article 15 was that it incorporated all the definitions of aggression contained both in the Charter of the United Nations and in General Assembly resolution 3314 (XXIX).

95. Sir Michael WOOD said that he took the view that nothing in draft article 15 or in the Commission's discussion thereof in any way affected the international law on the use of force and on aggression.

Draft article 15 was adopted.

Draft articles 16 to 18

Draft articles 16 to 18 were adopted.

ANNEX

The annex was adopted.

96. The CHAIRPERSON said he took it that the Commission wished to adopt on second reading the titles and texts of the draft articles on the effects of armed conflicts on treaties as a whole, subject to an editorial amendment to the French text of draft article 10.

It was so decided.

Organization of the work of the session (continued)*

[Agenda item 1]

97. Ms. JACOBSSON (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, and Mr. Perera (*ex officio*).

The meeting rose at 11.45 a.m.

3090th MEETING

Friday, 20 May 2011, at 10.05 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (continued)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

REPORT OF THE WORKING GROUP ON RESERVATIONS TO TREATIES

1. The CHAIRPERSON invited the Chairperson of the Working Group on reservations to treaties to report on the work of the Working Group.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) said that at its 3080th meeting, held on 26 April 2011, the Commission had decided to establish a Working Group on reservations to treaties in order to finalize the Guide to Practice on Reservations to Treaties at the current session (as envisaged in paragraph 45 of the report of the Commission on the work of its sixty-second session¹⁰⁴).

3. The Working Group had held 14 meetings, from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, during which it had been able to finalize the whole set of guidelines constituting the Guide to Practice, the text of which was reproduced in document A/CN.4/L.779.

4. He paid tribute to the Special Rapporteur on reservations to treaties, Mr. Alain Pellet, whose mastery of the subject and guidance had greatly facilitated the efforts of the Working Group. He also thanked the members of the Working Group for their active participation and the secretariat for its assistance.

5. In accordance with its mandate, the Working Group had revisited the draft Guide to Practice as provisionally adopted by the Commission at the previous session with a view to finalizing the text by taking into account, where appropriate, the observations made by Governments. The Working Group had also made a number of linguistic and technical changes to the text. Furthermore, in order to facilitate the use of the Guide to Practice, it had been agreed that the structure of some sections should be slightly altered, and that had led to the renumbering of several draft guidelines and sections. In performing its tasks, the Working Group had relied, *inter alia*, on a document prepared by the Special Rapporteur containing his proposals for possible modifications to the text of the draft guidelines in the light of the written comments received from Governments (A/CN.4/639 and Add.1) and of the observations made by Governments during the debate in the Sixth Committee ever since the Commission had begun its consideration of the topic at its forty-seventh session, in 1995.

6. He would present only the main changes made by the Working Group to the text of the draft guidelines as provisionally adopted by the Commission and to the structure of certain sections of the Guide to Practice. However, he would not describe those changes that were of a purely technical or linguistic nature.

* Resumed from the 3085th meeting.

* Resumed from the 3080th meeting.

¹⁰⁴ *Yearbook ... 2010*, vol. II (Part Two), p. 19.

7. In Part 1 of the Guide to Practice, the Working Group had decided to delete draft guideline 1.1.1, entitled “Object of reservations”, and to move its content into the definition of reservations provided in draft guideline 1.1 by adding a second paragraph to the latter. After duly considering the merits of the comments received from Governments, the Working Group had decided to simplify Part 1 of the Guide by deleting some of the draft guidelines provisionally adopted by the Commission, on the understanding that the relevant elements would be addressed, as appropriate, in the commentary. Thus, the Working Group had deleted draft guideline 1.1.2, dealing with the instances in which reservations could be formulated, since it had been felt that the issue had already been covered in the definition of reservations. Similarly, the Working Group had agreed on the deletion of some of the draft guidelines (1.4.1 (Statements purporting to undertake unilateral commitments), 1.4.2 (Unilateral statements purporting to add further elements to a treaty) and 1.4.4 (General statements of policy)) that provided examples of unilateral declarations which were outside the scope of the Guide to Practice. Those examples would be referred to in the commentary to draft guideline 1.1. Moreover, the Working Group had decided to merge draft guidelines 1.4.6 (Unilateral statements made under an optional clause) and 1.4.7 (Unilateral statements providing for a choice between the provisions of a treaty), as provisionally adopted by the Commission, into a single provision which had become draft guideline 1.5.3, entitled “Unilateral statements made under a clause providing for options”.

8. In line with the conclusion that the Commission had reached with respect to the treatment of conditional interpretative declarations in the Guide to Practice,¹⁰⁵ the Working Group had supplemented the definition of those declarations, now provided in draft guideline 1.4 (Conditional interpretative declarations), by indicating that conditional interpretative declarations were subject to the rules applicable to reservations. Consequently, all other draft guidelines which dealt specifically with conditional interpretative declarations and which appeared in square brackets in the text provisionally adopted by the Commission had been deleted from the Guide to Practice. That applied to all sections of the Guide.

9. As most of the modifications made by the Working Group to the draft guidelines in Part 2 of the Guide to Practice were of a technical or linguistic nature, he would not describe them now. With respect to terminology, the Working Group had, after some discussion, agreed on the use of the term “right” (to formulate a reservation, an objection, an acceptance, etc.) instead of the word “freedom” which appeared in the guidelines provisionally adopted by the Commission. The Working Group had considered that the term “right” was more neutral and more commonly used in the context. The Group had also agreed on the deletion of draft guideline 2.1.8, entitled “Procedure in case of manifestly impermissible reservations”, in view of the negative reactions of various Governments to that provision, which was regarded, *inter alia*, as purporting to confer on the depositary a role that went beyond its functions as described in the 1969 and 1986 Vienna Conventions.

10. With respect to the late formulation of objections to a reservation, addressed in the guidelines in section 2.3, the Working Group had agreed on the inclusion of a new draft guideline, 2.3.2, stating that an objection to a reservation that was formulated late must be made within 12 months of the acceptance, in accordance with draft guideline 2.3.1, of the late formulation of the reservation.

11. As to the withdrawal of reservations, the model clauses that accompanied draft guideline 2.5.8 as provisionally adopted by the Commission, on the effective date of the withdrawal of a reservation, had been deleted on the understanding that reference would be made to relevant examples in the commentary to that guideline.

12. The Working Group had considered it necessary to revise the definition of objections to reservations provided in draft guideline 2.6.1 in order to cover the various possible scenarios with regard to the effects that an objection might purport to produce. The wording finally retained was in line with that of draft guideline 4.3 (Effect of an objection to a valid reservation). The Working Group had also been of the view that draft guideline 2.6.2, which provided a definition of objections to the late formulation or widening of the scope of a reservation, could be deleted while retaining an appropriate explanation in the commentary to draft guideline 2.6.1 (Definition of objections to reservations). Furthermore, the Working Group had agreed on the deletion of draft guideline 2.6.14 on conditional objections, which addressed the case of an objection to a specific potential or future reservation; it had been felt, among other things, that the inclusion of such a provision might be a source of confusion for the reader of the Guide to Practice.

13. Finally, in response to a suggestion made by a number of States, the Working Group had decided to delete paragraph 2 of draft guideline 2.9.9, entitled “Silence with respect to an interpretative declaration”. The commentary would still provide some indications regarding the cases in which silence might be relevant in relation to the approval of an interpretative declaration.

14. With respect to Part 3 of the Guide to Practice, entitled “Permissibility of reservations and interpretative declarations”, the Working Group, after careful consideration, had agreed to retain the word “permissibility” (in French, “*validité substantielle*”) in the corresponding guidelines, since they referred to the substantive conditions for the validity of reservations, interpretative declarations and reactions thereto. In contrast, the term “validity” (in French, “*validité*”) was used in other guidelines in the Guide to Practice where reference was made to both the substantive and formal conditions of validity. The approach followed by the Working Group was in line with a decision adopted by the Commission at its fifty-eighth session with respect to the meaning that should be given to the terms “permissibility” and “validity” in the Guide to Practice.¹⁰⁶

15. The Working Group had decided to renumber the guidelines that immediately followed draft guideline 3.1.5,

¹⁰⁵ See *Yearbook ... 2009*, vol. II (Part Two), pp. 82–83, paras. 78–79 and 82.

¹⁰⁶ *Yearbook ... 2006*, vol. II (Part Two), pp. 143–144, paragraphs (2) and (7) of the commentary to Part 3 of the Guide to Practice (Validity of reservations and interpretative declarations).

on the incompatibility of a reservation with the object and purpose of the treaty, in order to convey the idea that they were to be regarded as illustrations of draft guideline 3.1.5. The Working Group had also decided to simplify the wording of draft guideline 3.1.8, concerning reservations to a provision reflecting a customary rule, a provision that had been renumbered 3.1.5.3, by deleting the second paragraph, which indicated that such a reservation did not affect the binding nature of the customary norm. That element would be appropriately addressed in the commentary. Moreover, the Working Group had been of the view that the principle according to which a reservation could not exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law could be usefully addressed in the commentary, there being no need for a specific guideline on that point. Thus, the Working Group had agreed to delete draft guideline 3.1.9 (Reservations contrary to a rule of *jus cogens*) as provisionally adopted by the Commission.

16. Draft guideline 3.1.5.6, entitled “Reservations to treaties containing numerous interdependent rights and obligations”, was based on draft guideline 3.1.12, provisionally adopted by the Commission, which addressed the issue of reservations to general human rights treaties. The Working Group had been of the view that the substance of that guideline could be retained while avoiding a reference to the rather ambiguous notion of “general human rights treaties” and while making it clear that the issue addressed in the guideline related, in general terms, to the need to take into consideration the interdependence between the numerous rights and obligations set out in certain treaties in determining the compatibility of a reservation to such treaties with their object and purpose.

17. Draft guideline 3.2.3 (Consideration of the assessments of treaty monitoring bodies), as finalized by the Working Group, was a reformulation of the corresponding guideline that had been provisionally adopted by the Commission. However, the reference to a duty to cooperate with the treaty monitoring bodies had been omitted in the new text, which referred only to the consideration to be given by States and international organizations to an assessment by a monitoring body of the permissibility of a reservation.

18. Taking into consideration the negative views expressed, for various reasons, by many Governments about the soundness of draft guideline 3.3.3 concerning the effect of collective acceptance of an impermissible reservation (A/CN.4/639 and Add.1), as provisionally adopted by the Commission at the previous session, and also considering the concerns raised by the Human Rights Committee in relation to that provision, in view of its potential impact on the Committee’s capacity to make effective assessments of the permissibility of reservations, the Working Group had agreed to delete the draft guideline.

19. Following a suggestion made by the Special Rapporteur in response to the comments of States about the formulation of draft guideline 3.4.1, as provisionally adopted by the Commission, on the permissibility of the acceptance of a reservation,¹⁰⁷ as well as its relations with

other draft guidelines, the Working Group had modified the guideline so as to indicate that the acceptance of a reservation was not subject to any condition of permissibility. Concerning, in particular, the question of the acceptance of an impermissible reservation, it had been felt that the real issue to be addressed was not the permissibility of the acceptance itself, but rather the absence of effect of such acceptance, as clearly stated in draft guideline 4.5.2, paragraph 1.

20. With respect to draft guideline 3.5 on the permissibility of interpretative declarations, the Working Group had opted for the deletion of the reference to the incompatibility of an interpretative declaration with a peremptory norm of general international law. The majority of the members had been of the view that the issue of the effects, or absence of effects, of an interpretative declaration that was contrary to a peremptory norm of general international law could be adequately addressed in the commentary, there being no need to refer to such incompatibility as specific grounds for the impermissibility of the interpretative declaration.

21. Furthermore, concerning the permissibility of reactions to interpretative declarations, the Working Group had agreed to delete draft guidelines 3.6.1 (Permissibility of approvals of interpretative declarations) and 3.6.2 (Permissibility of oppositions to interpretative declarations), provisionally adopted by the Commission, on the understanding that the relevant explanations concerning the scenarios that were addressed therein would be given in the commentary to draft guideline 3.6.

22. Turning to Part 4 of the Guide to Practice, entitled “Legal effects of reservations and interpretative declarations”, he said that the Working Group had made some substantive changes to its provisions.

23. First, draft guideline 4.2.6, entitled “Interpretation of reservations”, was new. Following a suggestion made by the Special Rapporteur, the Working Group had agreed on the usefulness of including in the Guide to Practice a provision addressing that issue in general terms. The guideline read: “A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.” Those various elements, as well as the need to consider the unilateral character of a reservation for purposes of its interpretation, would be addressed in the commentary.

24. Draft guideline 4.3.2, concerning the effect of an objection to a reservation that was formulated late, also represented an addition to Part 4 of the Guide to Practice. However, the text of the guideline corresponded, with minor changes, to that of draft guideline 2.3.2 (Acceptance of the late formulation of a reservation) as provisionally adopted by the Commission.¹⁰⁸

25. Draft guideline 4.4.3, concerning the absence of effect of a reservation on a peremptory norm of general

¹⁰⁷ *Yearbook ... 2009*, vol. II (Part Two), p. 83, para. 82.

¹⁰⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 189–190.

international law (*jus cogens*), had been supplemented by an additional paragraph that read: “A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.”

26. The Working Group had devoted special attention to draft guideline 4.5.3. The guideline dealt with the complex and sensitive issue of the status of the author of an invalid reservation in relation to the treaty, an issue addressed in draft guideline 4.5.2 as provisionally adopted by the Commission at its previous session. Based on a proposal made by the Special Rapporteur, the Working Group had decided to restructure and reformulate the provision in an attempt to reconcile, to the extent possible, the divergent views expressed by Governments on the issue (A/CN.4/639 and Add.1).

27. The text of draft guideline 4.5.3 as finalized by the Working Group comprised four paragraphs. Paragraph 1 stated the principle that it was the intention of the reserving State or international organization that determined the status of the author of an invalid reservation in relation to a treaty—in other words, whether the author of the invalid reservation should be considered to be bound by the treaty without the benefit of the reservation, or should not be considered to be bound by the treaty. Paragraph 2 enunciated the positive presumption according to which the author of an invalid reservation was considered a contracting State or a contracting organization without the benefit of the reservation unless it had expressed a contrary intention or such an intention was otherwise established. While paragraph 3 set out the principle that the author of an invalid reservation might express, at any time, its intention not to be bound by the treaty without the benefit of the reservation, paragraph 4—which was of a recommendatory nature—addressed the specific case in which a treaty monitoring body expressed the view that a reservation was invalid; in such a case, if the author of the invalid reservation intended not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of 12 months from the date on which the treaty monitoring body made its assessment regarding the invalidity of the reservation. A view had been expressed that, because of its complexity and the sensitivity of the issues that it raised, draft guideline 4.5.3 deserved further consideration by the Commission.

28. Turning to Part 5 of the Guide to Practice, concerning the succession of States, he said that no specific drafting suggestions had been made by Governments on the subject. That said, the English text of the title of Part 5 and, as appropriate, of section titles had been slightly modified by the Working Group so as to refer to reservations, acceptances of reservations, objections to reservations and interpretative declarations “in cases of succession of States” (and no longer “in the case of”). It had been felt that the use of the plural would better reflect the diversity of cases of succession that were covered in Part 5.

29. In draft guideline 5.1.2 (Uniting or separation of States), paragraph 2, the Working Group had inserted a reference to the widening by the successor State of the scope of a reservation formulated by the predecessor State. It had appeared logical to the Working Group that, in those

cases in which the right of the successor State to formulate a new reservation was to be excluded, the widening by the successor State of a reservation that had been formulated by the predecessor State should likewise be excluded. Furthermore, the Working Group had replaced draft guideline 5.1.4, which had referred to the “Establishment of new reservations formulated by a successor State”, by a new draft guideline 5.4 dealing, in more general terms, with the legal effects of reservations, acceptances of reservations and objections to reservations in cases of succession of States. The draft guidelines in section 5.1 had been renumbered accordingly and the old section 5.4 had become section 5.5 (Interpretative declarations in cases of succession of States). The other modifications introduced by the Working Group to the text of the guidelines of Part 5 were of a purely linguistic or technical nature.

30. He expressed the hope that the Commission would be in a position to take note of the report he had just made.

31. Mr. PELLET (Special Rapporteur) expressed his deep gratitude to the members of the Working Group, most of whom had played along with him on what had been, not a second reading, but the finalization of the draft guidelines. His special thanks went to Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Huang for part of the time, Mr. Kamto, Mr. McRae, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Singh and Sir Michael Wood, who had all taken a very active part in the Working Group. He could not fail to thank the secretariat, in particular the ever-helpful Mr. Buzzini, as well as Mr. Mikulka and Mr. Korontzis. He also wished to commend his assistants, past and present, for their continuing hard work on the commentaries.

32. Lastly, he thanked Mr. Vázquez-Bermúdez, who had successfully steered the Working Group through its discussions with an iron hand in a velvet glove, enabling it to accomplish the feat of adopting the text by consensus. The Commission would have the opportunity to consider the 800 pages of commentaries to the guidelines during the second part of the session.

33. Mr. DUGARD said that it was his understanding that the Commission still had to consider some guidelines and asked at what stage of its work that would be done.

34. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) said that the Working Group had fulfilled its mandate, namely to finalize the draft guidelines that were to become a Guide to Practice. The only reference he had made to a draft guideline that might require further consideration (draft guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty)) reflected a view expressed in the Working Group that the guideline should be considered in greater depth. It was simply the expression of an opinion, and the draft guideline had actually been adopted by the Working Group.

35. Mr. PELLET (Special Rapporteur), replying to Mr. Dugard, confirmed that the Working Group had fulfilled its mandate. All the texts had been adopted by consensus, with the exception of draft guideline 4.5.3, which had nevertheless been adopted by the Working Group. During the second part of the session, the members

of the Commission would again take up the guidelines, to be accompanied then by the commentaries, and adopt them paragraph by paragraph.

Organization of the work of the session (*continued*)

[Agenda item 1]

36. Mr. MELESCANU (Chairperson of the Drafting Committee) read out the names of the members of the Commission who were to participate in the Drafting Committee on expulsion of aliens: Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Mr. McRae, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera, Rapporteur (*ex officio*).

The meeting rose at 10.45 a.m.

3091st MEETING

Tuesday, 24 May 2011, at 10.05 a.m.

Chairperson: Ms. Marie G. JACOBSSON

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens¹⁰⁹ (A/CN.4/638, sect. B, A/CN.4/642¹¹⁰)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPporteur¹¹¹

1. The CHAIRPERSON invited the Commission to resume its consideration of the topic “Expulsion of aliens” and drew attention to document A/CN.4/628 and Add.1,¹¹² containing comments and information received from Governments.

2. Mr. KAMTO (Special Rapporteur), introducing the second addendum to his sixth report on expulsion of aliens, said that it contained the last of the draft articles

¹⁰⁹ For the history of the study of the topic by the Commission, see *Yearbook ... 2011*, vol. II (Part Two), chap. VIII, sect. A, paras. 204–210.

¹¹⁰ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

¹¹¹ At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued at the current session with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2).

¹¹² Reproduced in *Yearbook ... 2010*, vol. II (Part One).

that he intended to submit to the Commission. The second addendum was a continuation of the first and comprised chapters IV [chap. III],¹¹³ section D, to VIII [chap. VII]. Some of the issues covered in those chapters had already been touched on during the discussion of the first addendum.¹¹⁴ At that time, concerns had been expressed about the basis in international law of the rules being proposed and the study of State practice. It was to be hoped that the text now before the Commission would allay those concerns.

3. The first issue discussed in the second addendum was the implementation of an expulsion decision, which could be done voluntarily or forcibly. When forcible implementation took place, the question of the conditions for the return of the expelled person to the State of destination arose. The international conventions on civil aviation provided for a number of auxiliary measures to ensure orderly return, the obligation to respect the fundamental rights of the expellee during the return journey being of paramount importance. In paragraphs 405 [para. 3] to 415 [para. 13] of section D of chapter IV [chap. III] of his sixth report, he had endeavoured to demonstrate that proposition by reference to the Twenty Guidelines on Forced Return adopted by the Committee of Ministers of the Council of Europe in May 2005,¹¹⁵ Annex 9 to the Convention on International Civil Aviation of 7 December 1944¹¹⁶ and the 1963 Convention on offences and certain other acts committed on board aircraft. In the light of his analysis of those texts and of a number of legal writings, he was proposing in paragraph 416 [para. 14] of section D of chapter IV [chap. III] of his report draft article D1, entitled “Return to the receiving State of the alien being expelled”, which read:

“1. The expelling State shall encourage the alien being expelled to comply with the expulsion decision voluntarily.

“2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the orderly transportation to the receiving State of the alien being expelled, in accordance with the rules of international law, in particular those relating to air travel.

“3. In all cases, the expelling State shall give the alien being expelled appropriate notice to prepare for his/her departure, unless there is reason to believe that the alien in question could abscond during such a period.”

¹¹³ The numbers in brackets refer to the numbering used in the mimeographed version of the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), available from the Commission’s website. The chapters, paragraphs and footnotes were renumbered for publication in *Yearbook ... 2010*, vol. II (Part One).

¹¹⁴ See *Yearbook ... 2010*, vol. II (Part Two), chap. V, paras. 135–183.

¹¹⁵ Document CM(2005)40 final, of 9 May 2005. See also the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Comments on the Twenty Guidelines on Forced Return (925th meeting), document CM(2005)40-Add.

¹¹⁶ International Civil Aviation Organization, *Annex 9 to the Convention on International Civil Aviation, Facilitation*, 12th ed., July 2005. The twelfth edition of Annex 9 contains important changes, including the reinforcement of travel document security and the fight against illegal migration (available from www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf).

4. The reference in paragraph 2 to the rules for air travel was essentially illustrative and did not rule out the possibility of taking similar measures if the expellee had to be returned by other means of transport.

5. Chapter V [chap. IV] of the sixth report dealt with an expellee's right to an effective review of the expulsion decision, a subject touched on briefly in the first addendum in the context of procedural guarantees. While that chapter did not culminate in the formulation of a draft article, it did confirm the basis for draft article C1, which had been proposed at the previous session.¹¹⁷

6. Having looked at international and domestic law to see if it offered any basis for appeals against expulsion decisions, he had found that the right of appeal was firmly grounded in both legal orders. He had then considered the impact of judicial review on expulsion decisions in terms of the time frame for reviewing an appeal and the suspensive effect of remedies. Lastly, he had explored such remedies against a judicial expulsion decision as were provided by national legislation and the case law of the European Court of Human Rights, which had been analysed by the Secretariat in its 2006 memorandum.¹¹⁸

7. Chapter VI [chap. V] was devoted to relations between the expelling State and the transit and receiving States. Those relations were governed by two principles: the freedom of a State to receive or deny entry to the expelled alien and the freedom of the expellee to determine his or her State of destination. The first principle, which had been recognized ever since the *Ben Tillett* case of 1898, was limited by a person's right to return to his or her country. That limitation had first been set forth in 1892 in a resolution of the Institute of International Law¹¹⁹ and had since become clearly established in contemporary treaty law.

8. Similarly, the expellee's freedom to choose his or her State of destination was not absolute; it was tempered by the possibility that the expelling State might select the State of destination in place of the expellee if that person believed that he or she might be tortured or subjected to inhuman and degrading treatment in his or her own country but was unable to find another State of destination. Although there was no universal general practice in that area, European practice as embodied in both treaty and case law, for example in the decision of the European Court of Human Rights in *T. I. v. the United Kingdom*, offered a useful basis for formulating a rule on the subject. Some national laws gave aliens a separate right of appeal against the choice of the State of destination in the event of expulsion *stricto sensu*, but not of *refoulement*.

9. It was in determining which State was capable of receiving an expelled alien that the notion of a "safe country" had emerged. Since the notion was confined to

European practice and that practice was still varied, it was too early for it to be embodied in a general rule.

10. Six possible States of destination had been identified, more from legal writings than from State practice: a State of nationality, a State of passport issuance, a State of residence, a State of embarkation, a State party to a treaty which assumed the obligation to receive aliens who were nationals of other States parties and a consenting State. The requirement of consent was rooted in the principles of State sovereignty and the political independence of States.

11. Chapter VI [chap. V], section D, examined the situation with regard to the expulsion of an alien to a State that had no duty to admit the alien. A State's consent to the admission of an expelled alien had to be obtained, the point at issue being whether, if a State withheld its consent, the expulsion of an alien to that State constituted an internationally wrongful act incurring the responsibility of the expelling State. Opinions had been divided on that point.

12. There was, however, one unchallengeable rule of international law: each State had the sovereign power to set the conditions of entry to and presence in its territory. For that reason, forcing a State to admit an alien against its will would constitute an infringement of its sovereignty and political independence. All those considerations had prompted him to propose draft article E1, entitled "State of destination of expelled aliens", which read:

"1. An alien subject to expulsion shall be expelled to his or her State of nationality.

"2. Where the State of nationality has not been identified, or the alien subject to expulsion is at risk of torture or inhuman and degrading treatment in that State, he or she shall be expelled to the State of residence, the passport-issuing State, the State of embarkation, or to any other State willing to accept him or her, whether as a result of a treaty obligation or at the request of the expelling State or, where appropriate, of the alien in question.

"3. An alien may not be expelled to a State that has not consented to admit him or her into its territory or that refuses to do so, unless the State in question is the alien's State of nationality."

13. Chapter VI [chap. V], section E, was devoted to relations with the State of transit. While priority was normally given to direct return to the State of destination, it was frequently necessary for illegal residents to use the ports or airports of certain States to make connections with sailings or flights to the State of destination. It might be useful to provide a legal framework for that type of procedure, in either bilateral agreements or a multilateral legal instrument; however, the elaboration of such a text would go beyond the scope of the current topic.

14. On the other hand, it must be expressly affirmed that the rules on protecting the human rights of aliens in the expelling State applied *mutatis mutandis* in the transit State. That was more a reflection of a logical rule than the codification of a rule deriving from established practice. To that end, he proposed draft article F1, entitled

¹¹⁷ *Yearbook ... 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

¹¹⁸ Document A/CN.4/565 and Corr.1, mimeographed; available from the Commission's website (documents of the fifty-eighth session).

¹¹⁹ "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892", *Annuaire de l'Institut de droit international*, vol. XII (1892-1894), p. 218 (available from the Institute's website at www.idi-ii.org/).

“Protecting the human rights of aliens subject to expulsion in the transit State”, which read:

“The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State.”

The term “*mutatis mutandis*” was more apposite than the word “also” that appeared in the text of draft article F1 contained in paragraph 520 [para. 118].

15. The third part of the report examined the legal consequences of expulsion from the standpoint of the rights of expelled aliens and the responsibility of the expelling State as a result of unlawful expulsion. When considering the rights of expelled aliens, he had sought first to identify rules on the protection of the property rights and similar interests of expelled aliens, and then to consider whether an unlawfully expelled alien was entitled to the right of return to the expelling State if the expulsion decision was annulled.

16. One aspect of the protection of the property rights and similar interests of expelled aliens was the prohibition of expulsion for the purpose of confiscating the expelled alien’s assets. The aim of that prohibition was to end certain practices that had emerged, mainly in Europe, before and after the Second World War, when the principal victims had been the German minorities in some central European countries. Those cases had been dealt with by the Convention on the Settlement of Matters Arising out of the War and the Occupation, between the Federal Republic of Germany, France, the United Kingdom and the United States, signed at Bonn on 26 May 1952, and subsequent declarations of the German Government, including that of Chancellor Schröder in 2000.¹²⁰ Other instances of confiscatory expulsions were the *Nottebohm* case, the expulsion of Asians from Uganda under the regime of Idi Amin¹²¹ and the expulsion of British nationals from Egypt.¹²² The lawfulness of those expulsions had been disputed because valid grounds for them were lacking and they took place in violation of property rights.

17. There was support for the protection of the property rights of expelled aliens in a number of international instruments that guaranteed the right to property and spelled out the rule that no one could be arbitrarily deprived of his or her property. Among international instruments, mention could be made of article 17, paragraph 2, of the Universal Declaration of Human Rights¹²³ and article 22, paragraphs 6 and 9, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; at the regional level, article 14 of the African Charter on Human and Peoples’ Rights, article 21 of the American Convention on Human Rights: “Pact of San José, Costa Rica” and article 1 of Protocol [No. 1] to the Convention for the Protection of Human Rights and Fundamental Freedoms could be cited. There was also

¹²⁰ “Rede von Bundeskanzler Gerhard Schröder anlässlich des 50. Jahrestages der Charta der deutschen Heimatvertriebenen am ‘Tag der Heimat’”, 3 September 2000.

¹²¹ See G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 212–216.

¹²² *Ibid.*, p. 216.

¹²³ General Assembly resolution 217 A (III) of 10 December 1948.

support in international case law for the protection of the property rights of aliens who had been expelled: for example, the decision handed down in *Hollander* and the much more recent ruling of the Iran–United States Claims Tribunal in *Rankin v. the Islamic Republic of Iran*.

18. In general, the expulsion of aliens involving illegal confiscation, destruction or expropriation, and summary expulsion by which individuals were compelled to abandon their property to pillage or sell it for far less than its real value, had been deemed by international arbitral commissions to call for compensation. The ICJ had just recently upheld the obligation to protect the property rights of an expelled alien in its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo*. The literature was unanimously favourable to protection of the property rights of expelled aliens. As far back as 1892, the Institute of International Law had adopted a resolution containing a provision to that effect.¹²⁴ Some national legislation discussed in the memorandum by the Secretariat protected the property and economic interests of aliens in the event of expulsion,¹²⁵ and other laws made it obligatory for a State to pay compensation for property it acquired as a result of an alien’s expulsion. Several authorities supported the view that even if the State sequestered the property of an alien expelled, it could retain only the equivalent of any debt owed by the alien and had to return the remainder to the alien. On that point, he would refrain from citing the conclusions of the Eritrea–Ethiopia Claims Commission on the property rights of aliens expelled during armed conflict, believing as he did that they must be examined in the light of *jus in bello*, something that did not fall within the ambit of the current study.

19. The foregoing left no doubt that the expelling State’s obligation to protect the property of expelled aliens and to guarantee their access to said property was established in international law. Hence his proposal of draft article G1, entitled “Protecting the property of aliens facing expulsion”, which read:

“1. The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

“2. The expelling State shall protect the property of any alien facing expulsion, shall allow the alien [to the extent possible] to dispose freely of the said property, even from abroad, and shall return it to the alien at his or her request or that of his or her heirs or beneficiaries.”

20. The bracketed text in paragraph 2 was not based on case law but seemed a reasonable way of covering cases where the return of property was impossible.

21. Turning to the second aspect of the rights of expelled aliens, namely the right of return in the case of unlawful expulsion, he said it was supported principally in article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Inter-American Commission on Human Rights had recognized that right in a case involving the arbitrary expulsion of a foreign

¹²⁴ See footnote 119 above.

¹²⁵ See footnote 118 above.

priest by the Government of Guatemala (*Case 7378 (Guatemala)*). It had recommended, *inter alia*, that the Government should permit the priest to return to its territory and reside there if he so desired.

22. National practice on such matters varied. Article L524-4 of the French Code on the Entry and Stay of Aliens and on the Right of Asylum provided for the right of return, subject to some restrictions. Germany, in its response to the Commission's request for information on the right of return of unlawfully expelled aliens, had indicated that the right of return was "only conceivable if the expulsion decision is not yet final and absolute, and it emerged during principal proceedings conducted abroad that the expulsion was unlawful".¹²⁶ While indicating in its own reply that its national legislation contained no specific provisions on the issue, the Netherlands had stated that a right of return would exist in the event that a lawful resident had been unlawfully expelled. The right of return of an unlawfully expelled alien was clearly recognized in Romanian legal practice. Malaysian practice, on the other hand, appeared to require unlawfully expelled aliens to submit to the ordinary immigration procedures established by legislation.

23. In the absence of any established international practice or consistent case law, the right of return could hardly be deemed to be a rule of customary law. State practice seemed to vary widely, although most of the States that had replied to the Commission's request for information recognized the right of return in the event of unlawful expulsion, albeit with some procedural conditions or restrictions *ratione personae*.

24. Still, it would be contrary to the very logic of the right of expulsion to accept that an alien expelled on the basis of erroneous facts or mistaken grounds as established by the competent courts of the expelling State or an international court did not have the right to re-enter the expelling State on the basis of a court ruling annulling the disputed decision. To do so would deprive the court ruling of a major legal effect and confer legitimacy on the arbitrary nature of the expulsion decision. That was why, on the basis of the trends just outlined, he believed that the Commission might formulate a rule on the right of return of an alien unlawfully expelled as part of the progressive development of international law. He was therefore proposing draft article H1, entitled "Right of return to the expelling State", which read:

"An alien expelled on mistaken grounds or in violation of law or international law shall have the right of return to the expelling State on the basis of the annulment of the expulsion decision, save where his or her return constitutes a threat to public order or public security."

25. Chapter VIII [chap. VII], which was the final chapter of his sixth report, concerned the responsibility of the expelling State as a result of an unlawful expulsion. Clearly, a State which expelled an alien in breach of the rules of international law was committing an internationally wrongful act and consequently incurred international

responsibility. That responsibility could be established following legal proceedings initiated by the State whose national was expelled, in the context of diplomatic protection, or following proceedings before a special human rights court to which the expellee had direct or indirect access. It was a rule of customary international law that had always been reaffirmed by international courts.

26. The expulsion of aliens had yielded plentiful and consistent international case law. He cited a number of cases in connection with the expellee's right to diplomatic protection; proof of unlawful expulsion; reparation for injury caused by unlawful expulsion; forms of indemnifiable damage; and satisfaction. That whole body of well-established international law on the international responsibility of the expelling State for unlawful expulsion had just been reconfirmed by the ICJ in the case concerning *Ahmadou Sadio Diallo*.

27. His own research on the Inter-American Court of Human Rights had uncovered a new form of damages, called "particular damages for the interruption of the life plan", that could be mentioned in the commentary to draft article I1. The points he had made were not a precursor to new codification work on responsibility of States in the context of expulsion of aliens. Draft article I1 on the responsibility of States in cases of unlawful expulsion, together with draft article J1 on diplomatic protection, simply referred to the well-established legal regimes in those two fields and were in no way intended to call them into question.

28. Draft article I1 was entitled "The responsibility of States in cases of unlawful expulsion" and read:

"The legal consequences of an unlawful [illegal] expulsion are governed by the general regime of the responsibility of States for internationally wrongful acts."

29. Draft article J1 was entitled "Diplomatic protection" and read:

"The expelled alien's State of nationality may exercise its diplomatic protection on behalf of the alien in question."

30. At the previous session, following the consideration of his sixth report, he had revised the text of draft article 8,¹²⁷ but it had not been referred to the Drafting Committee, the Commission having been of the view that more time was needed to discuss it in plenary. He hoped that the Commission could take it up at the current session and make a decision on it.

31. With the second addendum to his sixth report, he had now submitted the entire set of draft articles on expulsion of aliens. During the second part of the session, he would provide a seventh report (A/CN.4/642), for information purposes only, on relevant recent developments both at the national level and in the work of the ICJ. No new draft articles were proposed in the new report, but the existing ones had been restructured and renumbered, and the Commission would be invited to give its opinion on the text.

¹²⁶ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/628 and Add.1.

¹²⁷ *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

**Tribute to the memory of Ms. Paula Escarameia,
former member of the Commission (*concluded*)***

32. The CHAIRPERSON announced that the memorial seminar for Ms. Escarameia would be held on Tuesday, 12 July 2011, at 5 p.m., at the Graduate Institute of International and Development Studies of Geneva.

The meeting rose at 11 a.m.

3092nd MEETING

Wednesday, 25 May 2011, at 10.05 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Later: Mr. Maurice KAMTO (Chairperson)

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

**Expulsion of aliens (*continued*)
(A/CN.4/638, sect. B, A/CN.4/642)**

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR¹²⁸ (*continued*)

Ms. Jacobsson (Vice-Chairperson) took the Chair.

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the sixth report on expulsion of aliens and drew their attention to an issue that had not been discussed at the previous session for lack of time. It would be recalled that in 2010 the Special Rapporteur had presented a revised version of draft article 8 entitled “Expulsion in connection with extradition”, which was reproduced in footnote 1299 of the report of the Commission on the work of its sixty-second session.¹²⁹ The revised draft article aimed to take into account comments made on the initial version as presented by the Special Rapporteur in his sixth report.¹³⁰ Since the Commission had not been able to discuss the revised version at its

previous session, members were invited to address it in their statements at the current session.

2. Mr. FOMBA expressed appreciation to the Special Rapporteur for the second addendum to his sixth report on expulsion of aliens and for his oral introduction. By and large, he was in agreement with the underlying arguments in the report and with the consequences which the Special Rapporteur derived from them for the purpose of codification and progressive development. In paragraph 403 [para. 1],¹³¹ the terms of the debate were well defined with regard to the question of the implementation of expulsion decisions. Paragraph 404 [para. 2] placed emphasis on voluntary departure, its dual advantage being that it permitted greater respect for human dignity while being easier to manage administratively. As to the appropriate period for voluntary departure, he wondered whether the proposal by the Commission of the European Communities¹³² of a maximum of four weeks, unless there was a risk that the person concerned might abscond, was always suitable.

3. It emerged clearly in paragraph 405 [para. 3] that forcible expulsion was the logical consequence of a refusal of voluntary departure, and the Special Rapporteur rightly noted that a return was not always thwarted solely by the refusal of the expelled alien to leave. In paragraph 406 [para. 4], it was essential to ensure that when the State of return was not the State of origin, expulsion was not to a country where there was a real risk to the person’s life. With regard to expulsions effected by air, the 1944 Convention on International Civil Aviation contained important legal provisions which, if applied correctly and systematically, would ensure best conditions for the return of expelled persons. As to the definition of the phrase “potentially disruptive passengers” in paragraph 411 [para. 9], it might be asked whether the reference to expelled persons was always relevant from a theoretical and practical viewpoint. In paragraph 412 [para. 10], the reference to cases of ill-treatment suffered by some aliens showed the seriousness of the problems which could arise in practice. With regard to paragraph 413 [para. 11], he said that guidelines for good conduct in the field of expulsion were a good idea, but the difficulty was in their actual application together with a suitable and effective mechanism for monitoring and sanctions. On paragraph 416 [para. 14], he agreed with the Special Rapporteur’s conclusion that it was not necessary to draw up a specific draft article on the protection of human rights during the transport stage of the deportation process, even in the name of progressive development, since that was already covered by the general obligation set out in draft articles 8 and 9.

4. Turning to the draft articles themselves, he noted that draft article D1 (Return to the receiving State of the alien being expelled) was a draft text of a general nature relating to the conditions for the return to the receiving State of the

* Resumed from the 3081st meeting.

¹²⁸ At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2).

¹²⁹ *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176.

¹³⁰ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2, p. 153, para. 72; also reproduced in *ibid.*, vol. II (Part Two), p. 160, para. 138, footnote 1286.

¹³¹ The numbers in brackets refer to the numbering used in the mimeographed version of the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), available from the Commission’s website. The chapters, paragraphs and footnotes were renumbered for publication in *Yearbook ... 2010*, vol. II (Part One).

¹³² Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, presented by the Commission of the European Communities, document COM(2005) 391 final, of 1 September 2005, article 6.

alien being expelled. It was relevant and, on the whole, its basic reasoning was sound. Paragraph 1 of that draft article enunciated the principle and recommended encouraging voluntary compliance with an expulsion decision, which seemed logical and useful. Paragraph 2 provided for the exception—forcible implementation—and placed the expelling State under an obligation with respect to both the results and the means: to ensure the normal and orderly transportation to the receiving State of the alien being expelled and, to that end, to take the necessary measures, in accordance with the rules of international law, in particular those relating to air travel. He agreed with the point made in paragraph 417 [para. 15] to the effect that paragraphs 1 and 2 of the draft article had already been codified in that they were derived from, in particular, general international and treaty law. As to paragraph 3, the Special Rapporteur was of the view that it was more a part of the progressive development of international law, and the arguments put forward in that connection were relevant and convincing. With regard to paragraph 457 [para. 55] of the report, he said that, like the Special Rapporteur, he doubted whether the proposal for a draft article on the suspensive effect of a remedy was justified. On paragraph 461 [para. 59], he agreed that it was not necessary to establish a specific rule in respect of remedies against an expulsion decision, even as part of progressive development, and he endorsed the conclusion set out in paragraph 490 [para. 88] that the “safe country” concept could not be formulated as a draft general rule.

5. The line of reasoning behind draft article E1 (State of destination of expelled aliens) was sound. Paragraph 1 was logical; it contained a strict obligation of principle that was supported in international law. Paragraph 2 provided alternative solutions and had the advantage of also taking the wishes of the expelled person into account, and paragraph 3 rightly specified a strict and absolute obligation for the State of nationality. With regard to paragraph 519 [para. 117], he agreed that the elaboration of a legal framework for a transit procedure for illegal aliens, although it would be useful, went beyond the scope of the topic.

6. Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) could be supported in that it was based on a *mutatis mutandis* approach. He endorsed the line of reasoning behind draft article G1 (Protecting the property of aliens facing expulsion). Paragraph 2 of the draft article was balanced because it established the obligation for the State to protect and return property while recognizing the right of the alien to dispose freely and effectively of that property. As to the phrase “to the extent possible” in square brackets, it suggested that there were cases in which the alien’s right could not be realized. It might be useful to consider what conclusion could be drawn from the analysis of practice in that regard.

7. On draft article H1 (Right of return to the expelling State), he agreed with the view that the provision could be proposed as part of progressive development. He endorsed on the whole the explanations and line of reasoning in paragraph 562 [para. 160] of the report. The first part of the draft article enunciated the principle and gave the main reasons for it. He wondered, however, whether it would not be possible to provide a more exact definition of the words “mistaken grounds”, for example by saying “on mistaken

grounds resulting from an error of fact or law” (*pour des motifs inexacts résultant d’une erreur de fait ou de droit*). That was a drafting question which could easily be resolved. In the judgment of the ICJ of 24 May 2007 in the *Ahmadou Sadio Diallo* case, reference had been made to a possible case of an error of law with regard to the legal characterization of the act in question as “refusal of entry” or “expulsion” (see para. 575 [para. 173] of the report). The second part of the draft article defined the exception, the only really valid one in the current case. With regard to paragraphs 596 [para. 194] and 597 [para. 195] of the report, on the emergence of particular damages for the interruption of the life plan, he said that that new approach to the right to reparation, although interesting, was problematic and should therefore be considered with caution.

8. As noted in paragraph 608 [para. 206], draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) were merely reference clauses that did not call for any particular comment. He did not have a position of principle on the word in square brackets in draft article I1 (“illegal”), but perhaps it could be retained so as to be consistent with the usual terminology on the law of responsibility. In closing, he said that he was in favour of referring all the proposed draft articles to the Drafting Committee.

9. Mr. McRAE thanked the Special Rapporteur for the second addendum to his sixth report on expulsion of aliens, which was the result, as with his preceding reports, of thorough research and a detailed analysis of State practice. The Special Rapporteur’s careful and thoughtful treatment of the issues prompted a number of observations. The topic was very difficult, as seen by the discussions in the Commission over the years, the comments of Governments and the many problems encountered by the Drafting Committee in finding a precise wording. There was no doubt that expulsion was an important contemporary problem, but it was less clear that the Commission would be able to produce a result that would win the widespread acceptance of Governments. Moreover, the current circumstances were quite different from those that had prevailed when the Institute of International Law and Harvard Law School had contemplated what was desirable in terms of expulsion. Different means of transport, global movements of persons, massive displacements due to conflicts, the search for economic opportunities and, more recently, the rise in international terrorism had changed the nature of the question of expulsion and resulted in a greater immediacy of the problem.

10. That evolution had always been a source of difficulty for the Special Rapporteur and the Commission when they had sought to determine whether a rule of customary international law existed on a particular issue. It raised the question of whether a rule that had been accepted 100 years earlier was still relevant to today’s circumstances. Answering that question presupposed a determination of what elements to rely on in deciding that practice, jurisprudence and scholarly literature had converged sufficiently to make it appropriate to propose a draft article. It also raised the question of the final form of the work on the topic. Should the Commission recommend that States adopt the draft articles as a basis

for a multilateral treaty, or were the draft articles more in the nature of guidelines for best practices for States? Those questions were not urgent, but they had implications for what the Commission regarded as an appropriate draft article on a particular aspect of the topic.

11. He had had those considerations in mind while reading the second addendum and listening to the Special Rapporteur's introduction at the previous meeting. The draft articles proposed by the Special Rapporteur provided useful standards and guidance to States in a difficult area, but he personally wondered about their status and whether a codification of customary international law was at issue or whether in reality a desirable progressive development of international law was concerned. That question arose in particular in relation to draft article D1 (Return to the receiving State of the alien being expelled), with regard to which the Special Rapporteur indicated that paragraphs 1 and 2 reflected existing codification and that paragraph 3 was part of the progressive development of international law, although that was not as clear as the Special Rapporteur suggested, because the entire draft article seemed in fact to be based on the best practices recommended by a working group of the International Air Transport Association (IATA) and on regional practices of the European Union. That did not mean that the draft article was unnecessary; he merely wished to draw attention to the difficulty of clearly distinguishing between what was customary international law and could easily be codified, and what was progressive development.

12. The difficulty was highlighted by the question of an appeal against an expulsion decision. After analysing domestic legislation and practice, the Special Rapporteur concluded in paragraph 451 [para. 49] of his report that the submission of an individual appeal against an expulsion order was clearly established under international law and it now had the force of customary law. Yet, having reached that conclusion, the Special Rapporteur did not go one step further and prepare a draft article providing that States must or should give individuals an opportunity to appeal an expulsion order, because an examination of remedies available in different States suggested that there was no uniform practice in that regard. Thus, the Special Rapporteur doubted whether the proposal for a draft article on the issue was justified (para. 457 [para. 55] of the report), and he reinforced that point in paragraph 461 [para. 59], where he maintained that, clearly, there was no basis in international law for establishing any rule regarding remedies against an expulsion decision, even as part of progressive development.

13. The effect of that conclusion was to relegate the question of an appeal by a person subject to an expulsion order to the realm of domestic legislation and practice, subject to relevant human rights obligations. In substance, the Commission was saying that it had no guidance for States in that regard. If the right to appeal was recognized in international human rights jurisprudence, then surely that was a sufficient reason to take note of that fact in a specific draft article. Even if there was no basis for identifying a particular remedy, perhaps an article should have a new paragraph that recognized the right to appeal and indicated that States should provide an appropriate remedy. The

commentary could explain the tentativeness of such a provision and could review the variations in State practice.

14. It was not his intention to criticize the Special Rapporteur, but to draw attention to the difficulties raised by an area in which State practice was often divided and in which attempts to recommend practices and propose best practices did not necessarily result in uniform behaviour. However, if the Commission put aside some subjects and disregarded others, the draft articles would have an episodic appearance. He therefore wondered whether it was really appropriate to leave out an article on the right to appeal. After all, if the practice of granting an appeal was sufficiently widespread to justify the Special Rapporteur's conclusion that it was a rule of customary international law, then the Commission should at the very least include a draft article recognizing the right to appeal.

15. Draft article E1 (State of destination of expelled aliens) essentially raised drafting problems, which needed to be mentioned because they might have consequences for the substance. The draft article contained two major ideas: first, the State of nationality was the State to which an alien could be expelled (although the imperative in paragraph 1 ("shall be expelled") seemed inconsistent with the later paragraphs), and, secondly, an individual could only be expelled to another State that would receive him or her, provided that such a State would not subject that individual to torture. If that was the case, he did not see why paragraph 2 included a list of other States of destination (State of residence, passport-issuing State, State of embarkation), unless as an indication of destinations which States might think of when contemplating expulsion. For the purposes of the draft article, surely the most important questions of principle were those of consent by the receiving State and the fact that an individual was not subjected to torture or other inhuman or degrading treatment. That was merely a reaffirmation of the general principle set out earlier in the draft articles that the human rights of individuals subject to expulsion must be respected. In any event, although it was certainly useful to provide guidance to States, the imperative nature of paragraph 1 should be removed. After all, why should an expelling State not be able to expel an individual to a State that did not fit any of those categories, that would not subject the individual to torture and that was prepared to accept the individual? As he saw it, those matters could be dealt with in the Drafting Committee, although some reworking of the provision would be required.

16. He agreed with the redrafted version of draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State). On draft article H1 (Right of return to the expelling State), he was not certain that the draft article, as worded, captured all the necessary qualifications in that area. There was no doubt that there might be certain circumstances where a wrongfully expelled individual should have the right to return, but what if the individual was present illegally in the first place? Did such an individual have a right of re-entry, and, if so, did it depend on the nature of the illegality of the expulsion? France and Germany had given very qualified responses with regard to the rights that an individual would have if his or her expulsion was revoked. The Malaysian practice of allowing such an individual to apply for an entry visa seemed to reflect a more widespread approach.

17. In sum, draft article H1 needed some clarification on what exactly was meant when it stated that an illegally expelled individual had a “right of return”. An illegal expulsion might be an international wrong, engaging the responsibility of the expelling State, but it was not clear whether it automatically entailed a right to return to that State. As for draft article I1 (The responsibility of States in cases of unlawful expulsion), he agreed that it passed the question on to the draft articles on State responsibility for internationally wrongful acts¹³³ rather than trying to draw any specific conclusions in that area. On the other hand, draft article J1 (Diplomatic protection) did not seem justified, because it stated the obvious and implied that there was some question about whether the State of nationality could exercise diplomatic protection on behalf of an illegally expelled individual. Perhaps that point could be made in the commentary to draft article I1.

18. With regard to draft article 8 (Expulsion in connection with extradition¹³⁴), he welcomed the deletion of the words “disguised expulsion”, which did not render well the idea that a State should not bypass the extradition process by expelling an individual directly to the requesting State or by expelling him or her to a State likely to extradite that individual to the requesting State if the expelling State did not have an extradition treaty with that State.

19. In closing, he said that he was in favour of referring the draft articles proposed in the second addendum to the Drafting Committee.

20. Mr. KAMTO (Special Rapporteur), referring to Mr. McRae’s statement, said he simply wanted to say that it was the suspensive effect of an appeal against an expulsion decision that could not be codified, and not the right to appeal as such.

21. Mr. CANDIOTI said that when the Special Rapporteur had addressed the question of procedures and rules relating to the implementation of an expulsion decision, he had taken care to distinguish between the case of voluntary implementation, which at first glance did not raise any major difficulty, and the much more complex case of forcible implementation, which was problematic. The Special Rapporteur had dwelt on the latter case in the last chapters of his sixth report (chap. IV, sect. D, to chap. VIII [chaps. III–VII of the second addendum]), setting out the modalities and conditions which needed to be met for expulsion to take place with due regard to all the interests and principles at play.

22. The Special Rapporteur provided valuable information on the current modalities for forcible implementation of an expulsion decision and the principles and rules which must be observed so that the orderly implementation of the measure went hand in hand with the concern for the physical and mental integrity of the expelled alien, and he had done well to draw attention to the risks of violence and ill-treatment which might unfortunately be associated with the expulsion procedure, not only during

the pre-expulsion phase but also, and above all, during the actual implementation of the measure.

23. The Commission should therefore approve draft article D1 (Return to the receiving State of the alien being expelled), which the Special Rapporteur proposed in paragraph 416 [para. 14] and which took into account the most recent recommendations and guidelines elaborated by IATA.

24. The text stressed that voluntary implementation of the expulsion should be encouraged and, if that was not possible, it enunciated the obligation for the expelling State to take the necessary measures to ensure, as far as possible, the orderly transportation to the receiving State of the alien being expelled.

25. The second point discussed in detail by the Special Rapporteur was the right of an alien subject to expulsion to appeal against the expulsion decision. The Special Rapporteur stressed that an alien’s fundamental right to request that the legality of the expulsion measure be examined by a competent and independent authority established in conformity with domestic law had long been recognized in general international law and in domestic law and had been embodied in treaties and mechanisms for the international protection of human rights, especially after the Second World War.

26. The decision on the appeal must be taken in a reasonable period in the light of the circumstances of each case and, as noted by the Special Rapporteur in paragraph 456 [para. 54], the effectiveness of the appeal could be ensured only if it produced a suspensive effect on the expulsion measure, so as to avert the sometimes disastrous consequences of an expulsion that was recognized as illegal.

27. However, in paragraph 457 [para. 55], the Special Rapporteur doubted whether a general rule regarding the suspensive effect of a remedy should be formulated, because it might upset the balance between the State’s right to expel on grounds of public order or national security and the right of the alien in question to have his or her human rights respected. He personally thought that the question required further consideration, and perhaps a formulation should be found that reconciled the different principles and interests at play in expulsion.

28. The third point examined by the Special Rapporteur concerned the cooperation that must exist between the expelling State and the transit and receiving States for an orderly implementation of the expulsion measure. On the whole, he endorsed the detailed treatment of that question in paragraphs 462 [para. 60] to 520 [para. 118], as well as draft articles E1 (State of destination of expelled aliens) and F1 (Protecting the human rights of aliens subject to expulsion in the transit State).

29. In the following chapter, the Special Rapporteur addressed the legal consequences of expulsion, analysing in particular the question of the protection of the property and other pecuniary interests of expelled persons. Draft article G1 (Protecting the property of aliens facing expulsion), which prohibited expulsion

¹³³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

¹³⁴ See *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176.

for the purpose of confiscating his or her assets and enunciated the obligation to respect the right of the alien facing expulsion to dispose of his or her property or to receive compensation, duly complied with the elementary imperatives of justice. The same was true for draft article H1 (Right of return to the expelling State), on the right of the alien to return to the State from which he or she had been illegally expelled when the expulsion decision had been annulled for substantive reasons. The Special Rapporteur had rightly referred to the principles and norms recognized in various legal texts, international instruments and decisions of human rights protection bodies.

30. In the last chapter of his sixth report, the Special Rapporteur addressed another equally important legal consequence of illegal expulsion: the international responsibility incurred by a State for failure to respect its international obligations with regard to the expulsion of aliens. The principles and rules relating to State responsibility for internationally wrongful acts, codified and progressively developed by the Commission in its 2001 draft articles, were fully applicable in the current case. The Special Rapporteur rightly cited the elements of international jurisprudence that had helped lay the groundwork for the general regime of State responsibility. As natural consequences of the application of that regime, the Special Rapporteur then examined the question of diplomatic protection as a means of making responsibility effective, as illustrated in the judgment rendered on 30 November 2010 by the ICJ in the *Ahmadou Sadio Diallo* case, and the issue of the forms of reparation for damage suffered on account of an illegal expulsion, discussed in paragraphs 584 [para. 182] to 608 [para. 206] with many examples of precedents. Draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) rightly referred to the general rules relating to responsibility and diplomatic protection evoked in the analysis in question. Perhaps a draft article should be added on the right of a victim of an illegal expulsion to have recourse to the protection mechanisms and remedies provided under human rights instruments.

31. Draft articles D1 to J1 could be referred to the Drafting Committee to be finalized, taking into account the comments made during the debate.

32. Mr. NIEHAUS said that draft articles D1 to J1, which the Special Rapporteur had introduced in the last chapters of his sixth report, provided a clear and logical summary of his arguments.

33. Draft article D1 (Return to the receiving State of the alien being expelled) posed a number of problems. Paragraph 1, which stated that “[t]he expelling State shall encourage the alien being expelled to comply with the expulsion decision voluntarily”, did not indicate how such encouragement was expected to take place. That might well open the door to the exercise of undue pressure, which would be prejudicial to the rights of the alien. To address that omission, it would suffice to refer to the possibility that the person concerned could voluntarily agree to the expulsion. He agreed with the Special Rapporteur that the voluntary departure of the alien facing expulsion permitted greater respect for human dignity while being easier to manage administratively.

34. In paragraph 2 of the draft article, the words “as far as possible” gave the unacceptable impression that, if it was not possible to have an “orderly” transportation that was “in accordance with the rules of international law”, the necessary measures must still be taken to ensure implementation of the expulsion decision. He also suggested that, for the sake of clarity, the reference to the rules of air travel should be deleted, since the Special Rapporteur had explained at the previous meeting that other means of transport were not excluded.

35. Paragraph 3 of the draft article, pursuant to which the alien being expelled must be given appropriate notice to prepare for his/her departure, was acceptable. Needless to say, such notice must take into account not only the rights of the alien, but also the security conditions necessary for the implementation of the expulsion measure. It would therefore be preferable not to allow for the possibility of shortening that period if there was a risk that the alien in question might abscond.

36. With regard to draft article E1 (State of destination of expelled aliens), it was logical that, in principle, aliens should be sent to their State of nationality, provided of course that they were not at risk of torture or inhuman or degrading treatment there. Thus, the draft article was acceptable, especially since it allowed for other possibilities in case of a problem or a refusal, namely expulsion to the State of residence, the passport-issuing State, the State of embarkation or any other State willing to accept the person in question. Provision should, however, be made for the unlikely but not impossible case in which no State apart from the State of nationality agreed to admit the person concerned to its territory and there was a risk of human rights violations in that State.

37. Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) was fully justified.

38. Part Three, on the legal consequences of expulsion, and which dealt with the rights of expelled aliens and the responsibility of the expelling State as a result of an unlawful expulsion, was particularly interesting. With regard to the rights of expelled aliens, the Special Rapporteur had done well to focus the provisions of draft article G1 on the protection of the property of aliens facing expulsion.

39. History unfortunately showed that the purpose of certain expulsion practices was to confiscate the property of the persons targeted, the State thereby seeking to enrich itself to the detriment of aliens residing on its territory, and sometimes going so far as to enlarge the definition of “alien” to include those of its own nationals who were of a particular religion or ethnic origin. The Special Rapporteur made that point and referred to the case of the expulsion from Germany during the Weimar Republic of foreign Jews and other aliens from Baden and Prussia, as well as the example of property confiscated from Germans in Europe and elsewhere during and after the Second World War. At the previous meeting he had himself evoked abuses committed in Latin America, in particular in Central America, where Germans had had their property confiscated during the war. In the jurisprudence, the *Nottebohm* case was best known because it had been

brought before the ICJ, but in many other instances, the victims had had the nationality of the confiscating State. In a completely arbitrary manner, as a function of the interests at play in each case, the nationality of persons of German ancestry had simply been annulled, not by judicial means but through the simple promulgation of an executive decree that had also declared the persons concerned to be “war enemies”, in other words, “Germans”, thereby allowing hastily adopted expropriation (in other words, confiscation) laws to be applied in order to seize their property.

40. Thus, it could be seen that the definition of “alien” could be manipulated at will to justify unlawful acts committed against nationals of a State essentially for the purpose of seizing their property, and for that reason he proposed the insertion of the words “or of a national unlawfully classified as an alien” in paragraph 1 of draft article G1, which would then read:

“The expulsion of an alien, or of a national unlawfully classified as an alien, for the purpose of confiscating his or her assets is prohibited.”

41. He endorsed draft article H1 (Right of return to the expelling State), as well as draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection), which were clear and succinct.

42. Mr. McRAE said that the right to challenge an expulsion, treated solely in the framework of procedural guarantees, should also be addressed from the viewpoint of what an appropriate remedy could be, given the suspensive nature of the appeal. It would be useful to have a provision on the right to appeal the expulsion and another on the right to an appropriate remedy.

Organization of the work of the session (*continued*)*

[Agenda item 1]

43. Mr. NOLTE said that, so far, the Study Group on the topic “Treaties over time” was composed of the following members: Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Gaja, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Perera, Mr. Petrić, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

Mr. Kamto (Chairperson) took the Chair.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

44. The CHAIRPERSON welcomed Ms. O’Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited her to take the floor.

45. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that she was very mindful of the fact that 2011 was the last year of the

current quinquennium. That in itself posed the challenge of seeking to complete several topics on the current programme of work, but also provided an opportunity to reflect further on future work so that the next Commission began on a solid footing.

46. Starting with the first cluster of issues concerning the work of the Sixth Committee, she said that, as in the past, the Sixth Committee had devoted several meetings to consideration of the Commission’s annual report. As was the tradition, that discussion was the highlight of the Sixth Committee’s deliberations. The Sixth Committee continued to be appreciative of the contribution of the Commission to the progressive development of international law and its codification. In particular, it had recommended that the Commission continue its work on the topics in its current programme, taking into account the comments and observations of Governments, whether written or as orally expressed in debates of the Sixth Committee. She was confident that the members of the Commission had had the opportunity to reflect on General Assembly resolution 65/26 of 6 December 2010, whose various provisions provided guidance for the Commission’s work during the current session.

47. The Sixth Committee had also had before it three items emanating from previous work of the Commission, namely: responsibility of States for internationally wrongful acts; diplomatic protection; and consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm.¹³⁵ In all three items, the Committee had focused its attention on the final form, in the light of the recommendations of the Commission. As in previous years, no final dispositive action had been taken in respect of any of those items; thus, further examination of the issues, after a lag of three years, would take place during the sixty-eighth session of the General Assembly.

48. With regard to the item entitled “Responsibility of States for internationally wrongful acts”, the General Assembly, in its resolution 65/19 of 6 December 2010, had decided to further examine the matter with a view to taking a decision, within the framework of a working group of the Sixth Committee, on the question of a convention on responsibility of States for internationally wrongful acts, or other appropriate action, on the basis of the draft articles adopted by the Commission in 2001.¹³⁶

49. Concerning the item entitled “Diplomatic protection”, the General Assembly, in its resolution 65/27 of 6 December 2010, had decided to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the draft articles on diplomatic protection adopted by the Commission in 2006,¹³⁷ and to identify any difference of opinion on the articles.

¹³⁵ General Assembly resolution 65/28 of 6 December 2010. The text of the draft principles adopted by the Commission is reproduced in *Yearbook ... 2006*, vol. II (Part Two), p. 58, para. 66.

¹³⁶ See footnote 133 above.

¹³⁷ *Yearbook ... 2006*, vol. II (Part Two), p. 24, para. 49.

* Resumed from the 3090th meeting.

50. In relation to the item entitled “Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm”, the General Assembly, in its resolution 65/28 of 6 December 2010, had invited Governments to submit further comments on any future action, in particular on the form of the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission in 2001,¹³⁸ and of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission in 2006,¹³⁹ bearing in mind the recommendations made by the Commission in that regard. Comments would be particularly important on two aspects: first, with regard to the elaboration of a convention on the basis of the draft articles, and, secondly, on any practice in relation to the application of the articles and principles. The Secretary-General had also been requested to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles and the principles, thus following the practice obtaining in respect of State responsibility.

51. At the forthcoming session of the General Assembly, the Sixth Committee would take up the consideration of two items which had been topics of previous discussion in the Commission, namely “Nationality of natural persons in relation to the succession of States”¹⁴⁰ and “The law of transboundary aquifers”.¹⁴¹ In both cases, the question of the final form of the draft articles, completed in 1999 and 2008, respectively, remained a key aspect of the discussion, in the light of the recommendations of the Commission.

52. She would like to single out a number of other items on the agenda of the Sixth Committee. First, the question of the scope and application of the principle of universal jurisdiction had generated interest in recent years, resulting in the inclusion of the item in the agenda of the General Assembly at its sixty-fifth session.¹⁴² In 2010, the Sixth Committee had had before it a report of the Secretary-General prepared on the basis of comments and observations received from Governments.¹⁴³ Moving forward, the General Assembly, in its resolution 65/33 of 6 December 2010, had invited Member States to submit before 30 April 2011 information and observations on the scope and application of universal jurisdiction, including information on relevant applicable international treaties, their domestic legal rules and judicial practice. This invitation had also been extended to observers, as appropriate. It was anticipated that at the sixty-sixth session of the General Assembly, the Sixth Committee would continue its consideration of the item, without prejudice to the consideration of the topic and related issues in other United Nations forums. For that purpose, a working group of the Sixth Committee would be established to undertake a thorough discussion

of the scope and application of universal jurisdiction. The Secretariat had been requested to prepare for the working group a compilation of international treaties and decisions of international tribunals which might be relevant to the principle of universal jurisdiction.

53. Secondly, the item entitled “Measures to eliminate international terrorism” remained a crucial one for the Sixth Committee as the international community continued to make concerted efforts to combat international terrorism. The outstanding issues, essentially concerning the exclusionary elements of the scope of application of the draft international convention on international terrorism which had been under discussion since 2001, continued to occupy the delegations. In 2010, in the context of a working group of the Sixth Committee, and in April 2011 within an *ad hoc* committee on terrorism,¹⁴⁴ Member States had reflected further on the 2007 elements of a package¹⁴⁵ submitted by the coordinator of the draft comprehensive convention. Delegations continued to have differences of opinion on the way forward, and another attempt would be made in the autumn, in the context of a working group of the Sixth Committee.

54. Thirdly, with regard to the criminal accountability of United Nations officials and experts on mission, it would be recalled that in 2009, the General Assembly had included that item in the provisional agenda of its sixty-fifth session for reporting purposes, while deciding that it would continue its consideration of the substantive aspects of the topic, including the still-open question of elaborating a legally binding instrument on the matter. Accordingly, at the current session, the Sixth Committee had only held a general debate, and General Assembly resolution 65/20 of 6 December 2010, which was an update of previous resolutions, retained the reporting mechanism first established in resolution 62/63 of 6 December 2007. It went without saying that the more general problem of gender violence and sexual exploitation and abuse, particularly in conflict zones, remained of critical concern to the United Nations.

55. Fourthly, with regard to the administration of justice system at the United Nations, she said that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, which had been established on 1 July 2009, were now in their second year of operation. To date, the Dispute Tribunal had issued more than 360 judgments, and the Appeals Tribunal more than 100 judgments. The judgments of the United Nations Appeals Tribunal had addressed fundamental issues such as the role of judicial review, the burden of proof for allegations of discrimination, whether an expectancy of renewal attached to a fixed-term contract of employment, the use of testimony by anonymous witnesses and the requirements for an award of compensation. While many of the judgments of the Appeals Tribunal had confirmed the jurisprudence of the former United Nations Administrative Tribunal, there had also been notable developments, which would have a significant impact on the development of the

¹³⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 146, para. 97.

¹³⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 58, para. 66.

¹⁴⁰ *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 47.

¹⁴¹ *Yearbook ... 2008*, vol. II (Part Two), p. 19, para. 53.

¹⁴² General Assembly resolution 64/177 of 18 December 2009, para. 3.

¹⁴³ A/65/181.

¹⁴⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 37 (A/66/37)*, report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Fifteenth Session (11–15 April 2011).

¹⁴⁵ *Ibid.*, *Sixty-second Session (A/62/37)*, Eleventh Session (5, 6 and 15 February 2007).

Organization's policies in matters of administration and management and the advisory role played by the Office of Legal Affairs in that regard. The General Assembly was expected to assess the operations of the new administration of justice system at its forthcoming 2011 session, after having expressed the view in 2010 that it was too early to do so. In 2010, the General Assembly had also decided that the consideration of outstanding legal aspects, including the question of effective remedies for non-staff personnel, as well as the code of conduct for the judges of the Dispute Tribunal and the Appeals Tribunal, was to be continued in autumn 2011 in the framework of a working group of the Sixth Committee.¹⁴⁶

56. Concluding that cluster of issues, she said that the question of the rule of law at the national and international levels continued to be a topical subject within United Nations circles, where the overall coordination and coherence of rule of law activities system-wide was an ongoing challenge. The debate in the Sixth Committee had focused on the theme entitled "Laws and practices of Member States in implementing international law". In its resolution 65/32 of 6 December 2010, the General Assembly had again reaffirmed its role in encouraging the progressive development of international law and its codification and had once again invited the Commission to continue to comment, in its annual report, on its current role in promoting the rule of law. At the sixty-sixth session of the General Assembly in 2011, the Sixth Committee would continue its consideration of the item by addressing the theme entitled "Rule of law and transitional justice in conflict and post-conflict situations". It would also finalize the modalities of the high-level meeting of the General Assembly on the rule of law that would be convened during the high-level segment of the sixty-seventh session in 2012.

57. Turning to the work of the Office of Legal Affairs over the past 12 months, she recalled that the Office had recently submitted comments and observations to the Commission on the draft articles on responsibility of international organizations, as adopted by the Commission on first reading (A/CN.4/637 and Add.1).¹⁴⁷ It had also been very busy responding to requests for advice on the role of the United Nations Operation in Côte d'Ivoire (UNOCI), as well as issues relating to the provision of humanitarian relief in the Libyan Arab Jamahiriya. As members were no doubt aware, there had been some major developments concerning transitional justice mechanisms, in particular the International Residual Mechanism for the Criminal Tribunals¹⁴⁸ for Rwanda (the International Tribunal for Rwanda) and Yugoslavia (the International Tribunal for the Former Yugoslavia).

58. Regarding the draft articles on responsibility of international organizations, she hoped that the comments and observations forwarded to the Commission in February had been of assistance in its consideration of the draft articles and commentary. As could be imagined, that

had been a significant project in the work of the Office. In preparing its comments on the draft articles, the Office had faced the enormous task of reviewing 60 years of United Nations practice against the principles as set forth in the draft articles, as well as the explanations contained in the commentary. As indicated in the comments, the Office had undertaken a thorough review of the practice of the Organization to examine the conformity of the draft articles with existing practice, as well as their propriety when no such practice existed. The research had revealed that "the practice" in the field of international responsibility was very limited in scope and subject matter and related, for the most part, to third-party claims in the context of peacekeeping operations.

59. Concerning international peace and security, she said that, following the genocide in Rwanda and Srebrenica, the Security Council had become more inclined to establish peacekeeping missions with increasingly robust and complex mandates and to authorize such missions, under Chapter VII of the Charter of the United Nations, to use force beyond self-defence, including to protect civilians under imminent threat of physical violence.

60. In that connection, UNOCI had recently been very topical, and over the past six months had raised a number of urgent legal issues. As members probably knew, UNOCI had been entrusted with a broad and complex mandate for both its civilian and military components. Following the second round of the presidential elections in November 2010, three legal issues had come under particular international scrutiny, the first relating to the certification mandate of UNOCI, the second to Côte d'Ivoire's representation in the United Nations and the third to the role of UNOCI in the armed conflict that had ensued between the forces supporting the outgoing President and those loyal to the elected President.

61. UNOCI had been mandated to ensure that the electoral process in Côte d'Ivoire was open, free, fair and transparent, in accordance with international standards, at all stages of the electoral process, including the results of the elections. The legal basis for its certification mandate had derived from the Pretoria Agreement on the Peace Process in Côte d'Ivoire¹⁴⁹ (Pretoria I) of 6 April 2005 and the Declaration on the Implementation of the Pretoria Agreement on the Peace Process in Côte d'Ivoire, of 29 June 2005 (Pretoria II¹⁵⁰), which had requested United Nations participation in the organization of the Ivorian elections and assistance in the elections. Those texts, and the role of the United Nations therein, had been endorsed by the relevant organs of the Economic Community of West African States (ECOWAS) and the African Union as well as by the United Nations Security Council. In his statement of 3 December 2010, the Special Representative of the Secretary-General had certified the result of the second round of the elections as announced by the Independent Electoral Commission on 2 December 2010. The result announced by the Independent Electoral Commission and certified by the Special Representative of the Secretary-General had been

¹⁴⁶ Decision 65/513 of 6 December 2010, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 49 (A/65/49)*, vol. II, p. 29.

¹⁴⁷ *Yearbook... 2009*, vol. II (Part Two), p. 19, paras. 50–51.

¹⁴⁸ Security Council resolution 1966 (2010), of 22 December 2010.

¹⁴⁹ Letter dated 25 April 2005 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council (S/2005/270), annex I.

¹⁵⁰ Available from www.peacemaker.un.org.

widely accepted by the international community, including by ECOWAS and the African Union, as well as by the Security Council and the General Assembly.¹⁵¹

62. As former President Gbagbo had refused to step aside after the election of President Ouattara, the issue of the representation of Côte d'Ivoire in the United Nations had become increasingly contentious. In accordance with the established policy and practice of the United Nations, the Secretary-General had put the matter before the Credentials Committee of the General Assembly in late December 2010. In its deliberations, the Committee had taken note of the decision of the African Union to recognize the results proclaimed by the Independent Electoral Commission and certified by UNOCI and to recognize Mr. Ouattara as President Elect of Côte d'Ivoire. Accordingly, the Committee had decided, by consensus, to accept the credentials of the representatives of Côte d'Ivoire presented by the President Elect's Government.¹⁵² The General Assembly, in its resolution 65/237 of 23 December 2010, had ultimately approved the report of the Credentials Committee, including the decision to accept the credentials issued by the Government of then-President Elect Ouattara.

63. In three successive resolutions,¹⁵³ the Security Council, acting under Chapter VII of the Charter of the United Nations, had authorized UNOCI to use all necessary means to carry out its mandate, including the protection of civilians, within its capabilities and areas of deployment. UNOCI had also been mandated to support, in coordination with the Ivorian authorities, the provision of security for the Government and other political stakeholders. At the height of the armed conflict, and having obtained confirmation from the Office of Legal Affairs that it was acting within its mandate and subject to its rules of engagement, including the principles of international humanitarian law, UNOCI had increasingly resorted to proactive and deadly force to ensure the protection of civilians, especially to prevent the use of heavy weapons against the civilian population. It had also been called upon to evacuate the nationals of a number of Member States from the country. While UNOCI had not been obliged to do so, it had acceded to those requests from Member States on a voluntary and exceptional basis, within its capabilities and resources, and without prejudice to the priority it was obliged to give to the evacuation of United Nations and associated personnel. UNOCI had also been called upon to provide protection to President Ouattara after the outbreak of hostilities. With the end of major hostilities, and following the capture of former President Gbagbo and his detention by the Government of Côte d'Ivoire, UNOCI was now providing security, at the request of the Ouattara Government, for the former President, members of his family and former members of his Government. Finally, UNOCI had also been called upon to provide refuge to former combatants defecting from Gbagbo's forces. In accordance with the advice of the Office of Legal Affairs and the Office of the Military Adviser, the defecting soldiers had been disarmed

and encamped outside the United Nations premises, taking into account the inviolability of UNOCI premises, the best interests of the UNOCI mission, including the best use of its capabilities and resources, the need to ensure the safety and security of United Nations personnel and other humanitarian personnel, and the priority accorded to the protection of civilians under imminent threat of physical violence.

64. Similarly, events in the Libyan Arab Jamahiriya had also raised a number of interesting legal issues, ranging from questions regarding access to Libyan territory for humanitarian purposes, both before and after the adoption of Security Council resolution 1973 (2011) of 17 March 2011, to action by the Security Council under the doctrine of the "responsibility to protect" (in particular, what measures could be considered "necessary" to protect civilians) and the representation of the Libyan Arab Jamahiriya at the United Nations.

65. Questions of humanitarian access had been raised with the Office of Legal Affairs both before and after the adoption of Security Council resolution 1973 (2011). Prior to the adoption of the resolution, the Office had examined the question of consent to humanitarian access, and, more particularly, whose consent (the State's or the rebels') should be obtained as a condition, in the absence of a mandate, for humanitarian access. However, with the adoption of the resolution, the combined effect of the Security Council's determination to ensure the rapid and unimpeded passage of humanitarian assistance, its authorization of "all necessary measures to protect civilians" (para. 4) and the exemption of humanitarian flights from the ban of flights (para. 7) had led the Office to conclude that humanitarian operations had been mandated under Chapter VII of the Charter of the United Nations, thus dispensing with the need for consent from the Libyan Arab Jamahiriya to the presence of those operations on its territory.

66. The question of responsibility to protect and measures considered "necessary" to that effect had also been considered. Security Council resolutions 1970 (2011) of 26 February 2011 and 1973 (2011) were the first to put the principle of responsibility to protect into full effect. They recognized the responsibility of the Libyan authorities to protect the Libyan population, and they identified the widespread and systematic attacks in the Libyan Arab Jamahiriya as crimes against humanity and thus framed them as violations of the responsibility to protect. The historical background of the resolutions was a testimony to the many diplomatic and humanitarian measures taken by States to protect civilians short of use of force, and finally, in the words of paragraph 139 of the 2005 World Summit Outcome resolution,¹⁵⁴ Member States had taken collective action through the Security Council, in accordance with Chapter VII of the Charter of the United Nations. The Security Council's authorization "to take all necessary measures ... to protect civilians and civilian populated areas" was the culmination of the doctrine of responsibility to protect. With regard to the question of what measures could be considered "necessary" to protect civilians, in resolution 1973 (2011) the Security Council "authorizes Member States ... to

¹⁵¹ See the Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire (S/2011/211).

¹⁵² A/65/583/Rev.1, para. 7.

¹⁵³ Resolutions 1962 (2010) of 20 December 2010, 1967 (2011) of 19 January 2011 and 1975 (2011) of 30 March 2011.

¹⁵⁴ General Assembly resolution 60/1 of 16 September 2005.

take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory". The scope of the authorization given to Member States was broad: it included any and all measures, apart from foreign occupation. It was also independent of and in addition to the authorization under paragraph 6 to establish a no-fly zone. It was for Member States, however, to determine the measures they might deem necessary to protect civilians, depending on the circumstances of the country and its civilian population and the nature of the threat to their physical well-being.

67. The question of the credentials of the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations had also raised interesting issues. By his letter of 27 February 2011, the Libyan Minister for Foreign Affairs had informed the Secretary-General that the Permanent Representative and Deputy Permanent Representative of the Libyan Arab Jamahiriya to the United Nations were "no longer authorized to represent or speak on behalf of the Libyan Arab Jamahiriya at the United Nations or any of its subsidiary organizations". The Minister for Foreign Affairs had followed up with a similar letter with regard to 15 other Libyan diplomats. As the Minister for Foreign Affairs had remained an accredited representative of the Libyan Arab Jamahiriya to the United Nations, and in the absence of any recommendation from an intergovernmental body of the United Nations, the Office had advised the Secretariat to act upon the communications from the Minister for Foreign Affairs. Consequently, as those diplomats had been recalled, they could not, under the rules of procedure of the General Assembly, perform any official functions on behalf of the Libyan Arab Jamahiriya, such as speaking from the Libyan seat or exercising the right to vote in the General Assembly. Their diplomatic passes had been replaced with courtesy "visitors' passes" issued at the discretion of the Secretary-General. That would allow them access to United Nations premises, but not to perform official functions on behalf of the Government. The Office of Legal Affairs had subsequently received several communications from the "Transitional National Council" of Libya seeking to reinstate the diplomats that had been recalled. Those communications had been forwarded to the Credentials Committee. In the absence of any recommendation from an intergovernmental body, the Secretariat had not been able to act upon those communications, as they had not been from an accredited representative of the Libyan Arab Jamahiriya. Should the Libyan Arab Jamahiriya seek to appoint a new Permanent Representative, then in order to be able to perform official functions he/she should present credentials to the Secretary-General in New York in person and also have the appropriate visa status.

68. With regard to developments concerning transitional justice mechanisms, the Office had a long history of involvement not only in the establishment but also in the day-to-day running of a range of international transitional justice mechanisms. As was well known, the 1990s and the early 2000s had been historic periods in international criminal justice, when new international criminal tribunals had been established to ensure accountability for genocide,

war crimes and crimes against humanity. Having made so much progress in fulfilling their mandates, the *ad hoc* international criminal tribunals were now completing their work and were preparing to close. However, it was essential that some of their functions continued post-closure. Those included witness protection, sentence enforcement, management of archives, review of sentences and contempt proceedings. It was generally accepted that those functions would be carried out by small and efficient international residual mechanisms. The next few years would be equally historic, as the United Nations and its Member States sought to establish unprecedented structures in the architecture of international criminal justice, and the Office had the privilege of being at the centre of that fascinating work.

69. After four years of negotiations, on 22 December 2010 the Security Council had adopted resolution 1966 (2010), which established the International Residual Mechanism for the Criminal Tribunals [of Rwanda and the Former Yugoslavia]. The Office of Legal Affairs was now leading in the implementation of that resolution so that the Mechanism could commence functioning on 1 July 2012. Critically, the Mechanism would continue the jurisdiction of the two Tribunals to try fugitives. The Council had established a novel structure. The Mechanism was a single new subsidiary organ of the Security Council, not a merged continuation of the two Tribunals, yet it would continue their jurisdictions. It would have branches in The Hague and Arusha, but would have a single president, prosecutor and registrar.

70. The Residual Special Court for Sierra Leone had been established through an agreement between the United Nations and the Government of Sierra Leone¹⁵⁵ that had been signed in July 2010. It would commence functioning immediately when the Special Court terminated following the conclusion of any appeal in the *Charles Taylor* case. Its functions were similar to those of the International Residual Mechanism for the Criminal Tribunals [of Rwanda and the Former Yugoslavia], but there was unlikely to be any trial of a fugitive. The case of the one remaining fugitive indictee, who was believed to be dead, would be transferred to a competent national jurisdiction either by the Special Court for Sierra Leone or the Residual Special Court for Sierra Leone. The latter would be based in The Hague, with a sub-office in Sierra Leone for witness protection and other functions. Its archives had been moved to the National Archives of the Netherlands in The Hague, which also housed the archives of the Nuremberg Tribunal.

71. The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda continued to work towards the goals set out in their completion strategies. It was unclear at the current stage exactly when they would conclude all trials and appeals, but the Security Council, in its resolution 1966 (2010), had urged them to finish all work by 31 December 2014. That meant that there would be a substantial period of overlap between the commencement of the International Residual Mechanism for the Criminal Tribunals [of Rwanda and

¹⁵⁵ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone (New York, 29 July 2010, and Freetown, 11 August 2010).

the Former Yugoslavia] in July 2012 and the termination of the Tribunals' work. The Security Council had laid down a number of transitional provisions which would determine the respective jurisdictions and functions of the Tribunals and the Mechanism during that period.

72. The trial of the former Liberian President Charles Taylor in The Hague was now the only remaining case on the docket of the Special Court for Sierra Leone. The trial proceedings had been completed and the Trial Chamber was now deliberating on the judgment. In the event of an appeal, it was expected that the proceedings would conclude around May 2012. That meant that the Court would be the first of the international criminal tribunals to complete its work, and its residual mechanism would be the first to start functioning. In the meantime, the two Tribunals were continuing their work, as evidenced by the conviction in April 2011 of two Croatian military leaders for war crimes committed in 1995 (*Gotovina et al.*) and the conviction earlier in May of the former commander of the Rwandan army for his role in that country's genocide in 1994 (*Ndindiliyimana et al.*). While many years had passed since those crimes had been committed, the fight against impunity continued.

73. With regard to the Extraordinary Chambers in the Courts of Cambodia, in July 2010 the Court had completed its first trial, convicting Kaing Guek Eav, alias Duch, of crimes against humanity, grave breaches of the Geneva Conventions for the protection of war victims and serious offences under Cambodian national law. Duch had been the Secretary of the S-21 detention centre in Phnom Penh, where records showed that more than 12,000 people had been detained and executed, although the actual numbers were believed to have been considerably greater. Duch had been sentenced to 35 years' imprisonment.

74. One of the really striking successes of the Extraordinary Chambers in the Courts of Cambodia was the impact it had had on Cambodian society. More than 31,000 Cambodians had visited the Chambers to witness the proceedings against Duch, many travelling long distances from the provinces and staying overnight. That figure was believed to be higher than for any of the other United Nations assisted tribunals or international criminal justice mechanisms. It was a forceful reminder of the importance of pursuing justice, wherever possible, in the country where atrocities had taken place. Moreover, there was strong potential for the transfer of capacity and international standards to the national courts, since the Chambers were embedded in the Cambodian national court structure and jurisdiction, with participation by international and Cambodian judges, prosecutors and court administrators. The Court was now preparing for trial in a second case, involving four senior leaders of the former Khmer Rouge regime, and it had recently announced that on 27 June it would hold an initial hearing for the four regime leaders (Nuon Chea and Khieu Samphan, as well as Ieng Sary and Ieng Thirith), who were currently in detention.

75. Concerning the Special Tribunal for Lebanon, the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, said that on 17 January 2011, the prosecutor had filed an indictment with the pretrial judge, which

remained confidential.¹⁵⁶ Despite much speculation in Lebanon and the region, the Office of Legal Affairs had no information about the proposed indictee or indictees, nor the charges. The Special Tribunal was based on civil law procedures, under which the pretrial judge was now considering confirmation of the indictment. The Office had no firm information on the timing of such confirmation. The mandate of the Special Tribunal ran until 29 February 2012, and it remained to be seen to what extent it might be extended to enable the Special Tribunal to complete its work.

76. The Secretary-General's Panel of Experts on Accountability in Sri Lanka had been established pursuant to a commitment made in a Joint Statement by the Secretary-General and the President of Sri Lanka on 23 May 2009,¹⁵⁷ in which the Secretary-General had underlined the importance of an accountability process to address allegations of violations of international humanitarian law and human rights law committed during the last phase of the military operations between the Government and the Liberation Tigers of Tamil Eelam. Unlike other commissions of inquiry, the Panel had not been an investigative or fact-finding body. Rather, it had been an advisory body tasked with advising the Secretary-General on the modalities, applicable international standards and comparative experience with regard to accountability processes in order to address alleged violations of international human rights and humanitarian law committed during the military operations. The report of the Panel, which had been released on 25 April 2011, had made a number of recommendations to the Government of Sri Lanka, the Secretary-General and the United Nations. The Panel's most important recommendation for the Government had been that it should conduct genuine investigations into alleged violations committed by both sides.¹⁵⁸

77. The three main recommendations were directed to the Secretary-General and the United Nations. The first recommendation had been that they establish an "independent international mechanism" to: (a) monitor and assess the extent to which the Government was carrying out an effective domestic accountability process; (b) conduct investigations independently into the alleged violations; and (c) collect and safeguard for future use information provided to it which was relevant to accountability for the final stages of the war. The second recommendation was that they conduct a comprehensive review of actions by the United Nations system during the war in Sri Lanka and the aftermath, regarding the implementation of its humanitarian and protection mandates. The third was that the Human Rights Council reconsider, in the light of its report, the resolution adopted regarding Sri Lanka at its Special Session in May 2009.¹⁵⁹

78. The recommendation to establish yet another independent commission of investigation raised a number

¹⁵⁶ Special Tribunal for Lebanon, *Second Annual Report (2010–2011)*, p. 13.

¹⁵⁷ Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, annex 1, p. 123 (available from www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf, accessed 10 January 2017).

¹⁵⁸ *Ibid.*, Recommendation 1, p. 120.

¹⁵⁹ Human Rights Council resolution S-11/1 of 27 May 2009.

of difficulties, both of a legal and political nature. In the recent practice of the United Nations, commissions of inquiry had been established either under a mandate from a United Nations organ or at the request of the country concerned. In either case, the cooperation of the Government was a necessary condition for the successful conduct of an investigation in its territory and for the implementation of its recommendations. In the absence of both a mandate and the consent of the Government—as was likely to be the case in Sri Lanka—the establishment of a commission of inquiry to conduct investigations within Sri Lanka was virtually impossible.

79. She then turned to the activities of the Codification Division, which, apart from being the substantive secretariat of the Commission, the Sixth Committee and other standing and *ad hoc* committees established within the context of the Sixth Committee, was responsible for implementing the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, an item which had been on the agenda of the General Assembly since the 1960s. In order to respond to increasing demand for international law training, the Codification Division had strengthened its face-to-face training activities under the Programme, with which many members of the Commission were familiar. Those measures had resulted in the award of more fellowships under the International Law Fellowship Programme, which was conducted annually in The Hague, and the organization of regional courses in international law. In the past six months, two such regional courses had been organized, one for Asia and one for Africa, and discussions were ongoing to organize a regional course in Latin America and the Caribbean. To further expand international law training and research opportunities for lawyers in developing countries, the United Nations Audiovisual Library of International Law,¹⁶⁰ created by the Codification Division, continued to grow with new lectures and research material. Since its launch in October 2008, the Audiovisual Library had been accessed in 191 Member States.

80. The Division for Ocean Affairs and the Law of the Sea continued to promote the uniform and consistent application of the United Nations Convention on the Law of the Sea, its implementing agreements and other relevant agreements and instruments and to assist the General Assembly in its annual review of ocean affairs and law of the sea issues, as well as other developments relating to the implementation of the Convention.

81. In particular, the General Assembly, in its resolution 65/37 A of 7 December 2010, had decided that the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects, was to be accountable to the General Assembly. It had also decided that the Regular Process was to be intergovernmental in nature and guided by international law, including the Convention and other applicable international instruments (para. 202). In addition, the General Assembly had established a group of experts as an integral part of the Regular Process. The deadline for the first integrated assessment of the state of the marine environment, to be prepared by the

Group of Experts, was set for 2014 (para. 205). With regard to fisheries, the resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks had been held in May 2010 to assess the effectiveness of the Agreement in securing the conservation and management of straddling and highly migratory fish stocks. The resumed Review Conference had also reviewed the implementation of the recommendations adopted at the Review Conference held in New York from 22 to 26 May 2006.¹⁶¹ Additional recommendations had been adopted, including a recommendation that the informal consultations of States parties to the Agreement continue and that the Agreement be kept under review through the resumption of the Review Conference.¹⁶² In 2011, the General Assembly would conduct a further review of the actions taken by States and regional fisheries management organizations and arrangements in response to resolutions 61/105 of 8 December 2006 and 64/72 of 4 December 2009 on the impacts of bottom fishing on vulnerable marine ecosystems. In preparation for the review, the Secretary-General would convene a two-day workshop on 15 and 16 September 2011 to discuss implementation of those resolutions. The Division for Ocean Affairs and the Law of the Sea continued to provide secretariat servicing to the Commission on the Limits of the Continental Shelf, whose workload was now considerable. In the past eight months, the Commission had received 4 new submissions, from Bangladesh, Denmark, Maldives and Mozambique, bringing the total number of submissions to 55.¹⁶³ Moreover, there were at least 43 additional potential submissions, as indicated in the preliminary information transmitted by coastal States to the Secretary-General.

82. With regard to the maritime zones established by the United Nations Convention on the Law of the Sea, she recalled that the Secretary-General performed functions regarding the deposit of charts or lists of geographical coordinates in relation to straight and archipelagic baselines and the outer limits of the territorial sea, the exclusive economic zone and the continental shelf. Since April 2010, such deposits had been made by Lebanon and Vanuatu. In total, 53 States had deposited information pertaining to the limits of their maritime zones, including the lines of delimitation. The Secretary-General gave due publicity to such deposits by issuing Maritime Zone Notifications.

83. In her final comments on the cluster, she said that over the past year, piracy off the coast of Somalia had continued to threaten the lives of seafarers, the safety and security of international navigation and the stability of the region. The Office of Legal Affairs had been working in a number of forums to assist States in addressing legal aspects of the repression of piracy under international law. While the Office had continued to provide information and advice to States on a broad range of legal issues, its work over the past year had focused

¹⁶¹ A/CONF.210/2006/15.

¹⁶² A/CONF.210/2010/7, annex, Outcome of the resumed Review Conference, New York, 28 May 2010.

¹⁶³ See www.un.org/depts/los/clcs_new/commission_submissions.htm.

¹⁶⁰ See www.un.org/law/avl.

on two principal areas, namely possible international mechanisms for the prosecution of suspected pirates and national legislation on piracy. With regard to international mechanisms, in 2010 the Office of Legal Affairs, pursuant to a request of the Security Council in its resolution 1918 (2010) of 27 April 2010, had prepared a report of the Secretary-General on possible options to further the aim of prosecuting and punishing persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. The report had identified seven possible options, ranging from the enhancement of United Nations assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy, to the establishment of an international tribunal pursuant to a Security Council resolution.¹⁶⁴

84. Following the initial consideration of the Secretary-General's report by the Security Council in 2010, the Secretary-General had appointed Mr. Jack Lang (France) as his Special Advisor on legal issues related to piracy off the coast of Somalia.¹⁶⁵ After undertaking wide-ranging consultations, Mr. Lang had submitted to the Secretary-General a comprehensive report¹⁶⁶ with 25 recommendations addressing a host of legal, political and socioeconomic issues. Mr. Lang had proposed the establishment of two special courts on piracy, to be located in Puntland and Somaliland, and an extraterritorial Somali special court to be temporarily located in a neighbouring country. The proposal of a three-part system for Somali special piracy courts incorporated two of the options set forth in the Secretary-General's report. Mr. Lang's recommendations were currently under consideration by Member States in the Security Council and were also being discussed in the Contact Group on Piracy off the Coast of Somalia. Two important initiatives had been taken to assist States in criminalizing piracy. The first initiative involved making publicly available on the website of the United Nations Convention on the Law of the Sea a compilation of national legislation on piracy¹⁶⁷ provided by States to the Division for Ocean Affairs and the Law of the Sea and the International Maritime Organization (IMO). The second initiative had involved the preparation of three studies by three entities—the Division for Ocean Affairs and the Law of the Sea, IMO and the United Nations Office on Drugs and Crime—on the elements of national legislation on piracy under relevant international legal instruments. Those studies had been presented to the Legal Committee of IMO at its 98th session in April 2011.¹⁶⁸

85. Turning to the activities of the International Trade Law Division in Vienna, which served as the substantive secretariat of the United Nations Commission on International Trade Law (UNCITRAL), she said that 2010 had been a busy year for UNCITRAL. It had adopted three important texts reflecting recent developments in international trade law: the UNCITRAL Arbitration

Rules, as revised to reflect changes in arbitral practice since the adoption of the original version in 1976;¹⁶⁹ the Supplement on Security Rights in Intellectual Property,¹⁷⁰ complementing the UNCITRAL Legislative Guide on Secured Transactions and addressing the need to make secured credit more available to intellectual property owners and other right holders; and the UNCITRAL Legislative Guide on Insolvency Law,¹⁷¹ which had been further developed to provide timely guidance on how to develop and improve the treatment of enterprise groups in insolvency. Through its working groups, UNCITRAL was now engaged in work on various new topics, including transparency in treaty-based investor-State arbitration, online dispute resolution and registration of security rights in movable assets. At its forty-fourth session, to be convened in Vienna from 27 June to 8 July 2011, UNCITRAL was expected to consider and finalize the revised version of its 1994 Model Law on Public Procurement¹⁷² to reflect the experience gained in its usage and new practices, in particular those resulting from the use of electronic communications. It would also consider possible future work in the areas of e-commerce and microfinance, as well as its role in promoting the rule of law at the national and international levels. The Division continued to work to promote UNCITRAL texts in order to ensure their uniform interpretation and application as well as effective implementation. To that end, the Division published digests of case law and operated Case Law on UNCITRAL Texts ("CLOUT"),¹⁷³ a system for collecting and disseminating information on court decisions and arbitral awards relating to UNCITRAL texts.¹⁷⁴ It also took part in various technical assistance activities and coordinated closely with relevant international organizations.

86. In the past year, the Treaty Section had continued to perform depositary functions on behalf of the Secretary-General, as well as the registration and publication functions mandated by Article 102 of the Charter of the United Nations. The Secretary-General was the depositary for more than 550 treaties. In 2010, five new multilateral treaties had been received for deposit, as well as two amendments to the Rome Statute of the International Criminal Court.¹⁷⁵ In 2011, the annual Treaty Event would take place from 20 to 22 and on 26 and 27 September during the general debate of the sixty-sixth session of the General Assembly.

¹⁶⁹ Report of the United Nations Commission on International Trade Law, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex I.

¹⁷⁰ *Ibid.*, annex II.

¹⁷¹ *Ibid.*, chap. V, sect. B.

¹⁷² Report of the United Nations Commission on International Trade Law, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, chap. III, sect. F.

¹⁷³ See www.uncitral.org/uncitral/en/case_law.html.

¹⁷⁴ The CLOUT User Guide was published as document A/CN.9/SER.C/GUIDE/1/Rev.2.

¹⁷⁵ Amendments to article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010), depositary notification C.N.533.2010.TREATIES-6 and amendments on the crime of aggression (Kampala, 11 June 2010), depositary notification C.N.651.2010.TREATIES-8, or *Official Documents of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, resolutions RC/Res.5 and RC/Res.6, respectively.

¹⁶⁴ S/2010/394.

¹⁶⁵ S/2010/556, para. 39.

¹⁶⁶ S/2011/30.

¹⁶⁷ See www.un.org/depts/los/piracy/piracy_national_legislation.htm.

¹⁶⁸ The documents created by these three entities were communicated to States by IMO circular No. 3180 (available from http://www.un.org/depts/los/piracy/circular_letter_3180.pdf), annexes 1–3, documents LEG/98/8/1–3.

87. The Treaty Section was also involved in providing training to Member States and international organizations at the regional level and at United Nations Headquarters on treaty law and practice, as well as on the implementation of treaty obligations in collaboration with other United Nations partners. In October 2010, it had organized in Jakarta, in collaboration with the Government of Indonesia and the Asian–African Legal Consultative Organization (AALCO), a regional training session on treaty law and practice. In the course of 2011, training courses organized jointly with the United Nations Institute for Training and Research would be held at Headquarters, and regional training courses were tentatively planned for the Commonwealth of Independent States, the Association of Southeast Asian Nations (ASEAN) and in Central and South America.

88. Assisting States in the submission of treaties for registration pursuant to Article 102 of the Charter of the United Nations was a key component of the Treaty Section's training activities. While there had been a steady increase over the years in the number of treaties and actions submitted for registration by Member States, the Treaty Section was aware that the number of treaties it had received did not reflect the actual number of treaties in force. The Treaty Section had also been continuing its efforts to enhance the efficiency of the registration and publication processes through increased automation. In October 2010, it had completed a major upgrade of its Treaty Information and Publishing System in order to enhance the desktop publishing of the United Nations *Treaty Series* with the objective of speeding up the availability of treaties in hard copy and electronically. At the end of 2010, the Treaty Section had submitted 73 volumes for printing. The web-publishing procedures had also been further enhanced with a view to facilitating the electronic availability of authentic texts of treaties shortly after their registration.

89. The current session of the Commission would be the last of the quinquennium. She hoped that some time would be devoted to reflecting on how the Commission could maintain its efficiency, effectiveness and productivity with the reduced resources at its disposal as it continued its important work in the progressive development of international law and its codification. The times were extraordinarily difficult from an economic point of view, and Member States from all regions were facing serious financial pressures. In March 2011, the Secretary-General had requested all Departments to reduce their outline figure for the 2012–2013 biennium by at least 3 per cent and had spoken of an emergency situation in which Member States were in serious financial distress. Since then, he had launched the project to strengthen and reform the United Nations, which aimed to ensure that the Organization would deliver more and contain costs in the long term. He had asked each head of Department to review all processes in their programme of work in order to achieve maximum effectiveness and demonstrate strong self-discipline. Given the budgetary constraints, all United Nations bodies, including the Commission, would need to seek creative ways of meeting their objectives.

90. That situation called for efforts in three areas: duration of meetings; possible recourse to online publications; and

reduction in the volume of parliamentary documentation. That would obviously have a bearing on the work of the Commission, particularly on the duration of its sessions, and on the question of whether there should be split sessions, as well as on the summary records of debates of the Commission, which would need to be curtailed.

91. Members of the Commission were aware of the limitations on budgetary growth at the United Nations over the past few bienniums. It had been costing more and more United States dollars to make payments in Swiss francs in respect of the Commission's expenditures. In recent years it had been possible to overcome such shortfalls—of between US\$100,000 and US\$200,000—by taking funds from other areas of the overall budgetary allocations made to the Office of Legal Affairs. For the 2010–2011 biennium, it was estimated that the Office of Legal Affairs would have to find approximately US\$550,000 from other areas of its budget to fund the shortfalls. That was a considerable sum of money for a relatively small Department. In preparing budget proposals for 2012–2013, and to address the Secretary-General's request for a reduction of at least 3 per cent in the outline figure, programme managers had been under instructions to reduce the overall budget of the Organization. That meant that it had not been possible to meet the cost estimates provided for the Commission by the United Nations Office at Geneva.

92. She raised those issues to draw attention to the intense focus of the Secretary-General on them and in the hope that the Commission would take them into account in its discussions, while assuring members that the Commission could count on the support of the Office of Legal Affairs.

93. The CHAIRPERSON invited the members of the Commission to put questions to the United Nations Legal Counsel.

94. Sir Michael WOOD said that he was grateful to the United Nations Legal Counsel for her statement, which showed that the Office of Legal Affairs continued to be central to the work of the United Nations, and he also expressed appreciation for the support which the Codification Division had provided the Commission.

95. The members of the Commission devoted a considerable proportion of their time, without remuneration, to the work of the Commission. In return, it was very important, despite current financial difficulties, that they continued to receive the support they needed. Publications were essential, because they were the outcome of the Commission's work. Summary records fulfilled a special role for the Commission, because they were the *travaux préparatoires* of the conventions and other instruments that it was seeking to elaborate, hence the need to recognize their importance.

96. He drew attention to the excellent work of the Treaty Section, and he also hoped that an attempt would be made at the annual Treaty Event to ensure the entry into force in 2014 of the United Nations Convention on Jurisdictional Immunities of States and Their Property on the tenth anniversary of its adoption.

97. Mr. VÁZQUEZ-BERMÚDEZ said that the efforts made by the United Nations to conduct its activities with fewer resources and to reduce its budget in view of current financial difficulties were perfectly legitimate. It should, however, be pointed out that the Commission had been working very effectively. At the end of the current biennium it would have completed consideration of four topics (the law on transboundary aquifers, responsibility of international organizations, effects of armed conflicts on treaties and reservations to treaties), the results of which would be submitted to the General Assembly. The consideration on first reading of the draft articles on expulsion of aliens might also be completed at the current session. Consequently, it would not be desirable for a reduction in resources to compromise the Commission's effectiveness and productivity. He was particularly worried about the level of assistance that would be provided to members if it were decided to hold a single session. He shared the concerns voiced by Sir Michael with regard to a possible curtailment of the drafting of the summary records of the Commission's meetings.

98. Mr. DUGARD asked what the difference was between fact-finding missions and the Secretary-General's advisory panels. Fact-finding missions had recently been criticized in the context of the Report of the United Nations Fact-Finding Mission on the Gaza Conflict¹⁷⁶ ("Goldstone report") on the grounds that, by their very nature, they were non-judicial inquiries. Yet now it seemed that the Secretary-General was bypassing that difficulty by appointing advisory panels, such as in the case of Sri Lanka¹⁷⁷ and Gaza.¹⁷⁸ The response from Sri Lanka to the Secretary-General's panel did not seem to be any different from the response from Israel to the Goldstone Commission.¹⁷⁹ If it was to be argued that a fact-finding mission was inherently flawed because it was not a judicial commission, did not the same criticism apply to the Secretary-General's advisory panels?

99. Mr. HMOUD said that for the past five or six years, the Sixth Committee seemed to have been caught in a vicious circle. Its work concerned recurrent subjects that had become very politicized. There had also been deficiencies with regard to topics and themes that the Committee ought to be considering. He asked what could be done to help the Sixth Committee overcome the deadlock and to support its work.

100. With regard to Security Council resolution 1973 (2011), the United Nations Legal Counsel had stressed that it was not necessary to have the approval of the Libyan Arab Jamahiriya to provide humanitarian assistance to the civil population. He pointed out that the resolution in question spoke of Member States and not organizations active in that country. In that connection, he wondered about the representativity of the Transitional National Council and whether it really represented the country, or whether that role did not continue to be vested

¹⁷⁶ A/HRC/12/48.

¹⁷⁷ See footnote 157 above.

¹⁷⁸ Report of the Secretary-General's Panel of inquiry on the 31 May 2010 flotilla incident (see www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf, accessed 10 January 2017).

¹⁷⁹ See <http://mfa.gov.il/mfa/foreignpolicy/terrorism/pages/initial-response-goldstone-report-24-sep-2009.aspx>, accessed 10 January 2017.

in the Government in place. The answer to that question depended on the actual control on the ground: those who exercised control also exercised representativity. As to financial questions, he expressed the hope that the current reduction in resources would not affect the activities of the United Nations, and those of the Commission in particular. That question called for in-depth studies, given the vital role which the Commission played in the area of the progressive development and codification of international law.

101. Mr. VASCIANNIE endorsed the remarks by Sir Michael on the excellent work of the Codification Division. Like Sir Michael, he was very concerned about the possible suspension of the drafting of summary records and other United Nations publications. Those documents were of particular importance to lawyers in developing countries, who did not have access to the material available in Europe or North America. On a final point, he said that it would be very regrettable if the Commission did not continue to meet in two-part sessions, because that would pose enormous difficulties for lawyers who had to come great distances to participate in its work. The current arrangement should not be called into question.

102. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) thanked Sir Michael for his kind words concerning the Codification Division, which was conscious of the difficulties and concerns of the Commission and was doing everything in its power to serve the Commission and defend its interests at Headquarters. She recognized not only the importance of the work of the Commission, but also the special role that it played in the international legal environment and the strengthening of the international legal order. She agreed that the United Nations Convention on Jurisdictional Immunities of States and Their Property was an important instrument that needed to be highlighted at the annual Treaty Event, and she undertook to bring up the question at Headquarters.

103. She assured members of the Commission that the Codification Division was fully aware of the difficulties that a reduction of resources would have. The Office of Legal Affairs was doing everything in its power to redeploy resources in order to provide the best possible service. The Secretary-General had stressed, however, that it was essential to do more with less.

104. The question raised by Mr. Dugard played an important role in discussions concerning legal and non-legal accountability mechanisms that had been established in recent years. As she saw it, the Goldstone Commission and the Panel of Experts on Sri Lanka were two completely different exercises. The Goldstone Commission had been set up by the Human Rights Council and the General Assembly, whereas the Panel of Experts on Sri Lanka had been established by the Secretary-General to advise him, with no fact-finding mission involved, because that had not been its mandate. However, when the Panel of Experts had submitted its report, it had become clear that, essentially, its conclusions had been the equivalent of those of a fact-finding mission. That situation had posed major difficulties. Some had argued that such a

result should have been expected, whereas for others, the Panel of Experts had exceeded its mandate. The latter argument had never been accepted. The Panel of Experts had in essence asserted that, in order to fulfil its mandate, namely to give the Secretary-General an opinion on the allegations formulated with regard to the events in Sri Lanka, it had had no choice but to investigate and “find facts”. One of the most important questions that arose concerned the circumstances in which the Secretary-General should, or should not, establish such panels of experts.

105. With regard to Gaza, the Secretary-General had set up a panel of experts on the flotilla incident for Gaza, which was expected to submit its report shortly.¹⁸⁰ The report would not fail to have an important impact on the situation in the Middle East, a circumstance that had caused considerable concern.

106. The Office of Legal Affairs shared Mr. Hmoud’s sentiment with respect to the Sixth Committee. As everyone knew, however, the work of the Sixth Committee, its agenda and other matters were determined by the representatives of Member States on that body. The Codification Division could hardly influence that situation; only the concerted efforts of Member States could enable progress to be made.

107. With regard to the Libyan Arab Jamahiriya and Security Council resolution 1973 (2011), she said that, prior to its adoption, it had been difficult to provide humanitarian assistance to the country, but enormous diplomatic pressure had been exerted on the United Nations for it to do so. In that connection, the Office of Legal Affairs had clearly indicated that, without the consent of the Libyan authorities, it would not be possible to provide humanitarian assistance to the population. That opinion had been respected and understood. However, in adopting resolution 1973 (2011), the Security Council had decided to authorize a humanitarian intervention, after which the consent of the Member State had no longer been required.

108. The question of the representation of the Libyan Arab Jamahiriya in the United Nations was with the Credentials Committee, which was competent to take a decision. The Office of Legal Affairs had simply informed the Secretary-General that, the Libyan authorities having annulled the credentials of their representatives in the United Nations, there had been no other choice but to comply with that decision.

109. She fully respected the view of the Commission on maintaining two-part sessions. Regardless of what action was taken, it must not undermine the Commission’s work. The issue was being given all due consideration.

The meeting rose at 1.20 p.m.

3093rd MEETING

Thursday, 26 May 2011, at 10.05 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPporteur¹⁸¹ (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV [chap. III],¹⁸² section D, to chapter VIII [chap. VII] of the sixth report on expulsion of aliens, reproduced in the second addendum (A/CN.4/625/Add.2).

2. Mr. VASCIANNIE commended the Special Rapporteur on his generally careful and systematic use of sources, in particular older sources such as the 1892 rules of the Institute of International Law,¹⁸³ referred to in paragraphs 453 [para. 51] and 467 [para. 65] of the addendum, and a United States Supreme Court ruling from 18 January 1892, referred to in paragraph 465 [para. 63] (*Nishimura Ekiu v. United States*). Such an approach was useful in providing a context for understanding more recent sources, demonstrating consistency between older and more recent ones and delineating differences among the various sources.

3. Some thought should be given to whether draft articles D1 to J1 adequately reflected the practice and *opinio juris* of countries from different regions and of States especially affected by expulsion. For those draft articles that were identified as rules of customary law, it might be tempting to limit research to those countries or regions with up-to-date reports or heavy caseloads

¹⁸¹ At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2).

¹⁸² The numbers in brackets refer to the numbering used in the mimeographed version of the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), available from the Commission’s website. The chapters, paragraphs and footnotes were renumbered for publication in *Yearbook ... 2010*, vol. II (Part One).

¹⁸³ “Règles internationales sur l’admission et l’expulsion des étrangers proposées par l’Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892”, *Annuaire de l’Institut de droit international*, vol. XII (1892–1894), p. 218 (available from the Institute’s website at www.idi-iil.org/).

¹⁸⁰ See footnote 178 above.

involving actual expulsions. However, the Special Rapporteur had avoided that temptation. While it was true that European approaches featured prominently in the report, there were pertinent references to multilateral human rights instruments and sources that were not Eurocentric, such as the African Charter on Human and Peoples' Rights and the American Convention on Human Rights: "Pact of San José, Costa Rica". The Special Rapporteur also relied to some degree on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, to which there were few, if any, States parties from the European Union. Where the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the European Union approach and multilateral human rights instruments pointed in the same direction, State practice in that regard might arguably serve as a fair guide in identifying rules that could gain State acceptance.

4. The Special Rapporteur's approach of distinguishing scrupulously between rules that amounted to codification and others that reflected progressive development seemed to imply that the Commission had greater flexibility in formulating provisions *de lege ferenda* than in adjusting agreed rules of law. If that was the Special Rapporteur's perspective concerning draft articles D1 to J1, he accepted it. It was a controversial area of the law: any substantial departure from what States clearly regarded as prevailing law could undermine the long-term viability of the Commission's final product. The Commission should remain mindful of the need to ensure a balance between States' rights and sovereign prerogatives on the one hand, and the human rights and interests of individuals on the other.

5. Turning to draft article D1 on return to the receiving State of the alien being expelled, he said he supported paragraph 1 in principle, since the voluntary approach to return of aliens avoided several problems and was clearly the path of least confrontation. Perhaps more substance could be given to the recommendation that the expelling State "shall encourage" the alien, however. What that phrase actually involved was unclear. It might be better to recommend that the expelling State "should take measures" to promote voluntary returns, a more measurable standard cited in paragraph 404 [para. 2] of the report as used by the Committee of Ministers of the Council of Europe.¹⁸⁴

6. Draft article D1, paragraph 2, should be retained, but he shared Mr. Niehaus's view that the express reference to air travel was at best superfluous. There was a case for including paragraph 3, even if it was not yet a binding rule of law. As a drafting matter, however, the phrase "unless there is reason to believe" might need to be adjusted in order to make it clear that the expelling State should have a reason to believe that the alien could abscond.

7. The Special Rapporteur's treatment of the subject of appeals against the expulsion decision was problematic, particularly with respect to the suspensive effect of an appeal. It was his understanding that the Special Rapporteur shared the view of the Institute of International

Law, cited in paragraph 453 [para. 51], that "expulsion may be carried out provisionally, notwithstanding an appeal".¹⁸⁵ However, as the Special Rapporteur noted, the practice under article 13 of the European Convention on Human Rights supported the suspensive effect of appeals. A third approach was that adopted in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provided that persons facing expulsion had the right to seek a stay of the expulsion decision. In arguing against the suspensive approach, the Special Rapporteur relied ultimately on the policy argument that most States would find it hard to accept a general rule that allowed the action of the expelling State to be blocked, particularly in those cases where the expulsion decision had been issued on grounds of public order or national security. Perhaps so, but perhaps there could be a rule allowing suspensive effects where expulsion was on grounds other than public order or public security. The policy in support of the approach adopted in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was that individuals experienced upheaval in their lives when they were expelled and, if it was possible that the expulsion decision might be overturned, they should at least be given the right to request that the decision should be suspended. Accordingly, he suggested that a provision similar to the one contained in article 22, paragraph 4, of the Convention should be included.

8. Greater clarity was needed in the discussion of the right of appeal. Draft article C1, paragraph 1 (b),¹⁸⁶ gave a person facing expulsion the right to challenge the expulsion or the expulsion decision. In addition, paragraph 1 (c) of that draft article gave the person facing expulsion the right to a hearing. As he understood it, such a hearing amounted to an appeal, but paragraph 452 [para. 50] of the report stated that there was no legal provision that allowed national courts to review administrative decisions to expel certain aliens from the national territory, particularly when issues of national security and public order were in question. Furthermore, the first sentence of paragraph 461 [para. 59], indicating that there was no basis in international law for establishing any rule regarding remedies against an expulsion decision, seemed to suggest an approach that was inconsistent with the right to a hearing provided for in draft article C1. The matter might have to be clarified in the commentary to the relevant articles.

9. With regard to draft article E1, paragraph 1, Mr. Vasciannie said he agreed that the State of nationality should be the destination for the expellee but saw a need for a rule or guideline concerning the burden of proof and respect for due process in determining nationality. The position of Louis B. Sohn and Thomas Buergenthal,¹⁸⁷ cited by the Special Rapporteur in paragraph 495 [para. 93] of the report, was a good starting point for solving a potentially difficult practical issue.

¹⁸⁵ "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892" (see footnote 183 above).

¹⁸⁶ *Yearbook ... 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

¹⁸⁷ L. B. Sohn and T. Buergenthal (eds.), *The Movement of Persons across Borders*, Studies in Transnational Legal Policy, vol. 23, Washington, D.C., American Society of International Law, 1992, p. 47.

¹⁸⁴ Document CM(2005)40 final, of 9 May 2005. See also the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Comments on the Twenty Guidelines on Forced Return (925th meeting), document CM(2005)40-Add.

10. While he supported the text of draft article E1, paragraph 3, he shared the view that paragraph 2 should be simplified. The possible destinations for the expellee were options that might or might not be open, depending on the consent of the receiving State, a point made clearly by Mr. McRae at the previous meeting.

11. He supported draft article F1, as revised. His only suggestion would be to insert the words “international law” before the word “rules” in order to make it especially clear that it was the rules of international law and human rights that were to be applied and not the rules of the transit State.

12. He also supported draft article G1 and was in favour of deleting the square brackets in paragraph 2.

13. Draft articles H1, I1 and J1 were generally acceptable, although draft article H1, especially the phrase “mistaken grounds” in the English text, might need to be redrafted for clarity. The Special Rapporteur might also wish to consider whether draft article J1 should be “without prejudice” to any other right the expellee might have in his or her individual capacity. However, the latter point could be explained in the commentary.

14. Although the revised version of draft article 8¹⁸⁸ was acceptable in principle, the English text might need further revision.

15. Mr. MELESCANU commended the Special Rapporteur on his well-researched report which provided a comprehensive analysis of the literature, case law and State practice on the expulsion of aliens. He was in favour of referring to the Drafting Committee draft articles D1 to J1 proposed in the last chapters of the sixth report as well as draft article 8 as revised by the Special Rapporteur at the previous session.¹⁸⁹ Despite the reservations expressed by some of his colleagues, the Drafting Committee would, in his view, be able to find acceptable wording to reflect the relationship between expulsion and extradition, a good starting point perhaps being the concept of “disguised extradition”.

16. The question of expulsion of aliens was not only topical but also highly complex, with unavoidable political implications. State practice varied significantly from one geographical area to another. The Commission’s goal should be to elaborate draft articles meant for universal application, building on the relevant European Union practice through progressive development of the law.

17. He had no problems with the first two paragraphs of draft article D1, which were based on the Convention on International Civil Aviation, the Convention on offences and certain other acts committed on board aircraft and proposals made in the Parliamentary Assembly of the Council of Europe. Despite the doubts expressed by some members concerning the legal value of such instruments, he thought the Commission could not afford to ignore them in its codification work. Paragraph 3, representing

the progressive development of international law, was an important statement of the need to protect the rights of persons being expelled. However, the provision under which the alien would be given no notice to prepare for his or her departure if “there is reason to believe that the alien in question could abscond during such a period” constituted a vague and totally subjective exception and seemed to negate the first part of the paragraph. He hoped that the Drafting Committee would be able to take up that matter.

18. Draft article E1 was one of the most important provisions from the point of view of respect for the fundamental rights and freedoms of the expelled person. Paragraph 1 set out the principle whereby an alien should be expelled to his or her State of nationality, which appeared to be the natural destination and, in any event, the most common one. The duty of the State of nationality to admit its nationals had been recognized in the 1928 Convention regarding the Status of Aliens and upheld by national courts. Paragraph 2 likewise seemed well grounded in treaty provisions and State practice. It cited a number of possibilities with respect to the State of destination, but it should perhaps be reformulated to give greater priority to any request regarding the State of destination made by the alien concerned. Paragraph 3 was well drafted and a logical extension of the first two paragraphs.

19. His only comment on draft article F1 was to endorse the Special Rapporteur’s proposal to replace the word “also” with the Latin expression “*mutatis mutandis*”.

20. In Part Three of the addendum, on the legal consequences of expulsion, the Special Rapporteur addressed the prohibition of expulsion for the purpose of confiscation. His analysis was primarily based on the seizure of property of Germans expelled from Czechoslovakia after the Second World War but also referred to the *Nottebohm* case, the expulsion of Asians by Uganda¹⁹⁰ and the expulsion of British nationals from Egypt.¹⁹¹

21. The Special Rapporteur next considered the protection of property of aliens, including those who had been lawfully expelled, referring to a wide range of relevant provisions contained in various international and regional instruments and national legislation. He then engaged in a thorough analysis of property rights and similar interests, giving numerous examples of case law. The conclusions of that analysis had been incorporated in draft article G1 on protecting the property of aliens facing expulsion. The only issue he wished to raise in that connection concerned the phrase “to the extent possible” in square brackets. He was in favour of deleting it, since it undermined the obligation of the expelling State to allow an alien to dispose freely of his or her property when facing expulsion.

22. With respect to the right of return in the case of unlawful expulsion, the Special Rapporteur referred to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the legislation of certain States. Romanian legislation provided for an appeals procedure before the national courts in the event of an expulsion order. If the judges of a higher

¹⁸⁸ *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

¹⁸⁹ *Ibid.*

¹⁹⁰ See G. S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978, pp. 212–216.

¹⁹¹ *Ibid.*, p. 216.

court decided to revoke the order, the person concerned would remain in Romanian territory, irrespective of any decision reached as to his or her guilt. If the order was annulled or revoked after the expulsion had been carried out, the judge was competent to grant the most appropriate redress. In principle, Romanian legal practice was that in such situations, the alien concerned must be allowed entry, a practice based on the decision of the European Court of Human Rights in *Kordoghliazar v. Romania*. Although it was true that in one State, namely Malaysia, the right of return was prohibited by the law, he thought that there were sufficient arguments for introducing a provision such as that proposed by the Special Rapporteur in draft article H1. The text contained sufficient guarantees, although he proposed replacing the phrase “a threat to public order or public security” with “a threat to public order and national security”, since that wording had already been accepted by the Drafting Committee. He also wished to insist on the need to include in the draft article provisions concerning the suspension of an expulsion order until the alien concerned had exhausted all remedies and the order became final. In the absence of such a provision, an alien’s right of return would in many cases be seriously affected.

23. Mr. WISNUMURTI said that the second addendum to the sixth report on expulsion of aliens reflected thorough research of the issue and in-depth analysis of relevant treaty law, judicial decisions and national legislation. The seven new draft articles proposed (D1 to J1) were supported by convincing arguments.

24. With respect to procedural rules, the Special Rapporteur had focused his attention on the voluntary departure of an alien facing expulsion and on the forcible implementation of an expulsion decision. A balance had to be achieved between the State’s right to expel an alien, on the one hand, and, on the other, the human rights and dignity, including during travel to the State of destination, of an alien subjected to forceful implementation of an expulsion decision. Draft article D1 had achieved that objective. Paragraphs 1 and 2 had already been codified, and paragraph 3 was part of the progressive development of international law.

25. Referring to paragraphs 434 [para. 32] and 451 [para. 49] of the report, he said that the Special Rapporteur had rightly underscored the fact that treaty law, international jurisprudence, national law and literature all recognized an alien’s right to have the legality of an expulsion order reviewed by a competent independent body, which meant that that right had now acquired the force of customary law.

26. In chapter V [chap. IV], section B, concerning the impact of judicial review on expulsion decisions, the Special Rapporteur had correctly concluded that, as the suspensive effect of a remedy against an expulsion decision was not widely accepted and the formulation of a general rule on the subject would hamper the exercise of the expelling State’s sovereign right of expulsion, no such general rule should be formulated. In addition, no article should be drafted on remedies against an expulsion decision, because it would be devoid of any basis in international law, and, in general, the issue fell within the scope of States’ widely varying domestic legislation.

27. Concerning chapter VI [chap. V], section E, he said that since a State had no obligation to allow an alien who was about to be expelled to enter its territory, an expelling State clearly had to ensure that a State of destination other than the alien’s State of nationality agreed to the expellee’s entry into its territory. As indicated in paragraph 518 [para. 116] of the report, that principle was founded on a rule of international law under which each State had the sovereign power to set the conditions of entry to and exit from its territory. Draft article E1 reflected that position. Paragraph 1 of the draft article was consistent with the rule that an alien subject to expulsion should normally be expelled to his or her State of nationality; paragraph 2 set out the exception to that rule; and paragraph 3 reflected the principle that a third State had no duty to admit a person facing expulsion. Since paragraphs 1 and 3 were closely linked, it would be logical to place the latter immediately after the former.

28. Draft article F1, as revised by the Special Rapporteur, was a necessary and logical extension of other provisions safeguarding the human rights of expellees. He supported Mr. Vasciannie’s proposal to insert “international law” before the word “rules”.

29. Draft article G1, paragraph 1, stipulated that the expulsion of an alien for the purpose of confiscating his or her assets was prohibited. Although the obligation to protect the assets of aliens subject to expulsion was grounded in international law, as demonstrated in paragraph 552 [para. 150] of the report, it was doubtful whether international law prohibited expulsion in cases where it was presumed that the expulsion decision was driven by a desire to confiscate the alien’s assets. That presumption was mentioned all too briefly in paragraph 532 [para. 130]. Since it was difficult to assess an expelling State’s underlying motives objectively, paragraph 1 of the draft article should perhaps not be retained. After all, paragraph 2 clearly established the expelling State’s obligation to protect the assets of the alien subject to expulsion. If the Commission were to maintain paragraph 1, with the necessary drafting improvements, the order of the two paragraphs should be reversed and the bracketed phrase “to the extent possible” deleted from paragraph 1. If, however, the Commission considered that such a qualifying phrase should be retained, in order to reflect certain eventualities, then it should be better worded.

30. He agreed with the Special Rapporteur that if an expulsion decision was annulled, the expelled alien should be able to benefit from the right to return to the expelling State. He was consequently in favour of draft article H1, which provided for that right. The text was balanced in that it expressly stated that an expelled alien had the right to return to the expelling State on the basis of the annulment of the expulsion decision, while at the same time making it clear that the expelling State was under no obligation to readmit the expelled alien to its territory if his or her return constituted a threat to public order or to public safety. As noted in paragraph 562 [para. 160] of the report, not all grounds for annulment of an expulsion decision conferred the right of re-entry: the annulment must be based on substantive and justifiable reasons, not on procedural errors. The need for substantive grounds for an annulment must therefore be reflected in the draft article’s wording.

31. He welcomed draft articles I1 on the responsibility of States in cases of unlawful expulsion and J1 on diplomatic protection since, as the Special Rapporteur pointed out in paragraph 608 [para. 206] of the report, the general regime of State responsibility for internationally wrongful acts was applicable to the unlawful expulsion of aliens. In such cases, however, the State of nationality could exercise diplomatic protection, as the ICJ had recently found in the case concerning *Ahmadou Sadio Diallo*.

32. In conclusion, he said that he was in favour of referring to the Drafting Committee the draft articles proposed in the second addendum to the sixth report.

33. Mr. SABOIA said that he agreed with most of the proposals made in the clearly reasoned second addendum to the sixth report. In chapter IV [chap. III], section D, the Special Rapporteur mentioned several cases where the human rights of persons being expelled had been seriously violated. While he approved of the general thrust of draft article D1, he thought it would be advisable to include in paragraph 2 of that text an express reference to respect for human rights and human dignity. He concurred with Mr. Niehaus that paragraph 1 should be reworded to ensure that it did not appear to induce the expelling State to exercise undue pressure to depart voluntarily on the person being expelled.

34. Like Mr. McRae, he thought that if, as stated in paragraph 451 [para. 49] of the report, the right of appeal of a person subject to expulsion had the force of customary law, then a draft article should be proposed in order to reflect that finding.

35. As far as the suspensive effect of appeals was concerned, it was plain that an appeal was useless if it had no such effect. He therefore endorsed Mr. Candioti's suggestion that a draft article should be formulated to make provision for the suspensive effect of an appeal, except in cases of serious threats to public security.

36. His only comment with regard to chapter VI [chap. V] on relations between the expelling State and the transit and receiving States was that it was vital to respect the right of any person to return to his or her State of nationality. In the event of expulsion, priority should go to returning a person to the State of nationality, apart from in cases where expulsion to that State entailed a risk of torture. He agreed with draft articles E1 and F1, as revised by the Special Rapporteur.

37. The reasoning behind chapter VII [chap. VI] was interesting. He supported draft article G1, provided that the phrase "to the extent possible" was deleted, as he endorsed Mr. Niehaus's comment that this expression would weaken the right to the protection of property. If property had been destroyed, looted or lost, the other forms of reparation provided for in the articles on State responsibility would apply.

38. He was in favour of draft articles H1, I1 and J1 and the revised version of draft article 8,¹⁹² and he recommended that they all be sent to the Drafting Committee.

39. Mr. FOMBA, clarifying his position with regard to the revised version of draft article 8, said that the justification for that provision should not be called into question, because the situation it was intended to cover was not merely hypothetical. The revised version was an improvement that should make it relatively easy to achieve consensus. Its wording seemed *prima facie* to be appropriate because, when expulsion was carried out in connection with extradition, certain conditions of expulsion had to be met.

40. As far as the legal basis for those conditions was concerned, the point at issue was whether it would be better to simply say "in accordance with international law" or to append to that phrase the words "or with the provisions of the present draft article". The wording "in accordance with international law" might be ambiguous in the specific context of expulsion. In principle, he had no firm preference; either formulation could be used but, in order to facilitate interpretation, it might be best to include the expression "or with the provisions of the present draft article". He would not oppose any consensus reached on other wording, however.

41. In any case, revised draft article 8 should be sent to the Drafting Committee.

42. Mr. DUGARD said that he was not convinced of the wisdom of Mr. McRae's suggestion that, instead of attempting to formulate articles, the Commission should be satisfied with developing guidelines. The natural course of the Commission's work led it to prepare draft articles on a particular topic. Although the Sixth Committee might decide not to convert those draft articles into a treaty, or might delay that process, as it had done with the articles on State responsibility for internationally wrongful acts¹⁹³ and on diplomatic protection,¹⁹⁴ it would probably be very helpful if the Commission did endeavour to prepare draft articles on the expulsion of aliens, currently a subject of great importance.

43. Concerning draft article D1, he said that he agreed that aliens should be encouraged to leave voluntarily. Consideration should be given to Mr. Vasciannie's suggestion that the State should "take measures" to encourage voluntary departure. The Commission should also address the cost of transportation—in the commentary, if not in the draft article itself—because in many instances aliens were unable to leave voluntarily for financial reasons. In paragraph 2, a reference to human rights should be included after the words "air travel", in order to emphasize the importance of the human rights dimension.

44. Like many other members of the Commission, he had reservations about the Special Rapporteur's position on an alien's right of appeal against an expulsion decision. The Special Rapporteur apparently believed that the rule set forth in draft article C1¹⁹⁵ covered such

¹⁹² See footnote 188 above.

¹⁹³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

¹⁹⁴ *Yearbook ... 2006*, vol. II (Part Two), p. 24, para. 49.

¹⁹⁵ See footnote 186 above.

appeals adequately. Although he acknowledged that European law did recognize the right of appeal, his conclusion in paragraph 461 [para. 59] of the report was based largely on the fact that there was no agreement as to the suspensive effect of such an appeal. He personally agreed with Mr. Vasciannie that the Commission should be guided, not by the 1892 resolution of the International Law Institute,¹⁹⁶ but by more recent instruments such as the European Convention on Human Rights and, possibly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In any event, the Special Rapporteur should give further consideration to the subject and perhaps formulate a provision dealing with the right of appeal and the possible suspensive effect of such an appeal against an expulsion order, since more clarity on the subject was certainly needed.

45. While he agreed completely with draft article E1, paragraph 1, he was troubled by paragraph 2, because it suggested that if the alien's State of nationality had not been identified, or if he or she was likely to be tortured there, the alien could be expelled to a number of other States. Although the Special Rapporteur's philosophy was apparently to ensure that a person was expelled to somewhere where he or she would be well treated and safe, it was uncertain that the draft article would necessarily achieve that aim: in the other States to which the person might be expelled, he or she might still be subjected to torture or inhuman and degrading treatment. It was therefore necessary to make it clear that the qualification relating to torture or inhuman and degrading treatment applied to those States as well.

46. Revised draft article 8 on the prohibition of expulsion in connection with extradition needed more careful examination. It might well be that if the Commission paid sufficient attention to the question of torture or inhuman and degrading treatment in draft article E1, paragraph 2, the bracketed phrase "or with the provisions of the present draft article" could be retained in draft article 8.

47. Draft article H1 provided that where a person had been expelled on mistaken grounds, he or she had a right of return, "save where his or her return constitutes a threat to public order or public security". That phrase needed further drafting work to ensure that the State concerned could not refuse to allow the person to return on purely arbitrary grounds.

48. He agreed with Mr. McRae that draft article J1 was unnecessary. Draft article 19 of the draft articles on diplomatic protection recommended that the State of nationality be under an obligation to grant diplomatic protection in certain circumstances, and as draft article J1 obviously disregarded that recommendation, it might be best to delete it.

49. He proposed that draft articles D1 to J1 contained in the second addendum to the sixth report should be referred to the Drafting Committee.

50. Mr. CANDIOTI, referring to draft article G1 on protecting the property of aliens facing expulsion, said that Mr. Wisnumurti was quite right in contending that paragraph 2 established adequate protection of property and other pecuniary interests of aliens subject to expulsion, even if the bracketed text was deleted. He could support paragraph 1 of the draft article, although it could perhaps go into greater detail. It would, however, be better placed in the section of the text dealing with the prohibition of certain types of expulsion such as collective expulsion and disguised expulsion.

The meeting rose at 11.15 a.m.

3094th MEETING

Friday, 27 May 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Later: Mr. Bernd H. NIEHAUS (Vice-Chairperson)

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPporteur¹⁹⁷ (*concluded*)

Ms. Jacobsson (Vice-Chairperson) took the Chair.

1. The CHAIRPERSON invited the Commission to resume its consideration of the second addendum to the sixth report by the Special Rapporteur on the expulsion of aliens.

2. Ms. ESCOBAR HERNÁNDEZ said that draft article D1 (Return to the receiving State of the alien being expelled) was well balanced, as she saw it. She endorsed the idea of placing emphasis, in paragraph 1, on voluntary compliance with the expulsion decision, in order to ensure the greatest possible respect for the wishes of the alien affected. However, she shared the view of previous speakers that the use of the word "encourage" before the phrase "to comply with the expulsion decision

¹⁹⁶ "Règles internationales sur l'admission et l'expulsion des étrangers proposées par l'Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892" (see footnote 183 above).

¹⁹⁷ At its sixty-second session, the Commission began the study of the sixth report of the Special Rapporteur by chapters I to IV, section C; it continued with the study of chapters IV, section D, to VIII, reproduced in the second addendum to the sixth report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1-2).

voluntarily” gave rise to some difficulties—first, because it could be interpreted as a call for undue pressure on the alien, and, secondly, because “encourage” was hardly a legal term. It would therefore be better to replace it with the phrase “take the necessary measures to enable”.

3. In paragraph 2, the phrase “as far as possible” should be deleted because expulsion must always be carried out in an orderly manner and in accordance with the rules of international law. If the idea was to raise the possibility of adopting coercive measures towards aliens under certain circumstances in order to ensure their expulsion, then that should be stated clearly, perhaps at the end of the paragraph. The specific reference to the rules of civil aviation was not particularly objectionable, as the vast majority of expulsions occurred by air. It was for the Drafting Committee to take up that issue in greater detail.

4 Paragraph 3 was quite acceptable. Notwithstanding the need to improve the wording, the provision clearly pertained to progressive development and was fully in keeping with the overall logic of the draft articles.

5. Turning to draft article E1 (State of destination of expelled aliens), she endorsed the Special Rapporteur’s reasoning about the State of destination and the preference accorded to the State of nationality. She also endorsed, in principle, the portion of paragraph 3 that said that only the State of nationality could be required to admit an expelled alien.

6. Nevertheless, further work on the draft article should take into account several factors, some of which had already been identified by other members of the Commission. First, in cases where the State of destination was not the State of nationality, the wishes of the alien being expelled with regard to the location to be chosen must be respected, in accordance with the principle set forth in draft article D1 of giving preference to voluntary compliance with expulsion decisions. Secondly, the risk that the alien facing expulsion might be subjected to torture or inhuman or degrading treatment should be taken into consideration with regard not only to the State of nationality but also to all States of destination. Further thought should be given to the situation of stateless persons who, at least as the draft articles now stood, could never be expelled, given that there was no State of nationality that could be required to accept them. The Drafting Committee might also consider that particular situation when it prepared its commentaries.

7. Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) did not raise major difficulties, except the one indicated by Mr. Vasciannie with regard to the description of the “applicable rules” as rules of international law. The Special Rapporteur had added a welcome nuance with the phrase “*mutatis mutandis*”, and that phrase should be retained.

8. The general approach in draft article G1 (Protecting the property of aliens facing expulsion) was acceptable, but Mr. Wisnumurti’s proposal to reverse the order of the two paragraphs should be taken into account. Further consideration should also be given to the bracketed phrase “to the extent possible” in paragraph 2. Any references

to restrictions on the protection of the property of aliens must be worded in a way that could not be construed as leaving full discretion to the expelling State.

9. Draft article H1 (Right of return to the expelling State) certainly came under progressive development and should therefore be given particular attention. The term “mistaken”, used to describe the grounds for expulsion, had little legal significance and was open to very subjective interpretation. The Drafting Committee should replace it with a more appropriate term.

10. As some members had already pointed out, draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) were two parts of a whole and could not be separated. She did not have a firm view as to whether they should be retained. While it was true that they introduced nothing new in the general regime of international responsibility of States and diplomatic protection, one of the main aspects of the topic under consideration was precisely the fact that the expulsion of aliens could, in some cases, constitute an internationally wrongful act. At the current stage of the Commission’s work, it might be advisable to retain the draft articles.

11. Draft articles D1 to J1 could be referred to the Drafting Committee.

12. With regard to the explicit recognition of the right of appeal against an expulsion decision and the suspensive effect of such an appeal, a provision to that effect that was fully in keeping with the Commission’s mandate of progressive development would certainly have its place in the draft articles. However, the Special Rapporteur had not distinguished clearly enough between appeals in the event of expulsion and appeals against expulsion decisions. There was a need to study more thoroughly whether an appeal that did not have suspensive effect could be considered an “effective remedy”, within the meaning of that phrase in international human rights law.

13. She understood that in preparing draft article 8, the Special Rapporteur had been inspired by the need to differentiate clearly between expulsion and extradition and to prevent extradition disguised as expulsion. It seemed to her, however, that the current wording was much too ambiguous and, while she was not opposed to referring the article to the Drafting Committee, she would like it to be made more precise.

14. Mr. NOLTE said that he generally agreed with draft article D1 (Return to the receiving State of the alien being expelled). It was not clear whether the proposal by Mr. Vasciannie and other members that the expelling State should “take measures to encourage” voluntary compliance with expulsion decisions would have the effect intended, as legitimate means of encouragement such as persuasion could hardly be described as “measures”. It was therefore preferable to retain the Special Rapporteur’s original proposal.

15. Paragraph 2 should not contain a specific reference to rules relating to air travel. Such rules were clearly covered by the general term “rules of international law”, and it was unclear why they should be mentioned when

there was no reference, for example, to the rules relating to sea travel or simply to the rules applicable to the transport of persons. Referring only to air travel might suggest that most forcible expulsions took place through that means of transport and that this form of expulsion was particularly prone to abuse. That was not necessarily the case, however: a specific reference to human rights would be more appropriate.

16. One of the most important aspects of the topic under consideration was the review of or appeal against an expulsion decision. Like Mr. McRae, he considered that this should be the subject of a separate draft article, to be placed in the part concerning procedural rules. He concurred with the Special Rapporteur's reasoning that customary international law recognized, not the right to judicial review, but merely the right to an effective remedy. The latter derived from both State practice and human rights guarantees as interpreted by various treaty bodies. Another argument for such a right was that determining whether an expulsion was lawful under a review procedure would make it possible to apply the rules relating to State responsibility and diplomatic protection cited in draft articles I1 and J1. He therefore encouraged the Special Rapporteur to provide the Commission with a draft article on the right to an effective remedy against an expulsion decision.

17. That led to the question of suspensive effect. There, much depended on the question that was posed. If the question was whether all appeals against an expulsion decision must, *de lege lata*, have suspensive effect, then the Special Rapporteur's response—that that was not true—seemed correct. However, if the question was whether an appeal against an expulsion decision should have suspensive effect when the person concerned could plausibly claim that he or she faced the risk of torture or inhuman treatment, then the answer must be in the affirmative. That response was not based solely on a provision such as article 13 of the European Convention on Human Rights, which guaranteed the right to an effective remedy. It could also be drawn based simply on the procedural ramifications of the right not to be subjected to torture or inhuman treatment. That did not mean that there was a general right, under customary international law, to a remedy with suspensive effect in all expulsion proceedings, because in some cases fundamental rights might not be at risk of being infringed. However, the Commission could and should recognize, *de lege lata*, that appeals must have suspensive effect in cases where there was a risk of torture or inhuman treatment, as the European Court of Human Rights had done in its judgments in the *Čonka* and *Jabari v. Turkey* cases. After all, the prohibition of torture was an element of *jus cogens* and States had an obligation to ensure that this prohibition was effective.

18. While he agreed with the general thrust of draft article E1 (State of destination of expelled aliens), like Mr. McRae, he thought that it should be reformulated by the Drafting Committee. Paragraph 1 was too strict, because it was quite conceivable that a person might be expelled to a State that was not his or her State of nationality even when the State of nationality could be identified. That had implications for paragraph 2, which should be in the form of an indicative list.

19. Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) should be reworded to make it clear that the transit State was not required to restart the expulsion procedure from the very beginning.

20. The Special Rapporteur's reasoning behind draft article G1 (Protecting the property of aliens facing expulsion) was noteworthy. He had chosen two examples from German history to make his point, namely the expulsion of Jewish foreign nationals by the Bavarian authorities at the time of the Weimar Republic and the expulsion of millions of Germans and ethnic Germans by other States after the Second World War. The Special Rapporteur could obviously have cited different, terrible examples dating from the interim between those two periods of history. The examples that he had chosen were indeed appalling and worth mentioning, but broad conclusions should not be drawn from them, not only because the expulsions carried out after the Second World War raised very complex questions that the Special Rapporteur only touched upon, but also because the main motivation behind the expulsions was arguably not to confiscate property but rather to manifest various forms of hatred or to pursue political goals. That was why Ms. Escobar Hernández and Mr. Wisnumurti were right to say that draft article G1 should emphasize, not the motive for or purpose of confiscation, but rather the protection of the property of expelled persons in general. He therefore went along with Mr. Wisnumurti's proposal to make paragraph 2 the main paragraph of draft article G1 and agreed with Mr. Dugard's idea of moving the current paragraph 1 to the part of the draft articles that dealt specifically with prohibited forms of expulsion, such as mass expulsion. He wished to emphasize again, however, that he considered the inclusion of a draft article on the protection of the property of expelled persons to be very important.

21. Draft article H1 (Right of return to the expelling State) should be clarified by the Drafting Committee. First, it should speak of the right of re-entry, as the concept of the right of return seemed to be used for cases in which people had been driven from their homeland. The main point, however, was that the current wording of draft article H1 was too broad. He himself did not interpret the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families or the resolution of the Inter-American Commission on Human Rights in *Case 7378 (Guatemala)* as recognition of a general right of return, as did the Special Rapporteur in paragraph 554 [para. 152]¹⁹⁸ of the sixth report. The Convention only indicated that an earlier expulsion decision should not be used to prevent the person expelled from re-entering the State concerned, but that did not preclude other factors that might prevent re-entry. As for the Inter-American Commission on Human Rights, it had simply made a recommendation in a particular case. He accepted the idea that a right of re-entry should be the normal consequence of a final determination that an expulsion decision had violated certain rules. That right flowed from the principles of State responsibility and was recognized in the legislation and practice of certain States.

¹⁹⁸ The numbers in brackets refer to the numbering used in the mimeographed version of the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), available from the Commission's website. The chapters, paragraphs and footnotes were renumbered for publication in *Yearbook ... 2010*, vol. II (Part One).

However, it must be made clear that only the violation of certain rules could give rise to a right of re-entry. The Special Rapporteur admitted as much when he wrote that an annulment of an expulsion decision founded on a purely procedural error could not confer that right. He himself would like the Commission to go further and state that the right of re-entry could only ensue from the violation of a substantive rule of international law.

22. He generally agreed with draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) but wished to emphasize that States should be held responsible only for violations of the rules of international law. He therefore suggested that the words “unlawful expulsion” in draft article I1 be replaced with “internationally wrongful expulsion”.

23. Draft articles D1 to J1 could be referred to the Drafting Committee.

24. Mr. GAJA said that he agreed that the draft articles proposed by the Special Rapporteur in his sixth report should be referred to the Drafting Committee, with one exception, to which he would return later. However, he had some doubts about the impact that the proposals could have if they were ultimately adopted by the Commission, mainly because of the difficulty of tackling some practical problems raised by expulsion.

25. Under draft article D1, aliens should be encouraged to comply with expulsion decisions voluntarily. However, as Mr. Dugard had noted, many aliens facing expulsion did not have the means to return voluntarily to their State of nationality or to go to any other State willing to accept them. They might also not wish to comply with a measure that they considered too harsh or think that if they refused to leave, the decision might be annulled or revised. In both cases, the alien could end up being detained. Such detention could last for some time before a State willing to accept the alien was found. It should be noted that the European Court of Human Rights had been rather lenient towards States concerning the length of such detention. The Commission might consider recommending some restrictions, not only on the length of detention but also on the very act of detaining aliens facing expulsion, at least in the absence of grounds of public policy or national security. Of course, the latter concepts should not be manipulated or rendered meaningless, but there was only so much that the Commission could do in that regard.

26. Whether aliens left a country voluntarily or not, they were likely to encounter economic difficulties in returning to the country in the event that an effective remedy was available and the appeal was successful. As Mr. Melescanu and Mr. Saboia had emphasized at the previous meeting, the suspensive effect of an appeal was essential for that remedy to be effective. Regardless of whether or not aliens were lawful residents, that remedy must always have a suspensive effect, unless considerations relating to national security came into play. A draft article on that issue should therefore be included. Mr. Nolte had suggested earlier in the meeting that an exception should be envisaged in cases where there was a risk of torture or ill-treatment; it would be better if the general rule was that an appeal had a suspensive effect.

27. The length of time spent in detention pending expulsion might be attributable to the difficulty of ascertaining the nationality of the alien or the attitude of the State of nationality. In many cases, the State of nationality would be the only State willing to receive an expelled person. However, for various reasons, that State might not wish to cooperate with the State that intended to expel the alien, particularly if such cooperation went against the grain. While enhancing cooperation between States would facilitate expulsion, it would also limit the length of time the persons concerned were detained. It was therefore a matter of considerable practical importance and should be further studied. Bilateral readmission agreements could enhance cooperation but might increase the risk that expelled persons would be subjected to torture or inhuman or degrading treatment. In addition, when such agreements were entered into with third States, the persons concerned risked being detained pending yet another expulsion.

28. Dealing with issues such as detention pending expulsion, the suspensive effect of an appeal against an expulsion decision and cooperation between States could lead to texts that supplemented the existing rules of general international law or even international instruments that enjoyed near universal acceptance. Finding solutions would be difficult—but the draft articles would at least have the benefit of addressing such fundamental issues.

29. Disguised extradition, even if it accounted for a relatively limited number of cases, deserved the Commission’s attention. Endorsing the comments just made by Ms. Escobar Hernández, Mr. Gaja said that he was not certain that the proposed draft article 8 dealt with the issue properly. The article provided that: “Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft articles].”¹⁹⁹ The fact that the expulsion constituted disguised extradition was significant, since there had to be additional safeguards for persons who were not only returned to a country but returned to be tried or to serve a sentence. However, draft article 8 seemed to suggest that only the ordinary restrictions on expulsion applied in such cases. In other words, the fact that disguised extradition was involved changed nothing: such expulsion was treated like any other. An effort should be made to determine whether there were additional guarantees that should be applied in the requesting State: for example, ensuring a fair trial in the requesting State. Such guarantees would limit the number of expulsions that were in fact disguised extraditions.

30. Members of the Commission had a habit of asking Special Rapporteurs to carry out additional work. In the present case, little further work was needed; the Special Rapporteur could perhaps make some additional proposals that would give the outcome of the Commission’s work more practical significance.

31. Mr. NOLTE, referring to what Mr. Gaja had presented as an intermediate proposal regarding the suspensive

¹⁹⁹ *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

effect of an appeal, suggested that the difference between *lex lata* and *lex ferenda* might be significant in that context. If one acknowledged that suspensive effect came under *lex lata* in cases where there was a risk of torture or inhuman treatment, it might be said that, *de lege ferenda*, the Commission wished to encourage States to give appeals against all expulsion decisions suspensive effect. That distinction might be taken into consideration for the elaboration of a future draft article.

32. Mr. GAJA said that Mr. Nolte seemed to be changing the rules of the game. His comment was not really about the suspensive effect of an appeal but about the existence of an obligation not to return persons to a country where they risked being tortured. That, however, was a basic obligation that applied in all cases, regardless of whether an appeal had been made: it was not an incidental consequence of the appeal.

33. Mr. MELESCANU said that he did not believe that encouraging voluntary repatriation could create problems. In practice, what Mr. Gaja had said was true, but for some countries, including his own, there were legal implications. Absent some arrangement for voluntary repatriation, if a person subject to an expulsion decision refused to be expelled, the cost of his or her repatriation would not be defrayed. In Romania, for example, it was a fundamental principle that all citizens were repatriated and their travel paid for provided that they freely consented to return. If they refused, Romania could simply not cover their expenses. Nevertheless, he was pleased that Mr. Gaja had brought up some very practical and real problems at the current, very important stage of finalizing the draft articles. His observations should help to make the text more specific, so that it had a direct impact, and would help to resolve some of the difficulties involved in preparing the draft articles.

34. Sir Michael WOOD said that the second addendum to the sixth report of the Special Rapporteur was, as expected, thorough, detailed and thought-provoking. If at times he himself seemed to be criticizing the report, that was because the subject matter presented real difficulties—it was no reflection on the quality of the Special Rapporteur's efforts or of his reports. Member States still seemed to harbour serious doubts as to whether the Commission should address the topic, something that was hardly surprising given the political sensitivities and practical problems inherent in the subject matter—a point that Mr. Gaja had just made in more diplomatic terms. Mr. McRae had stated at an earlier meeting that it was not certain that the Commission could produce a result that would be widely accepted by Governments, a view that he himself shared. Perhaps that was immaterial and the Commission's role was to move forward even if Governments did not accept everything that it said in some areas. Nevertheless, it would be good for the Commission to reassess the topic in order to see where it was heading before it embarked on a second reading.

35. At the previous meeting, Mr. Vasciannie had raised several important questions about sources. The issue of sources was particularly difficult in an area like the present one, which went to the heart of State sovereignty and had mostly been dealt with by States in their domestic

legislation. He was not sure that he would endorse all the Special Rapporteur's conclusions on the current state of customary international law in the field: for example, he was not convinced by the conclusion arrived at in paragraph 451 [para. 49], notwithstanding the lengthy analysis of domestic legislation, practice and writings that preceded it.

36. In determining the rules of customary international law, the Commission should look first and foremost to State practice. Writings, even those emanating from venerable bodies such as the Institute of International Law, should be treated with caution, as should case law under specific regional regimes such as the European Convention on Human Rights. Even when looking for State practice, the Commission must be very careful. European Union practice with regard to European citizens was probably of rather limited relevance to the topic under consideration. Of much more interest was Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.²⁰⁰ It would be particularly useful to be able to show that the European Union and its 27 member States considered that they had been adopting rules required by international law, although it was not entirely clear to what extent that had been so. National laws and their implementation could be essential to ascertaining customary law in that area, and the Special Rapporteur had paid due attention to them. However, one problem was that the laws were constantly changing under the pressure of events and politics: for years, the United Kingdom had been adopting new legislation on immigration once a year.

37. However, that was perhaps not the main point. The fundamental question for the Commission was whether to engage in the codification or the progressive development of international law, or a combination of both. The Commission must indicate clearly—more than States ever did—whether it was seeking to identify *lex lata* or aiming to propose new rules for consideration by Governments, in the form either of a convention or, as suggested by Mr. McRae, of guidelines that represented best practices to be followed in that area. If the Commission intended, as seemed to be the case, to develop new laws or guidelines—in other words, if it was engaged in a policy exercise—perhaps it did not need to be very strict about sources. He tended to share the view expressed a few days earlier that the topic did not lend itself to the elaboration of draft articles that could eventually be part of a treaty; he was not of the view that the Commission should, as a matter of principle, assume that the outcome of its work would necessarily be draft articles suitable for conversion into a convention.

38. With regard to the proposed draft articles, several questions arose, most of which had already been raised by other members. He shared the doubts expressed about draft article D1, paragraph 1, which hardly seemed appropriate as a legal rule. In its current form, at least in the English version, it carried unfortunate undertones of

²⁰⁰ *Official Journal of the European Union*, No. L 348, 24 December 2008, p. 98.

pressure to return “voluntarily”. One might even wonder whether it was appropriate to speak of voluntary return where there was a legally binding decision that required a person to return to his or her country. Like others before him, he questioned whether there was a need to mention air transport rules in paragraph 2 and was not sure what the reference to “rules of international law” was intended to convey in that context. Since it had been said repeatedly that the fundamental rights of persons facing expulsion must be respected, it was not clear what more there was to say about the practical arrangements for expulsion. While paragraph 3 might well reflect good practice, it was not clear that it should be made into a rule of law.

39. The chapter on appeals against the expulsion decision was in many ways the most interesting. In general, he agreed with the conclusions of the Special Rapporteur, who showed rather convincingly that the practice of States varied considerably and that there were few, if any, rules of customary law in that field. Even treaty provisions varied substantially. Indeed, the very notion of “appeal” was not clear. Since the term most commonly used seemed to be “review” and the nature of such reviews varied from one State to another, he was not sure that the phrase “right of appeal” could be employed unless one knew what was meant by that right in practice. He agreed with the Special Rapporteur’s conclusion that there was no basis in international law for a general right to a suspensive appeal, especially when people repeatedly exercised the right to appeal in a manner that could become abusive. However, as Mr. Nolte had explained, a different position might be taken when the right to life and the right not to be subjected to torture were concerned, and the issue deserved further consideration. He was not convinced by Mr. Gaja’s argument for a general right to a suspensive appeal, because even if there were a such a right when the right not to be subjected to torture or the right to life was threatened, that would not necessarily mean that aliens would invoke it in any appeals they made, as they would have to have some factual basis for doing so. However, he agreed with members who considered that draft article E1 (State of destination of expelled aliens) could advantageously be restructured.

40. He was perhaps misreading draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), yet he had to confess that he still did not understand it. The amended version read: “The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State.”²⁰¹ But what rules for the protection of human rights should apply in the transit State under that provision? Presumably, it could only be the rules of international human rights law by which the transit State was bound. However, the draft article seemed to suggest that the rules on human rights applicable in the expelling State must apply in the transit State *mutatis mutandis*—whatever that term meant in that context. If a State party to the European Convention on Human Rights expelled an alien via a third State that was not a party to the Convention, for example the United States, would the United States be bound to apply the Convention *mutatis*

mutandis? It was also unclear whether draft article F1 was intended to impose an obligation on the expelling State, the transit State or both. In other words, while the issue of the transit State must certainly be addressed, the drafting of article F1 needed careful attention.

41. He had no serious questions concerning draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) although, like other members, he was not sure that draft article J1 on diplomatic protection was necessary. He shared the view expressed by Mr. Nolte earlier concerning draft article G1 (Protecting the property of aliens facing expulsion). On the other hand, draft article H1, on the “right of return”, needed careful review. He was not sure that that was the most appropriate term in the context. More substantially, like Mr. Nolte and other members, he had doubts as to how far one could generalize a right to have an expulsion decision revoked and to be allowed to return to the expelling State. It all depended on the particular circumstances. Finally, with regard to revised draft article 8 on the prohibition of extradition disguised as an expulsion, he continued to think that the provision was out of place in the draft articles. However, if it were to be included, it would have to be substantially recast to achieve what seemed to be its purpose.

Mr. Niehaus (Vice-Chairperson) took the Chair.

42. Mr. HMOUD said that the Special Rapporteur had done outstanding work in identifying issues that must be addressed in the draft articles in the light of State practice, national and international proceedings, jurisprudence and scholarly writings. It should be noted that State practice was not uniform in several of the areas tackled in the report and that national legal systems took different approaches to the proceedings in expulsion-related matters. The Special Rapporteur had been careful in trying to reach conclusions based on *lex lata* when international rules existed and in developing new rules when practice was not uniform, taking into account the need to strike a balance between the interests of the State and those of the alien. Concerning the implementation of expulsion decisions, while voluntary departure should be the option chosen by States as far as possible when they implemented an expulsion decision, the wording of draft article D1 (Return to the receiving State of the alien being expelled), paragraph 1, should be revised to indicate that it was only an option and not a binding rule. There was insufficient practice in that area to stipulate that the State must encourage voluntary compliance with expulsion decisions by the persons concerned. Concerning forcible implementation, he agreed that the expulsion decision should be carried out in accordance with the rules of international law and that the provisions already included in another draft article on respect for the human rights and dignity of the expelled person were sufficient. Perhaps paragraph 2 should further provide, however, that the measures taken to enforce the decision should be only those needed to implement it. That seemed warranted given the fact that the paragraph focused on the “orderly transportation” of the alien being expelled. Regarding appeals against expulsion decisions, he said that although the right to an effective remedy so as to challenge an expulsion decision had been provided for in draft

²⁰¹ The Special Rapporteur presented a revised version of this draft article in a meeting document with distribution limited to the members of the Commission.

article C1 (Procedural rights of aliens facing expulsion),²⁰² the Special Rapporteur seemed to consider that no specific rule on the right of appeal was necessary. Since the content of that right was recognized in international law, it was hard to understand why the Special Rapporteur concluded in paragraph 461 [para. 59] of his report that in general the issue “falls ... within the scope of States’ domestic legislation”. While it could be left to national systems to determine the body responsible for reviewing expulsion decisions and the procedure for review, the draft articles should at least cover what international law already recognized as a right to review a decision. It might be specified for that purpose that access to effective remedies included the right of persons subject to expulsion to have their case reviewed by a competent authority of the expelling State, unless there were reasons of national security and public order. He agreed with the Special Rapporteur that no rule of international law provided that a suspensive effect should be the consequence of an appeal. In response to the comments made by Mr. Nolte and Sir Michael, he suggested that the problem could be resolved by defining the notion of a “safe country” elsewhere in the draft articles or by providing that no one should be sent to a State where he or she would be persecuted as an alien. The issue of the suspensive effect of an appeal would then no longer arise.

43. With respect to the relationship between the expelling State and States of transit and destination, the Special Rapporteur, understandably, had emphasized the rights of the expelling States and States of destination. It was also established under international law that the State of nationality had an obligation to receive its nationals. However, there was no convincing argument not to refer in the draft articles to the right of an expelled person to be sent to the State of his or her choice when that State agreed to admit the person into its territory. The expelling State had the right of expulsion under international law, but that should not deprive a person subject to expulsion of the possibility of choosing the country to which he or she wished to be sent, as long as the receiving State consented to it and the expelling State had no compelling reason to refuse that choice. A provision to that effect should be incorporated into draft article E1 (State of destination of expelled aliens), preceding the paragraph on the State of nationality and establishing a sequence among alternative States of destination. While the Special Rapporteur made it clear in his report that there was no international obligation for a State other than the State of nationality to admit an alien, except when that State agreed to the admission by treaty or otherwise, paragraph 2 of draft article E1 was not clear in that regard. It seemed to suggest that the State of residence, the passport-issuing State or the State of embarkation had a duty to admit expelled aliens. If that was not the case, then the paragraph, at least the English version thereof, should be more clearly worded. He agreed that the concept of “safe State” should be incorporated in the draft article to ensure that aliens were not sent to a country where they might be persecuted. Although the concept was simply a general rule under international refugee law, many States currently included it in their agreements with other States involving the return of persons, in order to ensure that the person returned would not face persecution in the receiving State.

²⁰² *Yearbook ... 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

44. The pertinent rule with regard to protection of the property rights of expelled aliens was article 17 of the Universal Declaration of Human Rights, which stated:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.²⁰³

There had been considerable differences of opinion within the international community on the existence of the right to property and the content of the right beyond what was provided for in article 17, which could be considered a general rule of international law. What was relevant to the issue at hand was that the expelling State could not arbitrarily deprive persons subject to expulsion of their property. Conversely, there was no rule of international law that prohibited a State from expropriating the property of an alien, as long as it did not do so arbitrarily, and a large body of jurisprudence on the matter asserted that the State had that right. While the concept of arbitrariness had been subject to various interpretations, the expropriating State must at least compensate the owner for the property that it had seized. There was no single standard of compensation for expropriation. In accordance with General Assembly resolution 1803 (XVII), dated 14 December 1962 and entitled “Permanent sovereignty over natural resources”, compensation must be “appropriate”, while under the standard applied in the *Chorzów Factory* case, it must be “fair” and, according to the formula used by United States Secretary of State Cordell Hull in his Note of 3 April 1940 to the Ambassador of Mexico,²⁰⁴ it must be “adequate, effective and prompt”. However, draft article G1 as currently worded imposed an obligation on the expelling State to return property to aliens at their request, which clearly contravened the right of the State under international law to expropriate the property of aliens as long as certain international guarantees were met, including the payment of compensation according to the standards just mentioned. While he supported the introduction in draft article G1 of the idea of prohibiting the expulsion of aliens for the purpose of confiscating their property, he pointed out that the concept came under *lex ferenda*.

45. Turning to the return to the expelling State of aliens expelled illegally, he said that he agreed that the draft articles should include the principle of return to the expelling State as a consequence of wrongful expulsion, despite the apparent lack of State practice in that regard. Like Mr. Nolte, he did not see how return could be a consequence of the violation of the rules of national law if the same national law prohibited return. If a State had the right under international law to control the entry, stay and exit of an alien, it should not be forced to admit an alien except under conditions specified by international law or when there was a violation of international law and the appropriate reparation of the violation was the readmission of the alien. He would therefore support confining draft article H1 (Right of return to the expelling State) to situations of expulsion that violated international law—including the rules of the current draft articles when they became international law—and to cases where return would not be an appropriate consequence, such as

²⁰³ General Assembly resolution 217 A (III) of 10 December 1948.

²⁰⁴ See M. M. Whiteman, *Digest of International Law*, vol. 8 (1967), p. 1020.

when readmission would threaten public order or public safety. In that case, of course, return would not create any acquired right of stay or residency.

46. Regarding the responsibility of the expelling State as a result of an unlawful expulsion, he noted that article 33, paragraph 2, of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission in 2001 seemed pertinent to the consequences of an internationally wrongful act. The paragraph provided that the part of the draft articles on the content of responsibility was without prejudice to any right arising from the international responsibility of the State that might accrue directly to any person or entity other than a State.²⁰⁵ Paragraph 1 stated that “[t]he obligations of the responsible State set out in this Part [the Part on the content of the responsibility, with particular reference to reparation] may be owed to another State, to several States or to the international community as a whole”.²⁰⁶ The provisions on reparation in the draft articles on State responsibility were thus addressed to injured States.

47. He agreed with the content of draft article J1 on diplomatic protection, although the right of the State in which an alien who was stateless or had refugee status resided to exercise diplomatic protection should also be mentioned, in line with article 8 of the draft articles on diplomatic protection adopted by the Commission in 2006.²⁰⁷ In conclusion, he recommended that draft articles D1 to J1 contained in the sixth report of the Special Rapporteur be referred to the Drafting Committee and said he hoped that the changes that he had proposed would be taken into consideration.

48. Mr. VÁZQUEZ-BERMÚDEZ, noting that some members of the Commission had again stressed not only the urgency of the topic but also its sensitivity and complexity, said that given the progress made so far, including the preliminary adoption of a large number of draft articles, he was convinced that the Commission would rise to the occasion and submit to the General Assembly, in a timely manner, draft articles that had been adopted on first reading and were sufficiently well structured and balanced to meet with general approval. It was therefore encouraging that the Special Rapporteur had introduced seven new draft articles, which he generally endorsed, with a few exceptions.

49. Section D of chapter IV [chap. III] of the sixth report dealt with the enforcement of expulsion decisions. The Special Rapporteur provided several examples of serious violations of the human rights of aliens during their expulsion, including cases of death. Draft articles 8 and 11, which had been provisionally adopted by the Drafting Committee, afforded the necessary protection in that regard. Draft article 8 provided that any person who was being expelled should be treated with humanity and respect for the inherent dignity of the human person throughout the expulsion proceedings. In addition, he or she was entitled to respect for his or her human rights, in particular

those cited in the draft articles.²⁰⁸ Draft article 11²⁰⁹ related to the expelling State’s obligation to protect the lives of aliens. It therefore seemed unnecessary to make another reference in draft article D1, on the conditions of return of expelled persons, to the obligation to respect the human rights of aliens. However, it was important to do so in the commentary to the draft article because, as the Special Rapporteur had shown, it was often during the enforcement of an expulsion decision that acts of violence against the persons affected occurred. In addition to the draft articles relating to respect for human rights, the Special Rapporteur was proposing draft article D1, which was based on State practice and international instruments relating mainly to air travel, including the Convention on International Civil Aviation and the relevant IATA guidelines. He agreed with the approach taken in paragraph 1, since by encouraging the voluntary return of the alien, difficulties in the enforcement of expulsion decisions could be prevented and avoided. He endorsed Mr. Vasciannie’s comments to the effect that the State was required not only to “encourage” voluntary compliance with expulsion decisions but also to “take measures to promote voluntary return”, as stated in one of the Twenty Guidelines on Forced Return adopted by the Committee of Ministers of the Council of Europe in May 2005:²¹⁰ the phrase clarified the content of the obligation. The word “facilitate” could even be added, so that the phrase read: “take measures to promote and facilitate voluntary return”.

50. Paragraph 2 of draft article D1 was useful, since in cases of forcible implementation of an expulsion decision, the expelling State must take the necessary measures to ensure that the alien being expelled was transported to the receiving State in accordance with the rules of international law. It did not seem necessary to make a specific reference in the paragraph to the rules relating to air travel: they could instead be mentioned in the commentary. The sentence could thus end after the words “international law”.

51. It also seemed useful, in the context of the progressive development of international law, to retain paragraph 3, which provided that the expelling State must give the alien being expelled appropriate notice to prepare for his or her departure, in order to protect the rights of the alien, who was clearly in a vulnerable position.

52. Turning to the detailed analysis made by the Special Rapporteur of appeals against expulsion decisions, he noted that at the previous session, in the first addendum to the sixth report, the Special Rapporteur had proposed draft article C1²¹¹ on the procedural rights of aliens facing expulsion, which included the right to challenge the expulsion, the right to a hearing and the right of access to effective remedies to challenge the expulsion decision without discrimination. The Special Rapporteur had

²⁰⁸ *Yearbook ... 2010*, vol. II (Part Two), p. 158, para. 117, footnote 1272.

²⁰⁹ *Ibid.*, p. 158, para. 120, footnote 1275.

²¹⁰ Document CM(2005)40 final, of 9 May 2005. See also the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, Comments on the Twenty Guidelines on Forced Return (925th meeting), document CM(2005)40-Add.

²¹¹ *Yearbook ... 2010*, vol. II (Part Two), p. 162, para. 145, footnote 1294.

²⁰⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 28, and pp. 94–95 for the commentary thereto.

²⁰⁶ *Ibid.*

²⁰⁷ *Yearbook ... 2006*, vol. II (Part Two), p. 25, para. 49.

argued for the inclusion of those provisions on the basis of State practice and case law, particularly that of the Court of Justice of the European Communities. He himself had expressed support for the Special Rapporteur's proposal in his statement at the time. He had also endorsed Mr. Gaja's proposal to include an additional procedural guarantee in the draft article²¹² concerning the stay of execution of expulsion decisions while the decision was being appealed in order to ensure that this could be an effective remedy in the event that the competent authority decided in favour of the applicant. The Special Rapporteur's thorough analysis of the relevant international and regional multilateral human rights instruments, State practice and case law only confirmed the need to include such a procedural guarantee, namely of "the right of access to effective remedies to challenge the expulsion decision without discrimination", once such a decision had been made. As the Special Rapporteur had pointed out in paragraph 451 [para. 49], "[t]he submission of an individual appeal against an expulsion order is therefore clearly established under international law, particularly since the end of the Second World War and the subsequent creation of various institutions for the protection of human rights. We believe it now has the force of customary law".

53. In 2010, he himself had supported a proposal to add a provision on the suspensive effect of an appeal against an expulsion decision, and he maintained that position today. He noted with satisfaction that Mr. Gaja also maintained his position, and he endorsed the arguments that Mr. Gaja had put forward earlier, in particular on the need to ensure that the suspensive effect was not limited to cases where there was a risk of torture or cruel, inhuman or degrading treatment in the country of destination. He endorsed the Special Rapporteur's arguments in paragraph 456 [para. 54] of his report but disagreed with those in the following paragraph, which appeared to be based more on policy considerations. Decisions like the *Mamatkulov and Askarov v. Turkey* judgment of the European Court of Human Rights supported the notion that the effectiveness of remedies against expulsion decisions could be ensured only if appeals had a suspensive effect on such decisions.

54. Draft article E1 (State of destination of expelled aliens) was useful for States. Paragraph 1, which provided that an alien subject to expulsion must be expelled to his or her State of nationality, set out a basic and logical rule that was also consistent with human rights instruments.

55. Other options would be considered in cases where such expulsion was not feasible, for example if the nationality of the person concerned had not been identified. It should be clearly established that the potential States of destination listed in paragraph 2 of draft article E1 were options, provided that the State in question agreed to receive the expelled person.

56. In paragraph 3 of the draft article, he did not see the practical difference between the references to "a State that has not consented to admit him or her into its territory" and to a State "that refuses to do so".

57. It did not seem necessary to make an explicit reference in the draft article to the risk of torture or

inhuman or degrading treatment faced by the alien subject to expulsion, especially if only the State of nationality was mentioned in that respect. It should be recalled that the Drafting Committee had already adopted draft article 14,²¹³ which prohibited the expulsion of a person to a State where his or her right to life or personal liberty was in danger of being violated, and draft article 15,²¹⁴ which prohibited the expulsion of a person to a country where there was a real risk of being subjected to torture or to inhuman or degrading treatment. Draft articles 14 and 15 would clearly be applied in conjunction with draft article E1, something on which explanations could be provided in the commentary.

58. It was important to develop a draft article explicitly stating that in the event of transit through a third State during the return of an alien to the country of destination, that State must protect the alien's basic rights. On the other hand, it did not seem necessary to make a specific reference to the rules of international human rights law. He thought that the wording of the draft article could usefully be improved, as Sir Michael had suggested.

59. Part Three of the report concerned the legal consequences of expulsion. While draft article G1 was entitled "Protecting the property of aliens facing expulsion", to be more precise it would be better to refer to protecting the property rights of aliens. He endorsed paragraph 1 of the draft article, which prohibited the expulsion of an alien for the purpose of confiscating his or her property. It was an important provision because, as the Special Rapporteur had shown, such cases actually came up in practice. It was clear that expulsions should be carried out in accordance with the rules of international law on the right to property and the other economic assets of aliens, and that aliens must not be deprived of such rights as the right to make use of and to enjoy the benefits of their property. Universal and regional instruments were quite explicit on that point: one had only to refer to article 17, paragraph 2, of the Universal Declaration of Human Rights: "No one shall be arbitrarily deprived of his property."²¹⁵

60. To make it clear that the expelling State must protect, not the alien's property, but his or her right to own property, the beginning of draft article G1, paragraph 2, could read: "The expelling State shall protect the property rights of any alien facing expulsion and shall allow the alien to dispose freely of the said property, even from abroad". In addition, the phrase "to the extent possible" in square brackets should be deleted.

61. It might be helpful for the Special Rapporteur to explain what was meant, with reference to the property of aliens facing expulsion, by the wording to the effect that the expelling State "shall return it to the alien at his or her request or that of his or her heirs or beneficiaries". If that phrase was meant to refer to restitution, that meant that the State had expropriated the property of the person in question. Restitution was also one of the ways in which

²¹³ *Ibid.*, vol. II (Part Two), p. 157, para. 114, and p. 159, para. 124, footnote 1278, for the draft article as revised.

²¹⁴ *Ibid.*, p. 157, para. 114, and p. 159, para. 126, footnote 1279, for the draft article as revised.

²¹⁵ See footnote 203 above.

²¹² *Ibid.*, vol. I, 3065th meeting, para. 70.

a State might remedy a wrongful act that incurred its international responsibility. It was therefore necessary to clarify the meaning of that provision with a view to potential editorial changes.

62. Turning to the right of return in the case of expulsion characterized as unlawful by a competent authority of the expelling State or by an international court (draft article H1), he shared the view of the Special Rapporteur that not to permit the alien to return would be to legitimize the unlawful nature of the expulsion. In the draft article, the Special Rapporteur had struck a good balance between the interests of the expelling State and those of the alien by allowing for a derogation from that right in the event of a threat to public order or public security. He supported members of the Commission who had pointed out that the reference should be to re-entry rather than to return, a term that was usually used in other contexts. In that connection, he noted that the Inter-American Commission on Human Rights had recognized that right [*Case 7378 (Guatemala)*]. That said, the wording of draft article H1 could be improved: instead of the words “[a]n alien expelled on mistaken grounds”, it would be better to say, for example, “[a]n alien expelled on grounds invoked in error or without justification”, in other words, when the grounds were baseless.

63. With regard to the international responsibility of the expelling State, it should be noted that under the regime of the responsibility of States for internationally wrongful acts, a State that expelled an alien in breach of the rules of international law incurred international responsibility. He endorsed the Special Rapporteur’s use of a general formulation in draft article I1, which referred to the general regime of the responsibility of States for internationally wrongful acts. However, it must be borne in mind that the expelling State incurred responsibility only if it had violated an international obligation. That would not be the case if, for example, it had violated a rule of domestic law that did not reflect a rule of international law.

64. Moreover, an expulsion decision might be lawful in itself, but the expelling State could incur international responsibility if, for example, an alien was subjected to acts of torture or to cruel, inhuman or degrading treatment by agents of the expelling State when they escorted the alien back to the country of destination.

65. It was indeed useful to remind States, as was done in draft article J1, that they could exercise diplomatic protection, and for references to be included in the commentary in order to encourage States to exercise diplomatic protection. Furthermore, it should be made clear that persons whose rights had been violated were entitled to institute proceedings in a personal capacity, independently of any action that might be taken by the State of nationality. On that point, he cited the work of Mr. Dugard, Special Rapporteur on diplomatic protection.²¹⁶

²¹⁶ Preliminary report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1 (draft articles 1–9); second report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514 (draft articles 10–13); third report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/523 and Add.1 (draft articles 14–16); fourth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/530 and Add.1 (draft articles 17–22); fifth report: *Yearbook ... 2004*, vol. II

66. With regard to draft article 8 on the prohibition of extradition disguised as expulsion, he had already stated in 2010 that the Special Rapporteur’s revised version²¹⁷ could be referred to the Drafting Committee, as it was a better basis for the Commission’s work.

67. In conclusion, he was in favour of referring the proposed draft articles to the Drafting Committee.

68. Mr. PETRIČ said that he wished to commend the Special Rapporteur on his excellent report and agreed to the referral of all the proposed draft articles to the Drafting Committee. The Commission’s objective should be to establish rules of international law for codifying the topic of the expulsion of aliens as part of the progressive development of international law. As expulsion was a contemporary problem, the Commission must base itself on the contemporary practice of States, even if the problem had also presented itself in the past. The practice of States during the period leading up to the Second World War was of only limited relevance, as were the judicial decisions and writings of that period, when the idea of State sovereignty had been unquestioned and the principles of human rights had not yet been fully formed. During the Second World War and immediately thereafter, Europe in particular had witnessed significant population movements. Millions of people had been deported or expelled from the homes where they had lived for generations, even though they had been neither aliens nor illegal immigrants. That special and in some respects cataclysmic historical situation, preceding the drafting of the Charter of the United Nations and the Universal Declaration of Human Rights, had led to the development of the Convention relating to the Status of Refugees and the ensuing implementation of national and international rules concerning the treatment of refugees and asylum seekers.

69. Today, in addition to the refugees who were victims of international and national conflicts or natural disasters, there were millions of “refugees” from poverty endeavouring to gain a better life by crossing State borders illegally. Most were seeking asylum for economic reasons and had not been persecuted in their countries.

70. While States had the right to expel aliens, especially those who were unlawfully in their territory, the imperatives of respect for human rights, human dignity and non-discrimination placed limits on that sovereign right. The Commission should seek a balance between those two poles, sovereignty and human rights—a balanced approach like the one suggested by the Special Rapporteur—and it should develop minimum standards that States must respect when expelling aliens. However, it must be recalled that expulsion occurred in a number of very different contexts: for example, the situation of the European Union member States was different from that of other countries. The problem of the expulsion of illegal

(Part One), document A/CN.4/538 (draft articles 23–27); sixth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/546; and seventh report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/567. The draft articles on diplomatic protection and the commentary thereto adopted by the Commission are reproduced in *ibid.*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50.

²¹⁷ *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176, footnote 1299.

aliens could sometimes reach extraordinary dimensions, as had been the case in Malta a few years previously and was currently the case in Lampedusa, Italy.

71. Concerning the treatment of aliens, those both lawfully and unlawfully present in its territory, a State must take into account the fundamental differences that existed between States that had been built through immigration, like the United States of America, and States that tried to protect their identity, especially in the current period of globalization. Various types of integration policies and ways of treating aliens were accordingly needed.

72. The Commission must take into account those realities in order to produce an effective instrument. It should limit itself to developing firmly established minimum standards and procedural guarantees and leave it to States to regulate the treatment of aliens in their territory. In short, the draft articles must leave scope for national policies but nevertheless ensure that respect for human rights, human dignity and non-discrimination were guaranteed when States took expulsion measures.

73. As the Special Rapporteur had suggested, and in order not to create conflicts of law, the Commission should keep in mind the fact that the draft articles excluded certain categories of aliens, particularly those whose status was regulated by other instruments, such as those on refugees and on asylum.

74. He agreed with the Special Rapporteur on the need to be careful with regard to the suspensive effect of judicial review of expulsion decisions (para. 452 [para. 50]). Another facet of the suspensive effect must also be borne in mind, namely the legal uncertainty of applicants who often had to wait years before a constitutional court or the European Court of Human Rights reached a decision.

75. Turning to draft article D1 (Return to the receiving State of the alien being expelled), he noted that paragraph 1, which stated that the expelling State should “encourage” the voluntary departure of the alien being expelled, had been the subject of numerous comments. As he saw it, the issue should be left to States to decide, particularly with respect to the means of implementation. If the purpose of the paragraph was to set out a guiding principle, that would be of little benefit if the Commission chose to adopt a legally binding instrument. As far as paragraph 2 was concerned, he would delete the reference to rules of international law relating to air transport and perhaps refer instead to the protection of human rights. In the same paragraph, the phrase “as far as possible” should be deleted, as it could open the way to endless discussions. In paragraph 3, the words “unless there is reason to believe that the alien in question could abscond during such a period” should also be deleted. In a codification exercise, such practical matters should not be raised.

76. Paragraph 1 of draft article E1 (State of destination of expelled aliens) posed no particular problem. In paragraph 2, however, there was a need to delete the words “where appropriate”, which left extensive room for manoeuvre that was hardly compatible with an international instrument. Regarding paragraph 3, it should be stressed

that the State of nationality was often misidentified and that aliens who had fled their country were unlikely to wish to return. In addition, he failed to understand why the notion of State of residence was mentioned in paragraph 2 but not in paragraph 3. In practice, aliens were most often expelled to the State of embarkation. While thanking the Special Rapporteur for his important work on the issue, he thought that the Drafting Committee should look into the provisions of the draft article, which required further consideration in the light of State practice.

77. Regarding the new version of draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), he said that he shared the concerns expressed by Sir Michael and considered that the Drafting Committee should make the text more precise. Regarding draft article G1 (Protecting the property of aliens facing expulsion), he endorsed paragraph 1 but thought that the words in square brackets in paragraph 2 and the words following the phrase “to dispose freely of the said property” should be deleted. In addition, it might be appropriate to specify in a draft article of that kind whether the expelled alien had been lawfully or unlawfully present in a State’s territory. There was no doubt that, under international law, lawfully resident aliens retained title to the property that they had acquired, but the fact that some aliens resided in States unlawfully must not overshadow the plight of the thousands of aliens who turned up at borders impoverished and without documentation. In that regard, it should perhaps be indicated in the draft article that even if the State of destination had not yet decided whether to grant a visa, it must afford the applicants decent living conditions.

78. Draft article H1 (Right of return to the expelling State) was the article that had probably raised the most difficulties. Aliens expelled on mistaken or unlawful grounds, even though they had been residing in the expelling State lawfully, should be granted the right of return. Whereas illegal aliens expelled unlawfully were entitled to compensation, according to the case law of the European Court of Human Rights, in practice, they did not have the right of return. Thus, to grant illegal aliens who had been expelled unlawfully the right of return to the expelling State would be to go too far: even generally accommodating States would have difficulty in accepting such a right. Lastly, draft article I1 (The responsibility of States in cases of unlawful expulsion) and draft article J1 (Diplomatic protection) posed no particular problems. Commending the Special Rapporteur on his excellent work, he invited the Commission to press forward, with an eye towards the future, by focusing on the contemporary problems posed by the expulsion of aliens and on the practice of States.

79. Mr. HASSOUNA said that he would first like to thank the Special Rapporteur for his detailed and thorough report. He agreed with most of the positions advanced by members of the Commission and would simply like to make a few general comments. Draft article D1 (Return to the receiving State of the alien being expelled) raised the issue of the criteria to be used for forcible implementation of an expulsion decision. Proposals had been made on that score by European organizations and institutions. For example, the European Committee for the Prevention

of Torture and Inhuman or Degrading Treatment or Punishment considered that no more force than was reasonably warranted by the alien's own conduct should be the rule.²¹⁸ Because that notion was so broad, questions arose about its scope in practice. For example, did escape attempts during expulsion by air travel or cases of self-injury permit the use of restraints from the outset of the expulsion? If an alien escaped or caused harm while being escorted from a country on a commercial flight, what were the expelling State's obligations to the passengers? Was any liability incurred by the escorting officials?

80. The issue of remedies against an expulsion decision required clarification and it should be addressed in the draft articles. The Special Rapporteur stated in paragraph 461 [para. 59] that there was no basis in international law for establishing any rule regarding remedies against an expulsion decision. Thus, apart from invoking diplomatic protection before the ICJ, persons whose international rights had been violated had no option other than to initiate civil proceedings in the domestic courts of the expelling State, where immunity might come into play, or before the relevant regional human rights organizations. In other words, even if the State of destination agreed to the return of the expelled person, it might be difficult under international law to enforce the right to a remedy or compensation for unlawful expulsion. Therefore, it would be useful to study the issue further. It should also be noted that many international instruments suspended the right of appeal against an expulsion decision for compelling reasons of national security. Although there was always a risk of abuse in the application of those instruments, States, fortunately, were still cautious about claiming a national security exception, given the precedents that might be set as a result and the potential for reprisals by armed States. As the Institute of International Law had pointed out, expulsion decisions taken in wartime against aliens whose conduct was a threat to the security of a State arguably fell under the national security exception. The modern notion of the war on terror, however, could blur the issue.

81. Refusal by States to admit former nationals who had been expelled was a very problematic issue. Such refusal might prevent another State from exercising its right to expel an alien and lead to prolonged detention until the expelling State was able to find a State of destination other than the alien's former State of nationality. While the report addressed the question of whether the former State of nationality could refuse to admit the alien and noted that the expulsion could be suspended if that State refused to admit the alien, it did not go into the consequences for the expelling State. Nothing was said about the procedures and conditions for the alien's care and detention or available remedies, even though those were important issues. With regard to the "safe country" concept, it might be useful to consider how often the list of such countries should be updated, given that characterizing a country as "safe" was intended to speed up the expulsion process but did not replace a review of applications on a case-by-case basis. Criteria should be set for designating countries as "safe".

²¹⁸ *CPT standards* (CPT/Inf/E (2002) 1 - Rev. 2010), p. 57, para. 36 (available from www.cpt.coe.int/en/documents/eng-standards.pdf).

82. Concerning the expulsion of an alien for the purpose of confiscating his or her property, draft article G1 (Protecting the property of aliens facing expulsion) reflected the current state of international law, but it should perhaps provide for an exception when, in accordance with the right to due process, a court ruled that certain property had been acquired illegally under international law or domestic law. As currently worded, paragraph 2 of draft article G1 could be used to prohibit the State from deriving benefits from illegally obtained property if the offender had been expelled.

83. Draft article H1 (Right of return to the expelling State) said nothing about the status of aliens who enjoyed the right of return. While States could be required to accept the return of aliens, they were not obliged to grant them the same status as in the past, even if the expulsion had been contrary to international law. That gap should be filled so that a State that agreed to the return of an expelled person would not be able merely to grant a tourist visa or other document that prevented the alien from owning property, working or gaining access to the justice system to initiate new proceedings. In draft article I1 (The responsibility of States in cases of unlawful expulsion), it should be made clear that responsibility existed only in the event of unlawful expulsion under international law. While the regime of the responsibility of States ultimately permitted reparation to be obtained only for internationally wrongful acts, it might be appropriate to clarify that point. In the context of draft article J1 (Diplomatic protection), it was important to indicate that the expelled alien's State of nationality could exercise diplomatic protection on behalf of the alien. However, certain problems arose when the alien was a refugee who had been rendered stateless yet whose entry into its territory had been authorized by a State in order to grant nationality. The question then was whether the new State of nationality could make a claim for diplomatic protection on behalf of the new national or whether that would be precluded by the fact that the harm had been sustained before the person concerned had obtained his or her new nationality. Those specific issues did not need to be addressed in the draft article itself, but it would be useful to do so in the commentary. In conclusion, he expressed support for referring all the draft articles to the Drafting Committee.

84. Mr. KAMTO (Special Rapporteur) said that he wished warmly to thank all the members of the Commission who had taken part in the debate on the second addendum to his sixth report on expulsion of aliens, which seemed to have been generally well received. He was pleased that all members had agreed to refer to the Drafting Committee all the proposed draft articles, together with commentaries, observations and some proposals for amendments. In their general comments, several members had queried the approach to the topic, asking whether the Commission was drawing up guidelines, draft articles or general principles. He was puzzled as to why the question had been raised now—such questions usually came up at a later stage. Given that the draft articles dealt with a complex topic and national practices varied greatly, it was more a matter of progressive development than of codification. The issue of sources had also been raised: he wished particularly to thank Mr. Vasciannie for his excellent remarks.

85. The question of whether the Commission was engaging in codification had continually been coming up ever since the item had been placed on the agenda—a rather surprising state of affairs. What should be done? Were the Special Rapporteur on the expulsion of aliens and all the Commission's other special rapporteurs to be told how to recognize a customary rule for the purposes of codification? Should the topic proposed by Sir Michael, the formation of customary rules of international law, be taken up and the issue resolved before anything else was done? Except for the responsibility of States and to some degree diplomatic protection, no topic brought together as large a body of legal instruments, practice and international and domestic case law as did the expulsion of aliens. Under those circumstances, it was surprising to hear that the topic could not be codified, still more, that the Commission wished to develop guidelines. In any case, it would be for the Commission to decide on the form to be taken by the text that would be submitted to the General Assembly. He had no personal stake in the matter. However, it should be recalled that the topic had contributed material to the codification of State responsibility: most of the cases cited in the articles on State responsibility for internationally wrongful acts²¹⁹ related to the expulsion of aliens, from the conclusions of the arbitral proceedings of the late nineteenth century to those of the present day, not to mention the decisions of treaty bodies and regional human rights courts.

86. He welcomed the fact that the Commission had decided to refer all the draft articles to the Drafting Committee. He had taken note of all the drafting proposals, which would be considered in due course by the Committee that had been set up for that very purpose. Regarding the proposal to draw up a draft article on the suspensive effect of appeals against an expulsion decision, he continued to maintain that he had not found sufficient material, and still less, sufficiently convergent State practice, to enable him to put forward a draft article. However, the Commission might choose—as a matter of policy rather than of progressive development, as practice varied so widely—to propose a draft article on the subject. There was no reason not to do so, but it should be borne in mind that the foundation was not sufficiently solid.

87. Regarding the proposal to draft an article on international cooperation, he wished to recall that such cooperation was a general principle underlying all the relations between States in peacetime, according to General Assembly resolution 2625 (XXV) of 24 October 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. If the Commission decided to include such a provision in the draft articles, something that did not seem particularly useful, it would have to do the same for all the other texts it had produced.

88. A member of the Commission had questioned the usefulness of draft article 8 (Expulsion in connection with extradition). All the topics were interrelated, however, and it was not because one was not specifically on extradition

that a provision on that subject could not be developed. Draft article 8 was all the more useful precisely because it did not go into the subject matter of extradition. As to the retention of article J1 on diplomatic protection, he would have liked to have had more time to demonstrate its advantages. In the *Ahmadou Sadio Diallo* case, the ICJ had held that the application of the Republic of Guinea was admissible on grounds of the protection of Mr. Diallo's human rights, although diplomatic protection had previously been deemed to cover only certain personal rights. It would be regrettable not to reflect in a draft article the latest developments in the law. In conclusion, he thanked the members of the Commission for their support for referring all the draft articles on the expulsion of aliens to the Drafting Committee.

89. The CHAIRPERSON said that he took it that the Commission wished to refer to the Drafting Committee draft articles D1, E1, F1, as revised, H1, I1 and J1, as contained in the second addendum to the sixth report on expulsion of aliens, and revised draft article 8, as reproduced in a footnote to the report of the Commission on the work of the previous session.²²⁰

It was so decided.

Organization of the work of the session (continued)*

[Agenda item 1]

90. Mr. HASSOUNA (Chairperson of the Working Group on methods of work) said that the Working Group on methods of work was composed of the following members: Mr. Cafilisch, Mr. Candioti, Mr. Fomba, Mr. Galicki, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

The meeting rose at 1.05 p.m.

3095th MEETING

Tuesday, 31 May 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

²¹⁹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 30 *et seq.*, para. 77.

²²⁰ See footnote 217 above.

* Resumed from the 3092nd meeting.

Other business (A/CN.4/638, sect. J)

[Agenda item 15]

PEACEFUL SETTLEMENT OF DISPUTES (A/CN.4/641²²¹)

1. The CHAIRPERSON invited the members of the Commission to consider the working paper on peaceful settlement of disputes (A/CN.4/641) prepared by Sir Michael Wood.

2. Sir Michael WOOD, introducing the working paper, drew attention to a very useful note by the Secretariat entitled “Settlement of dispute clauses”, published at the sixty-second session.²²²

3. At its sixty-second session, the Commission had decided that its aim at the current session would be to identify specific issues relating to dispute settlement that might be taken up in the Working Group on the long-term programme of work.²²³

4. According to paragraph 140 of the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its sixty-fifth session (A/CN.4/638), some delegations had welcomed the indication that the Commission would continue its discussion on settlement of dispute clauses, and particular attention had been drawn to the idea of exploring options for the settlement of disputes involving international organizations.

5. Paragraphs 4 to 16 of the working paper contained a summary of the Commission’s debate on dispute settlement during the sixty-second session, and paragraphs 15 and 16 listed suggestions made for specific outcomes to be sought from the Commission’s study of the issue. Paragraphs 17 and 18 recalled the work already done on the peaceful settlement of disputes by the United Nations and other bodies, including regional organizations. A more detailed account of that work was contained in the note by the Secretariat on settlement of dispute clauses. Paragraphs 19 to 21 of the working paper contained tentative suggestions for specific issues that might be appropriate for further consideration.

6. The Commission’s consideration of dispute settlement issues could be viewed as part of its contribution to the debate within the General Assembly on the rule of law at the national and international levels. As was clear from the note by the Secretariat, the Commission had periodically addressed the subject of dispute settlement clauses, even if, for a variety of reasons, the results had been quite meagre.

7. During the debate at its sixty-second session,²²⁴ the Commission had noted the growing importance of procedures for the peaceful settlement of disputes. The view had been expressed that the Commission should

continue to have a role in promoting the practical implementation of the peaceful settlement of disputes, a basic principle of the Charter of the United Nations. It had been noted that the reasons that had led the Commission to hesitate to take up dispute settlement issues might no longer apply. The change was due to recent activity by the political organs of the United Nations stressing the importance of dispute settlement.

8. For all the respect paid to the rule of law in international affairs, many States continued not to accept dispute settlement clauses such as those contained in the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes. Many States maintained reservations to the dispute settlement clauses of multilateral conventions, including those drawn up on the basis of the Commission’s work. There had been an encouraging trend in the late 1980s and 1990s, with the end of the cold war, to withdraw such reservations or not to formulate them in the first place. Recent case law of the ICJ had the potential to promote that trend and thus to encourage States to accept such clauses.

9. It had also been suggested at the sixty-second session that, given the current emphasis on the rule of law in international affairs, there should be “a presumption in favour of including effective dispute settlement clauses in international instruments”.²²⁵ Such a trend could be seen in the inclusion of article 27 in the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004, and of elaborate dispute settlement provisions in the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006.

10. In specific cases, the inclusion of a dispute settlement clause might be an essential part of a package deal on some delicate issue. A classic example was the 1969 and the 1986 Vienna Conventions, which contained a dispute settlement clause relating to *jus cogens* provisions. Part XV of the United Nations Convention on the Law of the Sea provided another such example.

11. Paragraph 20 of the working paper listed five tentative suggestions for issues that might be appropriate for future consideration. One issue that had been highlighted by the Sixth Committee in 2010 was procedures for dispute settlement involving international organizations (A/CN.4/638, para. 140). Consideration of that issue followed naturally from the Commission’s work on the topic of the responsibility of international organizations, which it expected to conclude at the current session. One feature of that topic was the relative lack of corresponding case law, in contrast to the extensive amount of case law on State responsibility. That was, at least in part, a reflection of the lack of opportunities for cases to be brought by or against international organizations.

12. The Commission could decide in due course on the precise scope of a topic or subtopic relating to dispute

²²¹ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

²²² Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/623.

²²³ See *Yearbook ... 2010*, vol. II (Part Two), p. 15, para. 24 and p. 202, para. 388.

²²⁴ See *Yearbook ... 2010*, vol. I, 3070th meeting, pp. 261–268.

²²⁵ *Ibid.*, p. 263, para. 16.

settlement, focusing on the settlement of disputes to which international intergovernmental organizations were parties, and excluding the settlement of inter-State disputes by such organizations under Chapter VI of the Charter of the United Nations, *inter alia*.

13. Should the new topic be limited to universal organizations, or should it also include the regional organizations that were becoming increasingly important international actors? He thought that it should include all international organizations, both universal and regional. The Commission would also have to decide whether the topic should be confined to disputes arising under international law or also cover private-law disputes of a contractual or non-contractual nature. He thought that it should not include the latter, as such disputes differed significantly. As to whether the topic should include staff-related matters, he thought not, as such matters were already well catered for in the law. Other questions were whether the topic should include all forms of dispute settlement or only those involving third-party mechanisms, and within the latter, whether it should be limited to arbitral, judicial or other mechanisms leading to a binding decision. Lastly, the Commission would have to decide whether the new topic should cover the enforcement of decisions.

14. Arrangements for the settlement of disputes to which international organizations were parties had long been a source of fascination for international lawyers, and a field of innovation. There was already some practice and several mechanisms for dispute settlement. Some were to be found in instruments drawn up on the basis of the Commission's work, such as the annex to the 1986 Vienna Convention. Other examples were the binding and compulsory advisory opinion mechanism provided for in section 30 of the Convention on the privileges and immunities of the United Nations and in section 32 of the Convention on the privileges and immunities of the specialized agencies. Recourse had already been had to those mechanisms, as evidenced by the ICJ advisory opinion of 15 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* and its advisory opinion of 29 April 1999 on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The 1982 United Nations Convention on the Law of the Sea provided that certain organizations could be parties to dispute settlement proceedings under the new mechanisms it established in article 287, including the International Tribunal for the Law of the Sea. The Permanent Court of Arbitration had also drawn up optional rules for dispute settlement.²²⁶ However, those examples reflected a rather piecemeal approach. In most cases, there was no international court or tribunal that had any possibility whatsoever of jurisdiction over disputes to which international organizations were parties.

²²⁶ Optional Rules for: (a) Arbitrating Disputes between Two States (1992); (b) Arbitrating Disputes between Two Parties of Which Only One is a State (1993); (c) Arbitration Involving International Organizations and States (1996); and (d) Arbitration between International Organizations and Private Parties (1996); as well as (e) Arbitration of Disputes relating to Natural Resources and/or the Environment (2001); and (f) Arbitration of Disputes relating to Outer Space Activities (2011). These Optional Rules are available from the website of the Permanent Court of Arbitration at www.pca-cpa.org.

15. A new topic could either be self-contained or constitute part of a broader topic on the peaceful settlement of disputes. Depending on the choices made about its scope, a possible title for a new topic or subtopic might be "Procedures for the settlement of international disputes to which international organizations are parties". A first step towards the development of the topic might be to examine existing arrangements for the settlement of disputes involving one or more international organizations and arising under international law. Substantial material already existed, both at the universal level and regionally.

16. Certain suggestions made in the debate at the sixty-second session²²⁷ related more generally to the way the Commission set about its work. One was that the note by the Secretariat could serve as a point of reference for consideration by the Commission and by States of the inclusion of dispute settlement clauses in future drafts and instruments. Another was that, when drafting proposals, the Commission should recall that, in paragraph 9 of the Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10 of 15 November 1982, annex), the General Assembly had encouraged States to include in bilateral agreements and multilateral conventions effective provisions for the peaceful settlement of disputes arising from their interpretation or application. A third suggestion was that, in recognition of the practical importance of dispute settlement, the Commission should decide, at least in principle, to discuss it at an appropriate stage of the consideration of each topic or subtopic. Fourthly, the Commission should acknowledge the important work done by other United Nations bodies. The *Handbook on the Peaceful Settlement of Disputes between States*,²²⁸ published in 1992, remained a valuable introduction to the subject, and the Secretariat might be encouraged to find a way of updating it. Lastly, the Commission should invite regional bodies to provide information on any work they were doing in relation to dispute settlement.

17. He looked forward to hearing the reactions of Commission members, particularly to the proposal for a new topic and a first subtopic to be entitled, respectively, "Settlement of disputes" and "Procedures for the settlement of international disputes to which international organizations are parties". The appropriate place to develop the work was now in the Working Group on the long-term programme of work.

18. Mr. VARGAS CARREÑO said that he agreed with most of the comments and preliminary suggestions made by Sir Michael in his working paper. The peaceful settlement of disputes was a fundamental issue of international law, not only because in key provisions of the Charter of the United Nations it was accorded the status of a basic principle underlying a primary purpose of the United Nations—the maintenance of international peace and security—but also because in a globalized and increasingly interdependent world, it was essential to have dispute settlement mechanisms that allowed States to resolve their differences in a quick, effective and appropriate manner.

²²⁷ *Yearbook ... 2010*, vol. I, 3070th meeting, p. 263, paras. 19–24.

²²⁸ Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (OLA/COD/2394) (United Nations publication, Sales No. E.92.V.7), New York, 1992.

19. As the Secretariat had pointed out in its excellent note, over the past 15 years the General Assembly had adopted six conventions and three protocols, all of which provided for the same mechanism for the settlement of disputes: negotiation. A dispute that could not be settled by negotiation within a reasonable time must, at the request of either party, be submitted to arbitration. If the parties were unable to agree on the organization of the arbitration, any party could refer the dispute to the ICJ. The current trend thus was to attach increasing importance to negotiation, arbitration and recourse to the ICJ as the most suitable methods of resolving a dispute.

20. The Commission should perhaps recommend that, in any dispute in which the parties expressed a wish to have recourse to a peaceful method of settlement, they should start by seeking a solution through negotiation. Some members of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, when drafting the Declaration subsequently adopted as General Assembly resolution 2625 (XXV) of 24 October 1970, had proposed to include a requirement that States which were party to a dispute must try first to settle it by negotiation.²²⁹ That proposal had not been accepted because some considered initial efforts to settle a dispute by negotiation to be the standard practice and therefore viewed a legal provision as unnecessary. Today, however, when so many States were bound by agreements stipulating a means of dispute settlement, it might be useful to recommend that they should initially endeavour to resolve the dispute through negotiation.

21. Arbitration, so prevalent in the twentieth century, seemed now to have partially given way to recourse to the ICJ. Arbitration nevertheless continued to be a frequent dispute settlement method, particularly in respect of foreign investment, under the system established by the International Centre for Settlement of Investment Disputes (ICSID).

22. It was the States that were parties to the dispute which determined the applicable substantive and procedural rules for arbitration. Since those rules could not provide for every situation that might arise in an arbitration case, the subsidiary rules established by international customary law came into play, hence the importance of the Model Rules on Arbitral Procedure, which the Commission had adopted in 1958.²³⁰ Should the Commission decide to take up the topic of the peaceful settlement of disputes, it might usefully update those rules so that States could take them into account when opting for arbitration as a means of dispute settlement.

23. There was no doubt that the ICJ was the preferred dispute resolution forum in the Latin American region. The Court had recently adjudicated or was adjudicating an unprecedented number of disputes in the region. If the Commission decided to formulate recommendations on dispute settlement, one of them ought to be that States should recognize as compulsory the jurisdiction of the ICJ.

²²⁹ See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018)*.

²³⁰ *Yearbook ... 1958*, vol. II, document A/3859, Report of the Commission on the work of its tenth session, p. 83, para. 22.

That would be in line with similar recommendations made by the Security Council and the Secretary-General of the United Nations.

24. In his working paper, Sir Michael recalled a statement by the President of the Security Council calling upon States that had not yet done so to consider accepting the jurisdiction of the Court.²³¹ Sir Michael also referred to a letter from the Secretary-General encouraging States to withdraw reservations made to jurisdictional clauses contained in multilateral treaties to which they were a party providing for the submission to the ICJ of disputes relating to the interpretation or application of those treaties.²³² The difference between those two texts was that the statement of the President of the Security Council was broader. It allowed States which, for substantiated reasons, were not able to make a general declaration under the optional clause recognizing as compulsory the jurisdiction of the ICJ, to recognize—by means of the withdrawal of reservations to the relevant clauses—the jurisdiction of the Court in treaties that predated a dispute or were concluded after its emergence.

25. Negotiation, arbitration and recourse to the ICJ were thus the most common means of dispute settlement. In contrast, the instruments prepared by the Commission a few decades earlier and adopted subsequently by plenipotentiary conferences usually emphasized conciliation as a dispute resolution mechanism. It was provided for, *inter alia*, in the 1969 and 1986 Vienna Conventions and in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Conciliation had been mentioned in those instruments not because of its intrinsic merits but as a compromise between States that had advocated acceptance of the compulsory jurisdiction of the ICJ and those that had been in favour of including only a general reference to the methods of dispute settlement set out in Article 33 of the Charter of the United Nations.

26. The fact was that conciliation had never been used to settle a dispute, and it was not normally used in inter-State disputes. While it was true that many bilateral treaties provided for conciliation, there had been very few cases in practice where States had chosen to settle disputes in that way. When States wished to use the diplomatic channel, they opted for mediation, which had proved successful in cases such as the dispute between Argentina and Chile in the *Beagle Channel* case, mediated by the Holy See. Otherwise, if they wished to resolve a dispute definitively, States generally chose compulsory means, such as arbitration or the jurisdiction of the ICJ.

27. What was most important was that the Commission's analysis of dispute settlement be realistic and in line with current practice. That was one of the merits of the work done by Sir Michael. For instance, in his report he invited the

²³¹ Statement by the President of the Security Council of 29 June 2010, on the item entitled "The promotion and strengthening of the rule of law in the maintenance of international peace and security" (S/PRST/2010/11), para. 2.

²³² *Treaty Event 2010: Towards Universal Participation and Implementation*, "The Secretary-General's Letter to Heads of State and Government", of 12 April 2010 (available from <https://treaties.un.org>, under the "Treaty Events" tab).

Commission to consider why States accepted the settlement of disputes in trade matters, yet not in other areas. The truth was that the system for settling disputes in the WTO was probably one of the simplest and most efficient that existed and, more importantly, the costs involved were borne by that Organization. Of course, it was difficult to transpose such a system to other types of disputes, but the experience of WTO should be taken into account.

28. Accordingly, the study of international dispute settlement should not focus solely on inter-State disputes: other disputes under international law involving enterprises and private individuals should also be considered. Most cases of international arbitration were currently handled by ICSID, but its manner of doing so had been questioned. It might therefore be useful for the Commission to consider, not substantive matters relating to foreign investments—other bodies were more competent to do so—but procedures governing the settlement of disputes by ICSID.

29. Other useful recent practice in the settlement of disputes could be found in the decisions of regional human rights bodies. The judgments of the European Court of Human Rights and the Inter-American Court of Human Rights had greatly facilitated the protection of human rights at the national level and the progressive development of international law. The regional bodies had more experience than the United Nations in settling human rights disputes, although that was not true for other types of disputes, at least in Latin America.

30. The basic instruments of the inter-American system for the protection of human rights all stipulated, in almost identical terms, that American States would endeavour to settle any dispute through the procedures established under the inter-American system before referring the matter to the United Nations. Those provisions had been applied for many years, until the invasion of Guatemala in 1954. The appeal for assistance of the Government of Guatemala to the Security Council,²³³ whose members had included Brazil, Colombia and the United States of America, had been rejected on the grounds that the inter-American system did not allow States to appeal directly to the Security Council.²³⁴ The situation had since changed with the amendment of the relevant regional instruments so that nothing in their provisions could be interpreted as depriving a State of the right to refer a dispute directly to the Security Council in accordance with Article 35 of the Charter of the United Nations.

31. In conclusion, he said that the excellent documents prepared by the Secretariat and Sir Michael had enabled the Commission to get off to a good start in the work on dispute settlement. At its next session, the first in the new quinquennium, it should take up the topic of peaceful settlement of disputes. He was accordingly in favour of referring the matter at the current session to the Working Group on the long-term programme of work so that it could take appropriate action.

²³³ Cablegram, dated 19 June 1954, from the Minister for External Relations of Guatemala, addressed to the President of the Security Council (S/3232). See also Security Council resolution 104 (1954) of 20 June 1954.

²³⁴ See *Official Records of the Security Council, Ninth Year*, 675th meeting, 20 June 1954 (S/PV.675).

32. Mr. MURASE, referring to the topics for consideration listed in paragraph 20 of Sir Michael's useful working paper, said that consideration of the inclusion of model dispute settlement clauses in drafts prepared by the Commission (para. 20 (a)) might not be a fruitful exercise. Each set of draft articles had a distinctive character that might warrant a specific dispute settlement clause. If he were proposing a topic on international environmental law, for instance, he would certainly incorporate a dispute clause that addressed proof of scientific evidence, an important characteristic of environmental disputes. However, it might not be equally relevant in other branches of the law. Thus, the "one-size-fits-all" approach might not be appropriate.

33. The question of the access to and standing before different dispute settlement mechanisms of various actors (para. 20 (c)) would be an interesting topic for study, but it would be naive to expect that the Commission's ideas would be accepted by States. Declarations under the optional clause of the Statute of the International Court of Justice (para. 20 (e)) depended more on the political will of States than on technical questions of drafting.

34. In view of the increasing number of disputes arising between international organizations and States, he endorsed Sir Michael's proposal to consider strategies for improving procedures for dispute settlement involving international organizations (para. 20 (b)). Advisory proceedings were the only way that international organizations could bring their claims before the ICJ. The subject matter of the advisory cases varied, falling largely into four categories: the status of members of the organizations and their obligations; the status of members and observer missions in host countries; the status and treatment of officials and experts of international organizations in the territory of member States and non-member States; and treaty interpretation.

35. While it might be desirable from the point of view of international organizations to amend the Statute of the International Court of Justice so that they could bring their claims as contentious proceedings, such a proposal must come from States and not from the International Law Commission. Perhaps a proposal worth considering would be to invest the Secretary-General of the United Nations with the competence to request an advisory opinion, since the Secretary-General often mediated or arbitrated disputes between States, for example the "*Rainbow Warrior*" arbitration, and an advisory opinion from the ICJ would help significantly in settling such disputes. Yet even such a modest proposal might encounter opposition from some States. Therefore, there did not seem much that the Commission could do to enhance the role of the Court in handling disputes involving international organizations.

36. By contrast, disputes between international organizations and States were normally considered best settled by arbitration. The Commission could contribute a great deal by drafting a set of model rules on arbitral procedures involving international organizations, based on the 1958 Model Rules on Arbitral Procedure.²³⁵

²³⁵ See footnote 230 above.

37. The IMF generally responded to disagreements with its member States by withholding funding, which created fierce disputes on a number of issues such as the best accounting methods of a member State's central bank and the austerity measures that a defaulting country should take. Those were the types of contract disputes that would seem to lend themselves well to litigation or arbitration, but thus far no appropriate forum for them existed. It might make sense for organizations responsible for economic activities like the IMF and the World Bank to resolve disputes as if they were private parties. That would allow them, theoretically at least, to have recourse to ICSID or to a forum of commercial arbitration.

38. However, since international organizations were intrinsically different from private individuals on the one hand and from States on the other, it might be advisable to envisage a set of model rules specifically for disputes between international organizations and States. When drafting such rules, the Commission should focus on the cases that international organizations would be most likely to face. One typical area of dispute was the dissolution or bankruptcy of an international organization resulting in debt owed to third parties, such as in the case of the International Tin Council or, more recently, the Korean Peninsula Energy Development Organization. The model rules should also facilitate access to arbitration by private corporations—a point where his views seemed to differ from those of Sir Michael.

39. As to the second topic that the Commission might wish to explore, that of competing jurisdictions between international courts and tribunals (para. 20 (d)), he said that the proliferation of international courts and tribunals was a fact of life, but it posed problems of how to overcome the possible fragmentation of international case law and coordinate competing jurisdictions. The primary concern was the lack of *stare decisis* among the different courts and tribunals. For example, the ICJ and the International Tribunal for the Former Yugoslavia employed different tests (“effective control test” and “overall control test”, respectively) to determine the attribution of certain conduct to the State concerned, as illustrated by the former's case concerning *Military and Paramilitary Activities in and against Nicaragua* and the latter's *Tadić* case.

40. The second problem was parallel jurisdiction, which occurred both between universal and regional courts (the ICJ and the European Court of Justice) and between courts of general jurisdiction and specialized tribunals (the European Court of Justice and the WTO). In the era of the General Agreement on Tariffs and Trade (GATT), the European Court of Justice had on several occasions found that the GATT Panel Reports had no effect on the domestic law of European Community member States; he was not certain that the establishment of the WTO had eliminated that particular problem. The *MOX Plant* case had been before three tribunals: the European Court of Justice, the International Tribunal for the Law of the Sea and the dispute settlement procedure under the Convention for the protection of the marine environment of the North-East Atlantic (OSPAR Convention). The case concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks* had been before the WTO and the International Tribunal for the Law of the Sea concurrently.

41. One way in which States had tried to overcome the problem of competing jurisdictions was through treaty provisions. In *Southern Bluefin Tuna Cases*, in 2000, the Arbitral Tribunal constituted under annex VII of the United Nations Convention on the Law of the Sea had found, in favour of Japan, that it did not have jurisdiction under the general rules of the Convention because the parties had signed a more specific dispute resolution procedure that governed the dispute resolution mechanism. On the other hand, in the *MOX Plant* case it had been found that a similar regional treaty (the Convention for the protection of the marine environment of the North-East Atlantic) did not prevent the International Tribunal for the Law of the Sea from exercising parallel jurisdiction because the treaties did not cover exactly the same set of rights (order of 3 December 2001, para. 50).

42. The applicability of *lis pendens* and *res judicata* would also have to be considered. With regard to the former, in the case concerning the *Chorzów Factory*, the Permanent Court of International Justice had decided that it could exercise jurisdiction over the State-to-State dispute concerning the confiscation by Poland of German-owned factories, despite concurrent jurisdiction by the private German companies involved.

43. With regard to the principle of *res judicata* and its applicability between different international institutions, he noted that the American Convention on Human Rights: “Pact of San José, Costa Rica” had an explicit *res judicata* clause (art. 47 (d)), but such a clause was rare in treaties. The article prohibited the exercise of jurisdiction by the Inter-American Commission on Human Rights if the petition was substantially the same as one previously studied by that Commission or by another international organization. Like many other countries, Japan had made a reservation to the Statute of the International Court of Justice when accepting the compulsory jurisdiction of the ICJ to the effect that the Court would have jurisdiction only over issues that were not already decided by other forums.²³⁶ In its 1960 judgment in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906*, the ICJ had held that it could not decide the merits of a previously binding arbitration between the two States, although it maintained competence to declare the arbitral award null and void. The Court had upheld that judgment in its 1991 judgment in the case concerning the *Arbitral Award of 31 July 1989*.

44. In conclusion, he said that while he was not certain which of the suggestions made by Sir Michael in paragraph 20 (b) and (d) was better, he was ready to cooperate on whatever topic the Commission might wish to take up.

45. Mr. CAFLISCH said that while the Commission should consider all aspects of the peaceful settlement of disputes, it should pay particular attention to those that related to the multilateral conventions that were often the product of its work. It was true that, thus far, it had proved impossible to set up a universal jurisdiction or a general mechanism for the peaceful settlement of disputes, but success had been achieved in specific areas, for example,

²³⁶ *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. I.4.

the law of the sea, and the law of the WTO. It was therefore necessary to move forward cautiously when establishing rules on the peaceful settlement of disputes.

46. He was not in favour of preparing a single set of model dispute settlement clauses because the areas requiring peaceful settlement rules differed greatly. As Mr. Murase had pointed out, one size did not fit all. However, he could go along with the idea of drafting several sets of model clauses.

47. He was very much in favour of improving procedures for dispute settlement involving international organizations, more or less along the lines indicated in Sir Michael's introductory statement. That could constitute a first step and would not necessarily rule out work on the other topics suggested in paragraph 20 of the working paper.

48. As he had suggested at the previous session, the Commission should acquire the reflex, whenever it drafted an instrument, of considering whether it should include articles on a mechanism for the peaceful settlement of disputes and, if so, what that mechanism should be. That reflex could also take the form of always inviting special rapporteurs, when they began to study a topic, to consider the matter of dispute settlement and to submit proposals on how to deal with it.

49. He would like to see the Commission get down to serious work on dispute settlement at the current session so that when it was reconstituted at the next session, the new Commission could take up the subject with the least possible delay. He would not like the Commission to embark on an unfocused, general discussion that was unlikely to produce results, however.

50. Mr. DUGARD said that the peaceful settlement of disputes certainly was an important aspect of the rule of law. For that reason, it was encouraging that there was more international litigation than ever before and that the ICJ was the busiest it had been in the whole of its history. The time was therefore ripe for a study of measures conducive to the peaceful settlement of disputes.

51. It would be unwise to focus on procedures for dispute settlement involving international organizations, because the legal advisers to international organizations appeared to object to international organizations being singled out for special attention. The Commission should therefore broaden its scope of enquiry.

52. Conversely, it would be wise to examine the possibility of drafting model dispute settlement clauses for inclusion in the texts prepared by the Commission. Sir Michael had made the interesting comment that the recent case law of the ICJ might lead States to reconsider their reservations to dispute settlement clauses. Mr. Dugard wondered if Sir Michael was referring to the very powerful joint separate opinion in the case concerning *Armed Activities on the Territory of the Congo*, which had sent out the message to States that the Court might rule on the validity of reservations to dispute settlement clauses, or to the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. Sir Michael was quite right when he said that this aspect of the topic required careful attention.

53. Dispute settlement clauses had not been included in the most recent sets of draft articles drawn up by the Commission (on responsibility of States for internationally wrongful acts, responsibility of international organizations, diplomatic protection and the effects of armed conflicts on treaties). When the articles on State responsibility for internationally wrongful acts²³⁷ were being prepared, Mr. Kateka had launched a very interesting and controversial debate by suggesting that model dispute settlement clauses be included.²³⁸ At that juncture, the Commission had been fairly evenly divided on the matter, but since then it seemed to have taken it for granted that the issue should be left to the Sixth Committee or to other international forums charged with the task of converting the Commission's draft texts into international instruments.

54. There was a real need to address the subject of dispute settlement involving international organizations. The Commission should examine the suggestion that the Statute of the International Court of Justice be amended to allow it to hear disputes between States and international organizations. It could take that opportunity to consider the settlement of disputes between States and international organizations on the one hand and NGOs on the other. In the past, the only subjects of international law had been States and international organizations, but in the twenty-first century, international disputes frequently involved NGOs.

55. Concerns about forum shopping had arisen because the United Nations Convention on the Law of the Sea had provided for a choice of bodies to hear disputes involving the law of the sea: the International Tribunal for the Law of the Sea, the ICJ or an arbitral tribunal. It would therefore be helpful if the Commission were to ascertain whether offering such a choice had been an effective way of dealing with dispute settlement or whether it had led to the fragmentation of dispute mechanisms.

56. With regard to declarations under the optional clause in Article 36, paragraph 2, of the Statute of the International Court of Justice, he said that it was widely recognized that most States did not have the political will to accept that clause. However, very little pressure was brought to bear on them to do so. The Rome Statute of the International Criminal Court had been ratified by 115 States as a result of the pressure of public opinion and NGOs. Surely it would be possible to engage in such a process with respect to the optional clause. If the Commission did draft a model declaration, it might be easier for other bodies to press States to accept the optional clause.

57. The Commission should not be afraid of considering the idea of investing the Secretary-General with the power to request advisory opinions from the ICJ. Times had changed, and States might be more receptive than they had been in the past to that idea.

²³⁷ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

²³⁸ *Yearbook ... 2001*, vol. I, 2668th meeting, p. 14, para. 38; see also, *inter alia*, the statements by Mr. Pellet (*ibid.*, pp. 14–15, paras. 39–40); Mr. Dugard (*ibid.*, p. 16, para. 47); Mr. Sepúlveda (*ibid.*, 2671st meeting, p. 29, paras. 24–28); and Mr. Tomka (*ibid.*, p. 30, para. 36).

58. The Commission should also turn its attention to the establishment of procedures and principles for fact-finding missions. International organizations often set up a fact-finding mission in order to settle very serious disputes, but the very nature of the mission had sometimes been challenged on the grounds that it was not, by definition, a judicial body. During her visit to the Commission, the United Nations Legal Counsel had explained that the Secretary-General requested advice from panels, but in reality, such advisory panels engaged in a fact-finding exercise. The Commission had to recognize the need for a code of conduct for fact-finding missions, especially as the broad guidelines in the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, contained in the annex to General Assembly resolution 46/59 of 9 December 1991, were seldom followed in practice.

59. Mr. MELESCANU said that the Secretariat's excellent note on the peaceful settlement of disputes²³⁹ examined 17 peaceful settlement clauses, of which 9 had been embodied in texts and 8 had not. While the note offered the basis for imaginative solutions when drafting model dispute settlement clauses, he agreed that the main problem was the lack of States' acceptance of such clauses.

60. There had never been a better time to focus on improving dispute settlement procedures involving international organizations, since the Commission was about to adopt the draft articles on the responsibility of international organizations.²⁴⁰ It should therefore examine the manner in which disputes that might arise from their application could be solved.

61. The subject fitted in well with the campaign of the United Nations to strengthen the rule of law. The Commission could initially focus on procedures for improving dispute settlement involving international organizations, and it could then expand the list contained in paragraph 20 of the working paper. He strongly supported referral of the topic to the Working Group on the long-term programme of work with the recommendation that it be included as an item on the agenda of the following year's session. He agreed with Sir Michael that there was not enough time at the current session to appoint a Special Rapporteur on the topic.

62. Sir Michael WOOD, responding to some of the points raised during the debate, said that the case law to which he had referred in the context of reservations to dispute settlement clauses had been the judgment of the ICJ in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. The Court's approach indicated that the risk that States thought they were assuming if they accepted clauses under specific conventions, particularly those in the field of human rights, was not as great as it seemed, since the Court would interpret and apply such clauses in a reasonable manner.

63. Although Mr. Dugard had been right in saying that political will was the main problem in respect of declarations under the optional clause, it had to be acknowledged that

the actual drafting of those declarations was very difficult, because it was necessary to have a deep knowledge of case law in order to understand the effect of various provisions. In his experience, States often made such declarations in haste without carefully considering them. On a technical level, it would be helpful if the Commission were to look at possible elements for inclusion in those declarations. Some elements, for example a cut-off date, might be a means of encouraging States to accept the optional clause, as they would no longer fear being held responsible for events that had occurred many years earlier. When the Council of Europe had engaged in such an exercise, at least one State had accepted the optional clauses under articles 25 and 46 of the European Convention on Human Rights and other States had started to consider such action.

64. It would be advisable to investigate the principles underpinning fact-finding missions. It would also be interesting to explore the idea of giving the Secretary-General the power to request an advisory opinion from the ICJ.

Organization of the work of the session (*continued*)

[Agenda item 1]

65. Mr. CANDIOTI (Chairperson of the Working Group on the long-term programme of work) said that the Working Group had the following members: Mr. Cafilisch, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

66. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that in addition to Mr. McRae, who was the other Co-Chairperson, the Study Group comprised: Mr. Cafilisch, Mr. Candiotti, Ms. Escobar Hernández, Mr. Gaja, Mr. Hmoud, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood.

The meeting rose at 11.35 a.m.

3096th MEETING

Wednesday, 1 June 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

²³⁹ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/623.

²⁴⁰ *Yearbook ... 2011*, vol. II (Part Two), chap. V, sect. E.

Other business (concluded) (A/CN.4/638, sect. J)

[Agenda item 15]

PEACEFUL SETTLEMENT OF DISPUTES
(concluded) (A/CN.4/641)*Ms. Jacobsson (Vice-Chairperson) took the Chair.*

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the working paper on the peaceful settlement of disputes (A/CN.4/641).

2. Mr. GAJA said he regretted that he had been unable to attend Sir Michael Wood's presentation of his working paper on the peaceful settlement of disputes at the previous meeting and the ensuing discussion. He had, however, had the opportunity to read the text of Sir Michael's statement. If he had been a judge in the Court of Appeal or the House of Lords, he could simply have said that he concurred with his learned friend's opinion, but since he had the privilege of being a member of the Commission, he would, in accordance with custom, add a few words of praise for that lucid presentation, which had been very useful for the Commission's future work on the topic. Sir Michael had first referred to the proposal he himself had made at the previous session, in 2010, that the Commission should address the issue of the settlement of disputes involving international organizations and had then outlined certain issues that the Commission might consider in that regard. He would also add a few comments on that subtopic. It was an important topic; the question was how to address it and whether some precautions should not be taken before doing so. A full review of the settlement of disputes involving international organizations would require consideration of whether Article 34 of the Statute of the International Court of Justice should be amended in order to give certain organizations the possibility of bringing a claim or being sued before the Court. Some authors had suggested that Article 34 should be interpreted in a way that included some international organizations. Some judges—albeit in their capacity as scholars—had supported that development, in particular Sir Robert Jennings and Roberto Ago. In his last article, published in 1991 in the *American Journal of International Law*, the latter had written:

What reason can there be to continue to subject the settlement of disputes concerning the interpretation or application of an international instrument to different procedures depending on whether the parties to the dispute are two States or a State and the United Nations itself or one of the organizations belonging to its system? This disparity of treatment might have had a *raison d'être* when those international organizations had not yet become active participants in international life as distinct legal persons with their own interests and rights, different from those of the States that constitute them.²⁴¹

Judge Ago had made a plea for trying to broaden the scope of Article 34 of the Statute of the International Court of Justice to reflect the present situation of international organizations. It was clearly one of the difficulties of the topic because it would also be necessary to consider

whether the provisions of the Statute of the International Court of Justice should be amended.

3. An alternative system had been devised to allow an international organization to request an advisory opinion on a dispute that it might have with a State, for example with regard to the Convention on the privileges and immunities of the United Nations and the 1986 Vienna Convention. The system of asking for advisory opinions from the Court in order to settle a dispute between an international organization and a State also needed to be critically examined. That system was not balanced because, as evidenced in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, the organization had the final word about the important issue of how the request should be framed and, even when negotiations had taken place between the State and the United Nations, the wording used was certainly not what the State would have chosen. Moreover, the opportunity for a full discussion of the merits and the presentation of evidence was seriously curtailed in advisory proceedings.

4. The question of the ICJ was an important one and could not be left aside because, as Ago had said, the fact that there might be international conventions to which one or more international organizations were parties complicated the dispute settlement system. Other specific problems arose in the event of a dispute between an international organization and its member States which could result in a claim being brought before other international courts. In particular, it needed to be seen how the relationship between an international organization and its members could give rise to solutions that were different from those that generally applied. The Commission had addressed that question and revised some draft articles, in particular with regard to countermeasures, but the rules of the international organization could play a role in that context and further consideration of the topic was required.

5. Regarding the possible outcome, the topic did not lend itself to the formulation of a set of draft articles. The Commission could review the way in which disputes involving international organizations were settled and propose a number of recommendations, some of which could be far-reaching, in particular if they concerned Article 34 of the Statute of the International Court of Justice. It would be advisable to ascertain the views of States and international organizations on the usefulness of that new endeavour before including the topic of settlement of disputes concerning international organizations in the Commission's long-term programme of work. If Sir Michael's proposal was adopted, an appropriate question could be framed in chapter III of the Commission's annual report to the General Assembly in order to obtain some reaction on the part of States in the Sixth Committee, but international organizations could also be asked for their views, because it was important for those organizations to be actively and positively involved in the review of the way in which their disputes were settled. When the 1986 Vienna Convention had been negotiated, most international organizations had been very content without rules and would have preferred not to have any at all, as was reflected in the summary records of the time. Some had changed their opinion and eventually deposited instruments of formal confirmation in

²⁴¹ R. Ago, "Binding' advisory opinions of the International Court of Justice", *American Journal of International Law*, vol. 85, No. 3 (July 1991), pp. 439–451, at p. 450.

greater numbers than necessary for the Convention to enter into force. It had not yet done so, however, because some States were still reluctant to ratify it. The attitude of a number of international organizations with regard to the issue of their responsibility was also well known: they were very happy with the current situation and essentially perceived the rules of international law as obstacles to the exercise of their functions. Would international organizations like to see the Commission engage in further consideration of the issue of their immunity, as envisaged in the long-term programme of work, or would they view positively an examination of the way in which their disputes were settled? Probably not. Nevertheless, their early involvement would improve the prospects of enlisting their cooperation, hence the proposal to introduce an appropriate question in chapter III of the Commission's annual report before continuing work in that area.

6. Mr. HMOUD said that he was in favour of the Commission continuing its consideration of the topic of the peaceful settlement of disputes within the framework of a working group in order to undertake an in-depth study of all its aspects. In that way, the Commission could make a contribution to developing rules in that area. In recent years, States had increasingly used peaceful means to settle their disputes, but there was still a large gap in that area, which tended to limit the possibilities for the dissemination of international law and its application in international relations. Some States still had reservations about using the dispute settlement mechanisms provided for in the international conventions and agreements to which they were parties, and were unwilling to accept the optional clause recognizing the jurisdiction of the ICJ. They increasingly used political settlement mechanisms. As to international organizations and their attachment to dispute settlement mechanisms, it seemed that, as many members had indicated, they tended, for a number of reasons, to seek political solutions rather than legal ones to settle their disputes with countries or other international organizations. Their relations with States tended to be governed by their constituent instruments or State agreements, including headquarters agreements and agreements on privileges and immunities. In addition, there was a general, unspoken consensus which led to peaceful means not being used to settle disputes involving international organizations. In that regard, he agreed with the comments made by Mr. Gaja and Sir Michael at the previous meeting. There were several reasons why legal mechanisms for the peaceful settlement of disputes were not used, including the lack of political will to embrace solutions that would directly or indirectly oblige international legal entities to have recourse to a specific dispute settlement procedure and to accept the resulting outcome. However, there was also a lack of understanding or awareness of the different aspects of the issue, and the Commission could help resolve that problem by examining the question of the peaceful settlement of disputes and drawing some useful conclusions from its work. It could develop a model declaration that States could use to accept the optional clause recognizing the jurisdiction of the ICJ, indicate the required content of each declaration and specify the resulting legal obligations for States. That could assist States in accepting the Court's jurisdiction more readily, given that their reluctance was due in part to their lack of awareness of the consequences of such a step. The mechanisms available to States and

international organizations for the legal settlement of disputes should also be discussed, including arbitration and legal proceedings, all issues relating to the immunity of international organizations and the questions of the jurisdiction of States and the compulsory jurisdiction of international organizations. The Commission could also contribute to the peaceful settlement of disputes by developing model rules for inclusion in draft articles and international agreements and conventions. Those rules would merely be examples of solutions because it was very difficult to formulate model rules that would be appropriate for all forms of disputes and because treaties and conventions differed in content, characteristics and signatories. Furthermore, texts of international dispute settlement instruments could sometimes be replaced by an alternative solution while at other times they were linked wholly or in part to the purpose of the instrument. The Commission could propose several alternative dispute settlement mechanisms so that negotiating parties could use one of them wholly or in part. If the Commission approved that proposal, it could, if necessary, appoint a special rapporteur or establish a working group to consider it.

7. Mr. FOMBA said that it was essential for the Commission to contribute to the current debate on the need to promote the rule of law at the national and international levels. In that regard, it was appropriate to include the topic of the peaceful settlement of disputes in the Commission's programme of work, and the list of topics proposed in paragraph 20 of the working paper prepared by Sir Michael (A/CN.4/641) seemed generally acceptable.

8. Sir Michael's arguments for giving priority to the topic mentioned in paragraph 20, subparagraph (b), namely improving procedures for dispute settlement involving international organizations, were convincing. The general framework proposed in that connection seemed interesting and deserved greater consideration.

9. He thanked Mr. Gaja for his very interesting and relevant comments on the final outcome of the Commission's work and how to move forward. It would indeed be wise not to prepare draft articles but rather a number of recommendations, and to see the reaction of States and international organizations before including the topic in the Commission's long-term programme of work. Without prejudging the final decision that would be taken in that regard, he proposed that the topic be referred to the Commission's Working Group on the long-term programme of work.

10. Mr. NOLTE congratulated Sir Michael on his working paper, which provided an excellent basis for the Commission's discussions. He would confine his comments to the topics mentioned in paragraph 20 of the document.

11. He doubted whether it would be useful to prepare the model dispute settlement clauses mentioned in subparagraphs (a) and (e). States had a wide variety of possible clauses and it was unsure whether the Commission could give appropriate advice as to the best choice from a political or even a technical point of view. States would probably opt for one clause or another depending on the

kind of dispute, their interests and the substantive law at stake. As Sir Michael had recalled in paragraph 15 (e) of his working paper, the United Nations had already published in 1992 the *Handbook on the Peaceful Settlement of Disputes between States*,²⁴² which contained a digest of the different dispute settlement clauses found in State practice and which could be updated.

12. On the other hand, the suggestion made in paragraph 20, subparagraph (b), of the document was promising. Procedures for the settlement of disputes involving international organizations had been somewhat neglected, even though the issue was important and would probably become more so after the adoption by the Commission of the draft articles on the responsibility of international organizations. The topic as set out in subparagraph (b) could be enlarged to include some aspects of the topic proposed in subparagraph (c). The question of access to and standing before different dispute settling mechanisms, addressed in subparagraph (c), could have particular relevance to disputes involving international organizations and should therefore be given further consideration.

13. He had a number of concerns regarding the topic mentioned in subparagraph (d), regarding in particular the possible procedural fragmentation of international law. The Commission had decided not to include that topic in its initial study on the fragmentation of international law. He wondered whether discussion of the issue had moved forward enough for the Commission to propose more than a general frame of reference.

14. Mr. McRAE congratulated Sir Michael on his working paper. He noted that the topic proposed in paragraph 20, subparagraph (b), enjoyed the broad support of members of the Commission and he approved Mr. Nolte's idea of enlarging it to include some of the elements mentioned in subparagraph (c).

15. The topic proposed in paragraph 20, subparagraph (d), should not be ruled out. It might not be ripe for consideration, but it was a logical follow-up to the Commission's work on the fragmentation of international law. If a working group was established to study the issue of the peaceful settlement of disputes, it would be a good idea for it to consider that topic.

16. The topic proposed in paragraph 20, subparagraph (c), was interesting, particularly with regard to international organizations, but the Commission should take as broad an approach as possible to it. International organizations were at times subject to litigation. Sir Michael had mentioned cases brought before domestic courts as well as proceedings brought by staff against their own organization. The last issue should not be ruled out and deserved further study. It would be interesting to study the procedures established to enable staff to sue their organization through an international mechanism and make use of them as a basis for developing procedures applicable in the framework of other mechanisms.

17. In addition to the examples mentioned at the previous meeting of circumstances where organizations were sued, mention should also be made of the considerable number of cases brought before the WTO in which the European Union was either plaintiff or defendant, and which were a valuable source of experience.

18. As to the procedure to follow, it seemed logical to refer the topic to the Commission's Working Group on the long-term programme of work. There was a need for some caution about timing, however. Given the controversy surrounding the draft articles on the responsibility of international organizations, it would be useful for the Commission to know how those articles were received by the General Assembly before it decided to examine the topic of the settlement of disputes involving international organizations.

19. Ms. ESCOBAR HERNÁNDEZ congratulated Sir Michael on his working paper and thanked the Secretariat for its very interesting note. Her comments would focus on the importance and interest of the topic of the peaceful settlement of disputes on the one hand and the topics proposed by Sir Michael on the other.

20. On the first point, she agreed that it was an important issue for international law, not only from a general point of view, within the context of guarantees of the rule of law at the international level, but also in practical terms, where the Commission could make a useful contribution. The dispute settlement model had undergone some noteworthy changes in recent years, as reflected in particular by the increasing use of judicial settlement and the calling into question of certain aspects of the model, such as the scope and meaning of the advisory function and the legitimacy criteria, and the need to reflect on the interaction of alternative arrangements for the peaceful settlement of disputes, particularly in connection with the judicial model. Those included the recent ruling of the ICJ in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case and other recent decisions of the International Tribunal for the Law of the Sea concerning the relationship between prior negotiation and recourse to international authorities.

21. With respect to the second point, the topics which warranted particular attention fell into two general categories: on the one hand, the issue of international organizations and dispute settlement and, on the other, the need to initiate a wide-ranging review of the judicial settlement of disputes by conducting a cross-cutting analysis that would cover the different topics proposed and possibly include others such as the conditions for the exercise of international jurisdiction.

22. She had a few reservations regarding the preparation of model clauses relating to the settlement of disputes. The proposal was certainly interesting, but it called for an in-depth consideration of the issue by the Commission because it was not clear that it had much to contribute in that regard. Lastly, she supported the proposal to refer the topic of the peaceful settlement of disputes to the Working Group on the long-term programme of work for its consideration.

²⁴² Office of Legal Affairs, Codification Division, *Handbook on the Peaceful Settlement of Disputes between States* (OLA/COD/2394) (United Nations publication, Sales No. E.92.V.7), New York, 1992.

23. Ms. JACOBSSON, speaking as a member of the Commission, congratulated Sir Michael on his working paper. At the previous session, she had underlined the link between international peace and security and the rule of law and the peaceful settlement of disputes. It would therefore be useful for the Commission to make a contribution to the debate on the topic.

24. With respect to the five topics proposed by Sir Michael for the Commission's consideration, the most important were those mentioned in paragraph 20, subparagraphs (c), (e) and (b), in that order. The proposal for improving procedures for dispute settlement involving international organizations referred to in subparagraph (b) could be treated as a separate topic, despite the view to the contrary expressed by Mr. Dugard at the previous meeting.

25. Consideration of the topic proposed in subparagraph (c), namely a study of access to and standing before different dispute settling mechanisms of various actors, would be an important contribution by the Commission, particularly if it was accompanied by concrete proposals on how to improve the mechanisms and fill gaps.

26. The proposal contained in subparagraph (e) concerning declarations under the optional clause, including the elaboration of model clauses for inclusion therein, was timely. The issue was less sensitive now and seemed to be undergoing a new and positive development, and the Commission could take advantage of the work done by other legal bodies, such as the Committee of Legal Advisers on Public International Law (CAHDI).

27. She was not convinced of the value of elaborating model dispute settlement clauses for possible inclusion in drafts prepared by the Commission, as referred to in subparagraph (a). It would be better if the Commission more routinely included such clauses when preparing draft conventions. There was no "one-size-fits-all" solution and model clauses had to be tailored to each specific case.

28. She had stated at the previous session that it was important to widen the discussion and include not only genuine dispute settlement clauses but also alternative tools and mechanisms, such as fact-finding mechanisms. Fact-finding could be of a legal nature and it did not have to be political. That aspect was not expressly mentioned in the working paper and was not listed among the proposals. She was glad to note that other members had raised those issues during the debate and hoped that they would be included in the Commission's future work on the topic, if it was included in the long-term programme of work. It was also important to discuss mechanisms which had never been used, such as the mechanism of the OSCE and the mechanism provided for under article 90 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (known as the International Fact-Finding Commission). Mention should also be made of the rosters of experts listed under various treaties, which were never used.

29. It would be helpful if a workplan was presented to the Working Group on the long-term programme of work during the current session.

30. Sir Michael WOOD proposed that, in the light of the words of caution expressed by Mr. Gaja and Mr. McRae, chapter III of the Commission's annual report indicate that the Commission was planning to consider a new topic, namely the peaceful settlement of disputes, and list possible subtopics, in a different order from that set out in paragraph 20 of the working paper, with additions as appropriate. That approach would enable the Commission to see the reaction of States and international organizations.

31. A paper should be drawn up for the Working Group on the long-term programme of work. The paper could be prepared during the current session, but it would probably be wiser, in view of the comments that had been made, to wait until the 2012 session. Rushing ahead with the topic might raise concerns.

32. Mr. HMOUD said that he supported Sir Michael's proposal to refer to the topic in chapter III of the Commission's report. However, with respect to the issue of including the topic in the Commission's long-term programme of work, he wondered whether it could not be discussed in the Working Group at the same time as other points that had been raised by members of the Commission. It would be preferable, before establishing a workplan and preparing a paper, to decide on the approach to adopt and the aspects on which to focus.

33. Sir Michael WOOD said that, rather than taking a hasty decision, the best solution would perhaps be to ask the enlarged Bureau to decide in the light of the programme of work for the second part of the current session and the 2012 session.

The meeting rose at 11.05 a.m.

3097th MEETING

Friday, 3 June 2011, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS
(Vice-Chairperson)

Later: Mr. Rohan PERERA (Rapporteur)

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

Responsibility of international organizations (*concluded*)* (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MELESCANU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles adopted by the Drafting Committee on the responsibility of international organizations, which read:

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART ONE

INTRODUCTION

Article 1. Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an internationally wrongful act.

2. The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

Article 2. Use of terms

For the purposes of the present draft articles:

(a) “international organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) “organ of an international organization” means any person or entity which has that status in accordance with the rules of the organization;

(d) “agent of an international organization” means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.

PART TWO

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Article 3. Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Article 4. Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

* Resumed from the 3085th meeting.

Article 5. Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 6. Conduct of organs or agents of an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.

Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 8. Excess of authority or contravention of instructions

The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 9. Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under draft articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 10. Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.

2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

Article 11. International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

Article 12. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 13. Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION
IN CONNECTION WITH THE ACT OF A STATE OR
ANOTHER INTERNATIONAL ORGANIZATION

*Article 14. Aid or assistance in the commission
of an internationally wrongful act*

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

*Article 15. Direction and control exercised over
the commission of an internationally wrongful act*

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that organization.

*Article 16. Coercion of a State or another
international organization*

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(b) the coercing international organization does so with knowledge of the circumstances of the act.

*Article 17. Circumvention of international obligations through
decisions and authorizations addressed to members*

1. An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.

2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed.

*Article 18. Responsibility of an international organization member
of another international organization*

Without prejudice to draft articles 14 to 17, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in draft articles 61 and 62 for States that are members of an international organization.

Article 19. Effect of this Chapter

This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20. Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 21. Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Article 22. Countermeasures

1. Subject to paragraphs 2 and 3, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part Four for countermeasures taken against another international organization.

2. Subject to paragraph 3, an international organization may not take countermeasures against a responsible member State or international organization unless:

(a) the conditions referred to in paragraph 1 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

3. Countermeasures may not be taken by an international organization against a member State or international organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 23. Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the organization has assumed the risk of that situation occurring.

Article 24. Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

Article 25. Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(a) is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question; and

(b) does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the organization has contributed to the situation of necessity.

Article 26. Compliance with peremptory norms

Nothing in this Chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this Chapter is without prejudice to:

(a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) the question of compensation for any material loss caused by the act in question.

PART THREE

CONTENT OF THE INTERNATIONAL RESPONSIBILITY
OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Article 28. Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Article 29. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Article 30. Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31. Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Article 32. Relevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

CHAPTER II

REPARATION FOR INJURY

Article 34. Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

Article 35. Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36. Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage, including loss of profits insofar as it is established.

Article 37. Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Article 38. Interest

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Article 40. Ensuring the fulfilment of the obligation to make reparation

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.

2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 41. Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Article 42. Particular consequences of a serious breach of an obligation under this Chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of draft article 41.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of draft article 41, nor render aid or assistance in maintaining that situation.

3. This draft article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

PART FOUR

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 43. Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;

(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State or that international organization; or

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 44. Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(b) what form reparation should take in accordance with the provisions of Part Three.

Article 45. Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.

2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

Article 46. Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 47. Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 48. Responsibility of an international organization and one or more States or international organizations

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 49. Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and

(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 50. Scope of this Chapter

This Chapter is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

CHAPTER II

COUNTERMEASURES

Article 51. Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Article 52. Conditions for taking countermeasures by members of an international organization

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:

(a) the conditions referred to in draft article 51 are met;

(b) the countermeasures are not inconsistent with the rules of the organization; and

(c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.

2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

Article 53. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) obligations for the protection of human rights;

(c) obligations of a humanitarian character prohibiting reprisals;

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

Article 54. Proportionality of countermeasures

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 55. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and, if already taken, must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Article 56. Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 57. Measures taken by States or international organizations other than an injured State or organization

This Chapter does not prejudice the right of any State or international organization, entitled under draft article 49, paragraphs 1 to 3, to invoke

the responsibility of another international organization, to take lawful measures against that organization to ensure cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

PART FIVE

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE CONDUCT OF AN INTERNATIONAL ORGANIZATION

Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

Article 59. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

Article 60. Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

Article 61. Circumvention of international obligations of a State member of an international organization

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 62. Responsibility of a State member of an international organization for an internationally wrongful act of that organization

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:

(a) it has accepted responsibility for that act towards the injured party; or

(b) it has led the injured party to rely on its responsibility.

2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

Article 63. Effect of this Part

This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

PART SIX

GENERAL PROVISIONS

Article 64. Lex specialis

These draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Article 65. Questions of international responsibility not regulated by these draft articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these draft articles.

Article 66. Individual responsibility

These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Article 67. Charter of the United Nations

These draft articles are without prejudice to the Charter of the United Nations.

2. The Drafting Committee had held 11 meetings, from 29 April to 19 May 2011. It had concluded its work on the 67 draft articles and had decided to report to the plenary Commission with the recommendation that the draft articles should be adopted on second reading.

3. It was a historic moment for the International Law Commission. Its work on international responsibility, which had been among the original topics selected for consideration in 1949, was now drawing to a close, something that unquestionably constituted one of the Commission's most important contributions to the codification and progressive development of international law. Following the completion in 2001 of the articles on the responsibility of States for internationally wrongful acts,²⁴³ the Commission had turned its attention to the question of the responsibility of international organizations, which had kept it busy for the better part of the past decade.

4. The Commission had been particularly fortunate to have had at its disposal the services of extremely well-qualified and experienced Special Rapporteurs, who had put much of their energy and intellectual talent into conceptualizing and developing the international regime

²⁴³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

of responsibility for States and for international organizations. The current Special Rapporteur, Mr. Giorgio Gaja, had joined a select list of special rapporteurs who had made their mark on the contemporary understanding of international law. On behalf of the Drafting Committee, he expressed his deep appreciation to the Special Rapporteur for the efficient manner in which he had approached the second reading of the draft articles. His mastery of the subject had greatly facilitated the Drafting Committee's task. He also expressed his appreciation to the Committee's members for their constructive work and thanked the secretariat for its valuable assistance.

5. The draft articles on responsibility of international organizations were divided into six parts, Part One being entitled "Introduction".

6. Draft article 1 pertained to the scope of the draft articles. Paragraph 1 had been adopted as formulated on first reading,²⁴⁴ with the exception that the concluding phrase, "act that is wrongful under international law", had been amended to read "internationally wrongful act".

7. The Drafting Committee had amended paragraph 2 so as to more closely reflect the scope of the draft articles. It had sought a formula that took into account the fact that, in draft articles 60 and 61, the text covered the scenario of State responsibility for acts committed by an international organization that were not wrongful acts of that organization. Various formulations had been considered. The paragraph also had to cover the situation envisaged in draft article 62, where a State was responsible not for its own wrongful acts but for those of an international organization. The Committee had drawn inspiration from the title of Part Five in reformulating the concluding phrase of the paragraph as "for an internationally wrongful act in connection with the conduct of an international organization".

8. The Drafting Committee had also considered including a specific reference to Part Five, but had decided against it since, although the provisions relating to State responsibility were grouped in Part Five, it was not only that Part which applied to State responsibility: other parts, such as Part One and Part Six, were also relevant. The Committee had considered various formulations in order to capture the manner in which the draft articles dealt with the responsibility of States, including the use of terms such as "relates to", "refers to" and "concerns", but in the end it had decided to retain the more general reference, "apply to" State responsibility.

9. The Drafting Committee had also opted for the indefinite article "an" instead of "the" internationally wrongful act so as to align the formulation with the wording of paragraph 1. The title of draft article 1, "Scope of the present draft articles", remained unchanged.

10. Draft article 2 pertained to the use of terms. The version being proposed for consideration on second reading contained the definitions of four terms, as opposed to three in the text adopted on first reading.

11. Subparagraphs (a) and (b), defining "international organization" and "rules of the organization", respectively, retained the wording adopted on first reading, save for the insertion of the word "international" before the first reference to "organization" in subparagraph (b). That had been done for the sake of consistency in how the articles referred to international organizations. The same minor improvement had been made in a number of places throughout the text. For subparagraph (b), the Drafting Committee had decided not to adopt a proposal to emphasize those rules that were part of international law, since there were other rules of an organization that were not necessarily rules of international law but were nonetheless relevant—for example, in determining competence or the granting of consent. The Committee had also not considered it appropriate to include a hierarchy of rules, since such a hierarchy could vary according to the international organization concerned.

12. New subparagraph (c) and subparagraph (d) had raised the most difficult issues. Subparagraph (c) had been introduced in order to provide a definition of the phrase "organ of an international organization". That had been done on the basis of a proposal by the Special Rapporteur inspired by article 4, paragraph 2, of the articles on State responsibility.²⁴⁵ The word "means" had been chosen over "includes" so as to align the text with the definition of "agent" in subparagraph (d). The Drafting Committee had also considered a proposal to establish a more substantive definition of an organ than by reference to the rules of the organization. The definition would thus have been "person or entity through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions". The Drafting Committee had decided to retain the more general formulation proposed by the Special Rapporteur, since the concept of "organ" had different connotations for different international organizations. An individual or entity that might not be covered by the definition of "organ" by reference to the rules of an international organization could nonetheless be considered an "agent" if the terms of subparagraph (d) were satisfied.

13. Subparagraph (d) defined an "agent of an international organization". Two changes had been made to the text adopted on first reading. First, the words "of an international organization" had been added after "agent", so as to align the text with the formulation used in new subparagraph (c). The second change had involved bringing the provision closer to the broader definition contained in the advisory opinion of the ICJ on *Reparation for Injuries* by adding the phrase "who is charged by the organization with carrying out, or helping to carry out, one of its functions". The phrase "through whom the organization acts" had been moved to the end of the subparagraph and rendered as "thus through whom the organization acts". The word "thus" served to indicate that it was not a cumulative requirement, but rather a further specification of the requirement of carrying out, or helping to carry out, one of its functions, as the Court had put it in its advisory opinion. The reference to "person or entity" had been included in recognition of the practice whereby international organizations delegated their functions to other persons or entities, such as other organizations or companies.

²⁴⁴ *Yearbook ... 2009*, vol. II (Part Two), p. 25.

²⁴⁵ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40.

14. The Drafting Committee had considered the related issue of whether to avoid an overlap between the categories of “organ” and “agent” through the inclusion of the phrase “other than an organ”. While there might be situations where, under the rules of the organization, persons or entities were designated as both organ and agent, it made sense to draw a distinction between the two. Draft articles 6 to 8, for example, included the phrase “organ or agent”. The combined effect of subparagraphs (c) and (d) was that for the purposes of the draft articles, whatever the rules of the organization considered to be an organ was an “organ”; everyone or everything else that was charged by the organization with carrying out, or helping to carry out, one of its functions, was an “agent”.

15. The title of draft article 2, “Use of terms”, remained unchanged.

16. Part Two was entitled “The internationally wrongful act of an international organization” and consisted of five chapters.

17. Chapter I was entitled “General principles” and consisted of three draft articles, including the only new draft article introduced during the second reading.

18. Apart from changing the second reference to “the international organization”, in both draft articles 3 and 4, to “that organization”, the texts and titles of those two draft articles had been adopted without substantive change. A suggestion had been made by one State to include the requirement of causation of damage in draft article 4. The Committee had decided against that, since it was not clear how such an element could be required for acts committed by international organizations but not for those committed by States: the articles on State responsibility for internationally wrongful acts adopted in 2001 made no such allusion.

19. Draft article 5 was new. It had arisen out of the discussion on *lex specialis* in the context of draft article 64, specifically whether the provision could be interpreted as implying that if an act was lawful under the rules of an international organization, then it was necessarily lawful under international law. As a matter of policy, the Drafting Committee had felt that the draft articles should not allow for such an interpretation.

20. Accordingly, new draft article 5 dealt with the characterization of an act of an international organization as internationally wrongful. It used, with the necessary amendment, the formulation found in the first sentence of article 3 of the articles on State responsibility,²⁴⁶ and established the principle that it was international law that decided whether an act of an international organization was wrongful or not.

21. The Drafting Committee had not, however, included the second sentence of article 3 on State responsibility, since in the present context it did not seem possible to assert that the characterization could not be affected by the rules of the organization. The rules of the organization could include rules of international law that might be

relevant to the characterization of an act as being internationally wrongful. Although the Committee had attempted to capture that nuance, including by a proposed reference to the “internal law” of the organization, it had been unable to find a satisfactory reformulation. Accordingly, it had settled for the current version, on the understanding that it was best to leave the question of interaction with the rules of the organization for further explanation in the commentary.

22. The Drafting Committee had agreed that the provision should appear early in the draft articles, in a similar location to the equivalent text in the articles on State responsibility. It had initially envisaged it as a second paragraph in draft article 4 but had decided to make it a separate provision, since it dealt with a different set of issues than those covered by draft article 4.

23. Draft article 5 was entitled “Characterization of an act of an international organization as internationally wrongful”, by analogy with the title of article 3 of the articles on State responsibility.

24. Chapter II comprised four draft articles. The title adopted on first reading, “Attribution of conduct to an international organization”, had been retained.

25. Draft article 6 covered the conduct of organs or agents of an international organization. The provision had been retained largely in the form adopted on first reading, with some drafting amendments. In paragraph 1, the word “as”, before “an act”, had been deleted to bring the text more into line with the articles on State responsibility.

26. It had been suggested that the text specify that the conduct in question should be undertaken under the instruction and control of the organization or in an official capacity. However, the Drafting Committee had decided not to include that element so as not to seem to be establishing an additional requirement. The issue had been resolved through an amendment to draft article 8.

27. Paragraph 2 had been refined through the amendment of the opening phrase, which now read “The rules of the organization apply”. The purpose was to make it clearer that the rules of the organization were not the exclusive basis for determining the functions of the organ or agent, a point made in the commentary but not made clear in the text adopted on first reading. On the one hand, the fact that the attribution of functions to an agent went beyond its rules should not enable an international organization to deny that the conduct of the agent was attributed to it. On the other hand, the rules of the organization would normally apply in the determination of the functions of its organs and its agents. The shift from “shall apply to” to “apply in” was intended to convey that nuance.

28. The title of draft article 6 had been changed to read “Conduct of organs or agents of an international organization”, which was clearer and corresponded to the articles on State responsibility.

29. The Drafting Committee had noted that many of the comments made by States and international organizations on draft article 7 concerned the commentaries. It had considered a proposal by one State to specify that the organs

²⁴⁶ *Ibid.*, p. 30.

placed at the disposal of the international organization were used to carry out its functions. The Committee had not thought that necessary, and, accordingly, the text adopted on first reading had been retained.

30. The title of draft article 7 had been amended to read “Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization”, in order to align it more closely with the text itself.

31. In draft article 8, the indefinite article “an”, before the phrase “agent of an international organization”, had been deleted in accordance with the wording used throughout the draft articles. The Drafting Committee had further decided to replace the reference to “in that capacity” with “in an official capacity and within the overall functions of that organization”. The word “and” had been included in that phrase to make it clear that there were two separate issues. The new phrase was intended to align the text with the practice of international organizations. Although the Drafting Committee had been concerned that this might unnecessarily limit the ability of victims to seek recourse against international organizations, it had been of the view that the question of the wrongful conduct of an international organization for failure to control its organs or agents came under the scope of draft article 6.

32. The phrase “even though” had been changed to “even if”, the formulation used in the corresponding article of the articles on State responsibility. The title of draft article 8, “Excess of authority or contravention of instructions”, remained unchanged.

33. Draft article 9 concerned conduct acknowledged and adopted by an international organization as its own. The provision had elicited no changes other than the minor improvements of replacing the phrase “the preceding draft articles” with “draft articles 6 to 8” and deleting the second reference to “international”, before “organization”.

34. The title of draft article 9, “Conduct acknowledged and adopted by an international organization as its own”, remained unchanged.

35. Chapter III comprised four draft articles. The title adopted on first reading, “Breach of an international obligation”, had been retained.

36. Draft article 10 dealt with the existence of a breach of an international obligation. For paragraph 1, the Drafting Committee had taken note of a suggestion made by an international organization that it should be made clearer that breaches of the rules of an organization were not as such breaches of international law. The Committee had considered conveying that nuance by replacing the words “international obligation” with “obligation under international law”, but had decided against doing so, since it would have meant introducing the same change in other draft articles, which could have led to unnecessary *a contrario* interpretations arising from a difference between the draft articles on responsibility of international organizations and the draft articles on State responsibility. The commentary would clarify that what was meant by “international obligation” was obligations arising under international law.

37. The Drafting Committee had then focused on amending the concluding phrase, which in the version adopted on first reading had read “regardless of its origin and character”. The Committee had considered the use of the word “its” to be confusing and had decided to reformulate the phrase to read “regardless of the origin or character of the obligation concerned”. The words “origin and character” had been rendered as “origin or character”, in line with the formulation used in the draft articles on State responsibility.

38. In paragraph 2, the Drafting Committee had changed the phrase “breach of an international obligation” to “breach of any international obligation” so as to indicate that it was by no means all obligations that might arise under the rules of the organization that were international obligations. The Committee had discussed alternative formulations for the words “that may arise”, including “on the basis of”, “under” and “arising out of”. However, it had decided to retain the formulation adopted on first reading as an indication that, while the rules of the organization might not *per se* be rules of international law, they might nonetheless serve as the basis of obligations which arose under international law.

39. The Drafting Committee had also introduced the phrase “for an international organization towards its members”, after “international obligation that may arise”, as a reminder that the rules of the organization constrained the organization primarily in its relations with its members. Obligations in relation to non-members arising out of the rules of the organization were not likely to be obligations under international law. The phrase served to confirm what was also stated in draft article 32 and implied in draft article 5, namely that the rules of the organization could not be relied upon as a way of justifying the non-application or modification of rules of international law that would otherwise be applicable to the organization.

40. The title of draft article 10, “Existence of a breach of an international obligation”, remained unchanged.

41. Some minor improvements had been made to the texts and titles of draft articles 11, 12 and 13.

42. Chapter IV of Part Two was entitled “Responsibility of an international organization in connection with the act of a State or another international organization” and consisted of six draft articles. The Drafting Committee had decided to make no changes to the texts and titles of draft articles 14 to 16, 18 and 19, other than a minor improvement to subparagraph (a) of draft articles 14 and 15, replacing the words “that organization” with “the former organization”. Draft article 17 was the only draft article in the chapter that had been amended.

43. Under draft article 14, the Drafting Committee had considered the question of whether the element of intention should be added to that of “knowledge of the circumstances of the ... act”, since the commentary to the corresponding article on State responsibility made reference to that element. In the commentary to the text adopted on first reading, the Special Rapporteur had declined to reproduce the reference to the criterion of intention,²⁴⁷ out of concern that it would give rise to a discrepancy with the draft article,

²⁴⁷ *Yearbook ... 2009*, vol. II (Part Two), p. 42 (draft article 13).

which did not include such an element. While there had been support for the inclusion of the criterion of intention in the draft article, the Drafting Committee had decided against doing so, since it would imply a shift of emphasis regarding the concept of responsibility that could have implications for the text on State responsibility.

44. Draft article 17 had been the subject of some discussion in the Drafting Committee, and the provision had been significantly redrafted. The Special Rapporteur had proposed making the draft article subject to what were now draft articles 14 to 16 by including a phrase to that effect at the beginning of former paragraph 1. That would remove any overlap between those provisions and draft article 17 and would make it clear that draft article 17 was an additional basis for establishing responsibility. The Drafting Committee had decided that such a clarification was not strictly necessary, and that this could be explained in the commentary.

45. The central issue for the Drafting Committee, as in the plenary debate, had been whether the provision should be extended to cover circumvention through recommendations. The Special Rapporteur had proposed the deletion of paragraph 2 so as to limit the scope of the draft article to responsibility for binding decisions. Another proposal retained the text adopted on first reading,²⁴⁸ including paragraph 2, but deleted references to the organization's incurring responsibility for the recommendations it adopted, leaving only the concept of responsibility for authorizations. A further proposal included the element of a recommendation that caused members to commit an act. The Committee had ultimately preferred the proposal to limit the responsibility for non-binding acts to authorizations granted by an organization. The view had been that different organizations ascribed different meanings and legal consequences to the notion of "recommendations". What mattered was whether, by making a recommendation, the organization was, in effect, authorizing its members to act in a particular manner. The concept of "authorization" included within it those types of recommendations that constrained members of the organization to act in a certain manner. That would be explained in the commentary.

46. Working on that understanding, the Drafting Committee had adopted a provision similar to the one adopted on first reading, the key difference being that the concept of "circumvention" had been given greater prominence by being placed at the beginning of both paragraphs 1 and 2.

47. Paragraph 1 maintained the thrust of the text adopted on first reading. Paragraph 2 extended the scenarios under which an international organization incurred responsibility to its circumvention of one of its international obligations by authorizing its members to commit an act that would be wrongful for the organization if it had committed it. The earlier reference to the actual performance of the act had been strengthened by linking it to authorization, with the new words "and the act in question is committed because of that authorization". The underlying idea was abuse by the international organization of its separate legal personality.

²⁴⁸ *Ibid.*, p. 43 (draft article 16).

48. Paragraph 3 had been retained basically in the form adopted on first reading. The only changes had been to refer to members in the plural and to delete the reference to recommendations. The Drafting Committee had also decided to replace the word "directed" with "addressed", used in the title, so that the final phrase now read "to which the decision or authorization is addressed".

49. The title of draft article 17 had been amended to read "Circumvention of international obligations through decisions and authorizations addressed to members", so as to reflect more closely the content of the provision. The new formulation had the additional benefit of being similar to the titles for draft articles 14, 15 and 16.

50. Chapter V was the final chapter of Part Two. Its title, "Circumstances precluding wrongfulness", had remained unchanged. Of the eight draft articles in the chapter, the Drafting Committee had made changes to only two. It had adopted the texts and titles of draft articles 20, 23, 24, 26 and 27 exactly as on first reading. It had discussed draft article 21 without making changes, and amendments had been introduced to draft articles 22 and 25.

51. Draft article 21 on self-defence had been discussed at some length with a view to providing the Special Rapporteur with guidance for the preparation of the commentary. After considering some tentative proposals for refining the text by replacing "constitutes" with "may be regarded as", "may amount to" or "is", the Committee had decided to retain the provision as proposed on first reading, while recognizing that the situation it provided for was, to some extent, theoretical, and not analogous to that raised in the context of the responsibility of States. That had been shown through the inclusion of the new words "and to the extent that", which did not appear in the corresponding provision in the articles on State responsibility.

52. The title of draft article 21, "Self-defence", remained unchanged.

53. Draft article 22 dealt with the characterization of resort to countermeasures as a circumstance precluding wrongfulness. It had been the subject of much discussion in both the Drafting Committee and the plenary Commission. The main problem was with former paragraph 2 and the question of when an international organization might take countermeasures against one of its members.²⁴⁹ The Drafting Committee had accepted the working hypothesis suggested during the plenary debate that it was possible, though difficult in practice, to distinguish between countermeasures taken against a member for breaches of obligations unrelated to membership and those taken against a member for obligations binding on it because of its membership. The Committee had thus focused on possible scenarios for the taking of countermeasures by an international organization against its members. One of the options considered had been to convert paragraph 2 into a "without prejudice" clause, but that idea had not garnered sufficient support. Instead, the Committee had decided to structure the provision in line with its working hypothesis.

²⁴⁹ *Ibid.*, p. 47 (draft article 21).

54. Paragraph 1 established the general scenario of countermeasures taken against non-member States. The Drafting Committee had retained the text adopted on first reading. Paragraph 1 applied, subject to the exceptions set out in paragraph 2 and new paragraph 3.

55. Paragraph 2 covered the situation where countermeasures were taken against a member State or international organization for the breach of an obligation unrelated to the State's or organization's membership. As a policy matter, the Drafting Committee had been of the view that even if a dispute concerned an obligation unrelated to membership, there were institutional reasons for limiting the possibility of taking countermeasures, so as to preserve the relationship between the organization and its member. Paragraph 2 therefore presented several criteria retained from the text adopted on first reading, with some drafting changes.

56. Paragraph 3 dealt with the final scenario: when countermeasures were taken against a member in response to a breach of an obligation arising as a consequence of membership. Given the legal complexity that that implied, the Drafting Committee had felt that countermeasures should be permitted in such a situation solely where they were expressly provided for by the rules of the organization. Another restriction consisted in making it clear that paragraph 3 referred to an obligation arising for the wrongdoing member State or international organization under the rules of the organization. In such cases, the issue of whether countermeasures were possible would be decided by the rules of the organization. If the obligation on the member arose from other rules of international law, then paragraph 2 would apply. The relationship between the two paragraphs was indicated by the qualifying phrase at the beginning of paragraph 2, "Subject to paragraph 3".

57. The title of draft article 22 remained "Countermeasures".

58. Draft article 25 dealt with the invocation of necessity as a circumstance precluding wrongfulness. The Drafting Committee had retained the formulation adopted on first reading, with refinements in paragraph 1 (a) and (b). It had amended the scope of paragraph 1 (a) so as to add to the list of essential interests being safeguarded by the international organization the "interest of its member States", since the first-reading version might have excluded many international organizations whose functions did not involve protecting the interest of the international community as a whole. A comma had been inserted after "international community as a whole" and the final clause of paragraph 1 (a) had been changed from "the function to protect that interest" to "the function to protect the interest in question", to make it clearer.

59. In paragraph 1 (b), the word "international" had been inserted before "obligation". Concern had been expressed that the new reference to the interest of the members of the international organization in paragraph 1 (a) disturbed the balance between that text and paragraph 1 (b). The Drafting Committee had felt that the reference to an "international obligation" helped to clarify the fact that that part of the paragraph referred to the interest of the State or States, including non-member States, against which the circumstance precluding wrongfulness was being invoked.

60. The Drafting Committee had also considered, but rejected, a proposal to refer to the interests of the international organization itself in paragraph 1 (b). Its reasoning had been that such interests were not provided for in paragraph 1 (a) and that international organizations did not have "essential interests" on which they could rely to invoke necessity as a circumstance precluding wrongfulness or to prevent another entity from invoking necessity against them. That approach, agreed upon during the first reading, had been retained, since changing it would have meant broadening the concept of "essential interest".

61. The title of draft article 25 remained "Necessity".

62. The title of Part Three was, as before, "Content of the international responsibility of an international organization".

63. Chapter I was still entitled "General principles". The texts and titles of draft articles 28 to 30 had been adopted without any change to the formulation adopted on first reading.

64. For draft article 31, the Drafting Committee had considered the possibility of replacing the phrase "caused by the internationally wrongful act" with "caused by its internationally wrongful act", but had decided against it for fear of inadvertently changing the meaning. The Committee had further agreed to reflect in the commentary the point that international organizations could negotiate bilateral agreements to regulate the form and extent of reparation as a means of mitigating the potential impact of the obligation to make full reparation.

65. The title of draft article 31 remained "Reparation".

66. Draft article 32 had its roots in the corresponding provision in the articles on State responsibility for internationally wrongful acts. Paragraph 1 corresponded to article 32 of that text²⁵⁰ and established the general proposition that the responsible international organization could not rely on its rules as justification for failure to comply with its obligations under Part Three. The rules of the organization were not applicable to non-member States or organizations unless those third States or organizations had accepted them as governing their relations with the international organization or they applied as a matter of customary international law.

67. During the first reading, the Commission had accepted the view that, in the relations between the international organization and its members, the organization's rules could in fact derogate from the provisions of paragraph 1.²⁵¹ That flowed from draft article 10, which recognized that some rules of the organization might give rise to obligations under international law. Accordingly, paragraph 2 simply addressed the relations between the international organization and its members and recognized that the rules of the organization might play a role in the operation of Part Three.

²⁵⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 28 and 94.

²⁵¹ *Yearbook ... 2009*, vol. II (Part Two), p. 53 (paragraph (4) of the commentary to article 31).

68. During its consideration of draft article 32, the Drafting Committee had heard a proposal to include a general statement of principle as to the applicability of the rules of the organization, corresponding to that in article 3 of the articles on State responsibility. That statement of principle had now been inserted as new draft article 5, which replicated the first part of article 3 on State responsibility. The Drafting Committee had also felt no need to mention situations when the rules of the organization characterized an act as wrongful or not, out of recognition that international law and the rules of the international organization were to some extent intertwined in the relations between members and the organization and that the rules of the organization could apply as part of international law.

69. No change had been made to draft article 32, paragraph 1. The Drafting Committee had considered a proposal to insert the words “as such” after “may not rely on its rules”, as an indication of the nuanced role that the rules of the organization played, but had decided against doing so, since that could suggest that there might be situations where the rules of the organization could apply to non-members, which was not the case.

70. As to paragraph 2, the Drafting Committee had decided to replace the concluding phrase, “of the responsibility of the organization towards its member States and organizations”, with “to the relations between the organization and its member States and organizations”. The aim was to make the provision clearer and to convey the idea that paragraph 2 was only carving out an exception to paragraph 1 for the purposes of Part Three of the draft articles.

71. The earlier title of draft article 32 had been “Irrelevance of the rules of the organization”. After considering various options for amending it, the Committee had settled on inverting it, since paragraph 2 was less about the “irrelevance” of the rules and more about their “relevance” in relation to Part Three. The title of draft article 32 had thus become “Relevance of the rules of the organization”. Far from reversing the position of the State responsibility articles, that change simply reflected the operation, in the context of the responsibility of international organizations, of the exception in paragraph 2 in relation to the general proposition in paragraph 1.

72. Draft article 33 dealt with the scope of the international obligations set out in Part Three. The only change introduced by the Drafting Committee had been in paragraph 1, regarding the manner in which the many possible groupings of States and international organizations was described. One suggestion had been to change the phrase “to one or more other organizations, to one or more States, or to the international community as a whole” to “to a State or another international organization, to several States or international organizations, or to the international community as a whole”, which was closer to the formulation in draft article 47 of the current text and to that used in the articles on State responsibility. The Drafting Committee had felt that the proposal added an unnecessary element of imprecision and had preferred to work on the basis of the formulation adopted on first reading. Other suggestions had been to add “or combination thereof” or “singularly or jointly”, to suggest that there were

many possible combinations of groupings, but neither proposal had garnered sufficient support. The Committee had retained the first-reading text, merely reversing the references to States and to international organizations, since it was the practice to refer to States first.

73. The title of draft article 33 remained “Scope of international obligations set out in this Part”.

74. The title of chapter II was, as before, “Reparation for injury”. The Drafting Committee had adopted the texts and titles of draft articles 34 to 39 in the form adopted on first reading, without change.

75. Draft article 40 dealt with fulfilment of the obligation to make reparation. The Special Rapporteur had presented a revised text in his eighth report, combining the text adopted on first reading, slightly modified and presented as a new paragraph 1, and another text, proposed during the debate on the first-reading text in 2009 but not adopted by the Drafting Committee.²⁵² That provision had been reproduced as a new paragraph 2 in the Special Rapporteur’s proposal in his eighth report.

76. The Drafting Committee had noted that such a course of action had been supported by the plenary Commission. The Committee had accepted a suggestion to reverse the order of the paragraphs in order to present the obligation placed on the international organization first and then deal with the obligations of members of the organization, now addressed in paragraph 2.

77. The title of draft article 40 was “Ensuring the fulfilment of the obligation to make reparation”. It was an amended version of the title adopted on first reading. The earlier reference to “effective performance” had been replaced by “fulfilment”, so as to align the title with the text of the draft article, and the phrase “obligation of reparation” had been refined to read “obligation to make reparation”.

78. The title of chapter III remained “Serious breaches of obligations under peremptory norms of general international law”. The texts and titles of draft articles 41 and 42 had been adopted by the Drafting Committee without change.

79. The titles of Part Four and chapter I remained “The implementation of the international responsibility of an international organization” and “Invocation of the responsibility of an international obligation”, respectively. The texts and titles of draft articles 43, 44, 46 and 47 had been adopted in their first-reading form, without change. Modifications had been introduced in draft articles 45 and 48 to 50.

80. Draft article 45 dealt with the admissibility of claims. The text adopted was substantially the same as that agreed on first reading, with the following changes. The definite article “the” had been inserted before “nationality of claims” at the end of paragraph 1. The phrase “When a rule requiring the” had been replaced by “When the rule of” in paragraph 2. The Drafting Committee had considered

²⁵² *Ibid.*, p. 57 (paragraph (4) of the commentary to article 39).

refining the phrase “provided by that organization”, towards the end of paragraph 2, to read “provided by the rules of that organization”, but had felt that that would be too restrictive. It was possible for an international organization simply not to assert its immunities, but it was not clear that that would necessarily be undertaken in accordance with the rules of the organization. Concern had also been expressed that the proposed phrase could be read as being discretionary, which was not what was intended. The Committee had ultimately decided to delete the phrase altogether, thereby aligning the text with the articles on State responsibility.

81. If, under draft article 49, paragraph 5, responsibility was invoked by a State or international organization other than an injured State or organization, then only draft article 45, paragraph 2, was applicable. In other words, there was no requirement with respect to nationality of claims.

82. The title of draft article 45 remained “Admissibility of claims”.

83. The Drafting Committee had considered proposals for refining draft article 47 by finding a better formula for expressing the possible combinations of States and international organizations that might be injured by the same internationally wrongful act. The proposals included using the word “plurality”, as in the title. The Committee had decided not to make any changes to the text or title, noting that the potential constellations of arrangements were covered by the phrase “each injured State or international organization may separately”.

84. Draft article 48 dealt with situations where there was a plurality of responsible States or international organizations. In paragraph 1, the Drafting Committee had once again considered the manner in which the group of entities was described. It had recognized that the formula used earlier in the text was not appropriate, since the draft article dealt with the situation where one international organization was responsible together with one or more States or international organizations. Accordingly, it had retained the formulation adopted on first reading, with the minor refinement of inserting the word “international” between the words “or more States or other” and “organizations” and deleting the word “international” before “organization may be invoked”.

85. As to paragraph 2, the Drafting Committee had noted that the Special Rapporteur intended to clarify in the commentary the question of the sequence for the invocation of subsidiary responsibility in relation to that of primary responsibility. The commentary would make it clear that a temporal sequence was not a rigid requirement. The Committee had considered a proposal to say that in the text itself by replacing the words “has not led to reparation” with “does not lead to reparation” or “has not resulted in reparation”, but had decided to retain the formulation adopted on first reading.

86. The first-reading text had included a reference to the current draft article 62. The Drafting Committee had considered ways of formulating it differently, including by saying “as in the case provided for in”, but had eventually decided to delete the reference altogether, since it implied

that subsidiary responsibility was provided for in other draft articles.

87. The title of draft article 48 had been slightly amended to read “Responsibility of an international organization and one or more States or international organizations” so as to more clearly align it with the text of paragraph 1.

88. Draft article 49 dealt with invocation of responsibility by a State or an international organization other than an injured State or international organization. The Drafting Committee had focused its attention on paragraph 3. It had added the words “as a whole” after “international community”, thus using the standard phrase. The Drafting Committee had also considered a proposal to append at the end of paragraph 3 the phrase “and such invocation is within the powers and functions of the international organization invoking responsibility”. However, opposition had been expressed to the introduction of the concept of “powers”, and the Committee had settled for replacing “is included among the functions” with “is within the functions”, which it had felt was clearer. The current formulation allowed an international organization that had the task of promoting a certain interest to invoke responsibility for breaches of obligations in the area covered by that interest.

89. Draft article 49, paragraph 5, limited the requirements for the invocation of responsibility by interested non-injured States or international organizations by excluding the applicability of the nationality of claims rule. It had been suggested in the plenary Commission that the issue be clarified, but the Drafting Committee had considered the formulation adopted on first reading to be satisfactory.

90. The title of draft article 49 remained “Invocation of responsibility by a State or an international organization other than an injured State or international organization”.

91. Draft article 50 was a saving clause concerning the scope of chapter I. In the first-reading text, the equivalent article had described the scope of the entire Part Three. The Drafting Committee had focused on whether the saving clause applied also to chapter II on countermeasures. It had felt that it did not. Draft article 50 dealt with the entitlement to invoke the international responsibility of an international organization. Making it applicable to the entire Part implied recognition of the right of persons or entities other than a State or international organization to take countermeasures, which was not intended. The commentary would make that clear. Accordingly, the Committee had decided to limit the provision by replacing “Part” with “Chapter”.

92. The title of draft article 50 had been modified to read “Scope of this Chapter”.

93. The title of chapter II remained “Countermeasures”. The texts and titles of draft articles 51, 54, 55 and 56 had been adopted without change, except for the addition of the words “of countermeasures” in the title of draft article 54, so that it now read “Proportionality of countermeasures”. Modifications had been introduced in draft articles 52, 53 and 57.

94. Draft article 52 dealt with conditions for taking countermeasures by members of an international organization. The Drafting Committee had aligned the article with draft article 22 by introducing the distinction drawn there between obligations which arose generally for members of an international organization independently of the rules of the organization and those which were based on the rules of the organization. That had required the inclusion of an additional paragraph, with the former scenario captured in paragraph 1, and the latter in new paragraph 2. The relationship between the two was established by making paragraph 1 subject to new paragraph 2.

95. The Drafting Committee had moved a phrase in the former *chapeau* of the draft article, “under the conditions set out in the present chapter”, into a new paragraph 1 (a) and redrafted it as “the conditions referred to in draft article 51 are met” so as to align it with draft article 22.

96. Paragraph 1 (b) retained the text of former subparagraph (a).

97. Paragraph 1 (c) was based on the first-reading text of former subparagraph (b), but had been rewritten in order to follow the wording of draft article 22, paragraph 2 (c).

98. Paragraph 2 was new. The wording was based on that of draft article 22, paragraph 3, with some adjustments.

99. The Drafting Committee had considered different options for the title of draft article 52, including “Countermeasures by members of an international organization”. It had settled on “Conditions for taking countermeasures by members of an international organization”.

Mr. Perera (Rapporteur) took the Chair.

100. The CHAIRPERSON, reading out the report of the Chairperson of the Drafting Committee in the absence of the latter, said that draft article 53 dealt with the types of obligations that were not affected by countermeasures. The text was substantially the same as that adopted on first reading, with the following modifications.

101. For paragraph 1 (b), the Drafting Committee had taken into account comments made by Governments and in the plenary Commission to the effect that the reference to “fundamental human rights” was not in line with contemporary practice. After some discussion, the Committee had decided to delete the word “fundamental” on the understanding that the commentary would explain that the intention was not to widen the scope of draft article 53, thereby limiting the possibility of taking countermeasures. The change had been introduced simply to reflect contemporary usage when referring to human rights, including in the Commission’s own work.

102. The Drafting Committee had decided to simplify paragraph 2 (a) by replacing the phrase “the injured State or international organization” with the word “it”. The Committee had considered a suggestion from an international organization to redraft paragraph 2 (b) so as to reflect the privileges and immunities of international organizations. However, it had declined to do so because

it had not felt that it was the paragraph’s function to list the types of privileges and immunities that international organizations enjoyed. The proposed change could also not be accepted because not all international organizations enjoyed privileges and immunities to the same degree. The Committee had considered changing the word “any” to “the”, but had decided against it, since it suggested that there was a general rule that all organs and agents enjoyed immunities and privileges, which was not the case. Some organizations had no immunities at all. The commentary would explain that the word “any” meant wherever such privileges and immunities existed.

103. The only change made to paragraph 2 (b) had been to replace the word “agents” with the phrase “organs or agents”, as a consequence of the introduction of the new definition of “organs of an international organization” in draft article 2.

104. The title of draft article 53 remained “Obligations not affected by countermeasures”.

105. Draft article 57 was a “without prejudice” clause dealing with measures taken by States or international organizations other than an injured State or organization. It had its origin in the corresponding provision of the articles on State responsibility. The Drafting Committee had focused on aligning the text more closely with that provision and on improving the wording without making changes in substance.

106. The phrase in the first-reading text, “is without prejudice to the right”, had been refined to read “does not prejudice the right”. The words “responsibility of an international organization” now appeared as “responsibility of another international organization”. The phrase “measures against the latter international organization” had been amended to read “measures against that organization”. Finally, the words “injured party” were now “injured State or organization”.

107. The title of draft article 57 had been amended to read “Measures taken by States or international organizations other than an injured State or organization”, to more closely track the content of the draft article.

108. The title of Part Five had been changed to read “Responsibility of a State in connection with the conduct of an international organization”. The text and title of draft article 60 had been adopted without change. Modifications had been introduced in draft articles 58, 59, 61, 62 and 63.

109. Draft article 58 dealt with the responsibility of a State when it aided or assisted an international organization in the commission of an internationally wrongful act. Other than a drafting improvement to paragraph 1 (a)—modifying “that State” to “the State”—the Drafting Committee had retained the text adopted on first reading, which had become new paragraph 1.

110. The focus of the Drafting Committee’s discussion had been what was now new paragraph 2. The Committee had taken note of the fact that several Governments had called for a clearer distinction to be drawn between participation in the decision-making process within an international

organization and aiding or assisting the organization in the commission of an internationally wrongful act. While the issue had been mentioned in the eighth report as the subject of a possible clarification in the commentary, the Committee had nonetheless decided to include a reference to that point in the text of the draft article itself.

111. As had been done in respect of countermeasures, the Drafting Committee had drawn a basic conceptual distinction between member States acting as members and member States acting in a capacity other than as members. It had felt that the possibility of responsibility for aid or assistance in the commission of an internationally wrongful act should be restricted to the latter scenario.

112. One possibility considered had been to include a general saving clause, possibly in draft article 62 or draft article 63, stating that nothing in Part Five implied that the responsibility of a State arose simply because of a State's membership in an organization. However, that proposal had not found favour, since it was unclear what its effect might be on draft articles 61 and 62. As a matter of presentation, the Committee had preferred to deal with the matter early in Part Five, giving an accurate representation of the scope of draft articles 58 and 59 by including a second paragraph in both.

113. The new paragraph 2 sought to make it clear that the responsibility of a member State for aid or assistance to an international organization in the commission of an internationally wrongful act did not arise in situations where the State was acting as a member in accordance with the rules of the organization. The commentary would explain that this did not affect the State's responsibility for its own actions. In other words, the provision did not mean that a State member of an organization did not incur responsibility for the breach of its own international obligations arising from its participation in the activities of the organization. For example, a State voting within an organization in favour of the commission of an act which amounted to genocide continued to be held responsible under international law on its own account. When such a vote was taken in accordance with the rules of the organization, that State would not in addition be considered responsible for aiding or assisting the organization in the commission of the act in question.

114. That concern about preserving the obligations of the member State under international law was captured by the formula "[a]n act by a State member ... does not as such engage the international responsibility of that State", which suggested that it could do so in another capacity.

115. The title of draft article 58 remained "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization".

116. Draft article 59 concerned responsibility for direction and control exercised by a State over the commission of an internationally wrongful act. As with draft article 58, the Drafting Committee had retained the provision adopted on first reading as paragraph 1, with the technical refinement in paragraph 1 (a) of replacing "that State" with "the State". The Committee had decided to repeat draft article 58, paragraph 2, as a new paragraph 2 in draft article 59.

117. The title of draft article 59 remained "Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization".

118. The Drafting Committee had decided not to include in draft article 60 a second paragraph like the ones it had added to draft articles 58 and 59. It had felt that, as a matter of policy, to suggest that coercion could be undertaken in accordance with the rules of an international organization was unacceptable. The provision therefore made no distinction between acts of coercion undertaken as a member and those undertaken by member States acting in a different capacity.

119. The text and title of draft article 60 had been adopted in the same form as on first reading, with some drafting improvements in subparagraph (a), replacing "that international organization" with "the coerced international organization", and in subparagraph (b), replacing "that State" with "the coercing State".

120. Draft article 61 concerned the responsibility of a member State for circumvention of one of its international obligations. The Drafting Committee had adopted a reformulated version of paragraph 1.

121. The Special Rapporteur had proposed the inclusion at the beginning of the paragraph of a qualifying phrase subjecting draft article 61 to what were now draft articles 58 to 60, so as to limit any overlap between the provisions, but the proposal had subsequently been withdrawn, as it had not garnered enough support in the plenary Commission. The Drafting Committee had then proceeded to reformulate paragraph 1. It had decided to place the phrase "by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations" earlier in the text. Further changes included resorting to the word "circumvents" to replace "seeking to avoid complying with", so as to align the provision with the wording adopted in draft article 17, and replacing the reference to "prompting" with "causing", which was considered clearer.

122. The Drafting Committee had considered the question of intention and a proposal to include the words "seeks to" before "circumvent" so as to highlight the fact that intention was required. However, the Committee had decided not to adopt that language, since it could be interpreted as allowing for inchoate responsibility for merely seeking to circumvent, without actually succeeding. The Committee had considered proposals for making the text clearer by including the terms "intentionally", "deliberately", "purposefully" or "is able to" before "circumvents", but had decided against doing so, to avoid suggesting a shift in the way responsibility was envisaged within the draft articles. The requirement of intention was deemed to be implicit in the words "circumvents" and "caused". Not including an additional qualifier had the further benefit of producing a text that emphasized the commission of the act of circumvention by taking advantage of the fact that the organization had competence. That would be explained in the commentary.

123. No change had been made to paragraph 2.

124. The Drafting Committee had considered a proposal to include another paragraph along the lines of the new paragraph 2 in draft articles 58 and 59, but had decided against doing so, as it would limit the practical impact of draft article 61.

125. The title of draft article 61, having been amended several times, now read “Circumvention of international obligations of a State member of an international organization”, wording chosen to align the title more closely with the content of the draft article.

126. Draft article 62 concerned the responsibility of a State member of an international organization for an internationally wrongful act of the organization. The Drafting Committee had amended the wording adopted on first reading by way of taking into account some of the comments received.

127. In the *chapeau* of paragraph 1, and in line with what it had done in previous draft articles, the Drafting Committee had decided to delete the qualifying phrase “without prejudice to articles 58 to 61”. While that would leave a measure of overlap with those draft articles, it was thought to be generally tolerable.

128. In paragraph 1 (a), the Drafting Committee had taken into account a recommendation that the text make clear the need for acceptance *vis-à-vis* the State or international organization invoking responsibility, since acceptance could be an internal matter for the organization. The Committee had decided to add the phrase “towards the injured party” at the end of paragraph 1 (a) to clarify the point.

129. The Drafting Committee had considered several proposals to clarify paragraph 1 (b). First, it had considered the possibility of emphasizing the element of conduct by saying “it has by its conduct led”, but it had decided to cover the point in the commentary. Another proposal had been to replace the word “led” by “induced” or “caused”, but that, too, had not been taken up.

130. With regard to paragraph 2, in line with suggestions about emphasizing that the responsibility that was contemplated therein, namely subsidiary responsibility, was exceptional in nature, it had been decided to change the opening phrase, “The international responsibility”, to “Any international responsibility”. The commentary would also cover that point. The Drafting Committee had further refined paragraph 2 by replacing the phrase “which is entailed in accordance with” with “under”, in the English text, so as to align it with the French. The Committee understood paragraph 2 as implying that the responsibility of a member State arose in a residual manner, being subsidiary to that of the international organization itself. The invocation of such responsibility took place in accordance with draft article 48, paragraph 2. The fact that the responsibility of the international organization remained unaffected was clarified in draft article 63.

131. The title of draft article 62 had been slightly amended to read “Responsibility of a State member of an international organization for an internationally wrongful act of that organization”.

132. Draft article 63 was the final draft article in Part Five and dealt with the effect of that Part. The Drafting Committee had made three drafting improvements to the text adopted on first reading: introducing the definite article “the” before “international responsibility”; inserting “State or” before “other international organization” at the end, so as to align the provision with draft article 19; and deleting the phrase “under other provisions of these draft articles”. The third amendment was a consequence of the second and was also intended to avoid the implication that State responsibility was dealt with by provisions other than those in Part Five.

133. The title of draft article 63 remained “Effect of this Part”.

134. The final part of the draft articles, namely Part Six, continued to be entitled “General provisions”. The Drafting Committee had considered a proposal to adopt the title “Miscellaneous provisions”, but had decided against it.

135. Draft article 64 dealt with the *lex specialis* principle. The Drafting Committee had not accepted a proposal to include language to the effect that, regardless of the application of *lex specialis*, there should always be a responsible subject—such a general proposition could not be sustained. The Committee had also not accepted a proposal to add a provision requiring that the special characteristics of an organization be taken into account.

136. The Drafting Committee had accordingly limited itself to refining the first-reading text. The phrase “or a State for an internationally wrongful act of an international organization” had now become “or of a State in connection with the conduct of an international organization”, so as to align the text with the title of Part Five. A single lengthy sentence had been broken into two, the second sentence dealing with the rules of the organization.

137. The Drafting Committee had considered a proposal to expand the scope of the new second sentence to indicate that it was not just the rules applicable in the relations between the organization and its members that were being considered, although it would primarily be those rules that were relevant. That would leave it open for some rules of the organization also to apply in the relations between the organization and third States or organizations. The proposal had not been accepted out of concern that it would allow room for an interpretation that the rules of the international organization always trumped general rules of international law. The Committee had been of the view that the rules of the organization were relevant in the relations with third States or organizations, not as special rules, but in the application of general rules—for example, in determining the validity of consent—or where the third State or organization had accepted the rules of the organization as binding on it. In the latter case, the basis for applicability would be acceptance by the State, and not the *lex specialis* rule.

138. The focus had then turned to breaking the provision into two sentences for ease of understanding, without necessarily making any substantive changes. The formula that had been agreed upon used the phrase “special rules of international law” to make it explicit that it was that quality, namely the fact that they were

rules of international law, that was significant. The phrase “may be contained in” served to indicate that not all such rules of the organization operated as special rules. It had been decided to render the words “between the international organization and its members” as “between an international organization and its members”.

139. As a consequence of that discussion, the Drafting Committee had considered the possibility of including a statement of the principle that an organization could not rely upon its internal rules to avoid its international responsibility, in line with a similar statement in article 3 of the articles on State responsibility and further to its discussion of draft article 32. That idea had been realized, in a revised form, as new draft article 5.

140. The title of draft article 64 remained “*Lex specialis*”.

141. The texts and titles of draft articles 65 to 67 had been adopted without change to the first-reading formulations.

142. Draft article 67 was a saving clause relating to the Charter of the United Nations. The Drafting Committee had decided to retain the text and title as adopted on first reading. It considered that the provision should not be interpreted as meaning that the United Nations, as an international organization, was exempt from the draft articles. The Committee had also considered a proposal to indicate that the draft articles had to be interpreted in conformity with the Charter of the United Nations, as had been done in the commentary to the equivalent provision in the draft articles on State responsibility.²⁵³ It had decided against such a clarification in either the provision itself or in the commentary, however, because it felt that such an assertion could be more easily sustained in the context of State responsibility than in that of the responsibility of international organizations. Contrary to States, international organizations were not capable of becoming parties to the Charter of the United Nations and as such could not become members of the Organization. Nor were they necessarily bound by the provisions of the Charter of the United Nations or even by the decisions of the organs of the United Nations. The preference had therefore been for a provision that merely preserved the Charter of the United Nations without taking a position on whether or not it was binding on international organizations generally. A proposal to make that clearer by adding the words “to any obligations arising under” before “the Charter of the United Nations” had not succeeded in the Committee, out of concern that modifying the formulation adopted in the articles on State responsibility could have unintended consequences.

143. In conclusion, and on behalf of the Chairperson of the Drafting Committee, Mr. Perera expressed the hope that the plenary Commission would be in a position to adopt the draft articles on the responsibility of international organizations, on second reading, as presented.

144. He then invited the Commission to adopt the titles and texts of the draft articles on responsibility of international organizations, as reproduced above, on second reading.

PART ONE.

INTRODUCTION

Draft articles 1 and 2

Draft articles 1 and 2 were adopted.

PART TWO.

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I. GENERAL PRINCIPLES

Draft articles 3 to 5

Draft articles 3 to 5 were adopted.

CHAPTER II. ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Draft articles 6 to 9

Draft articles 6 to 9 were adopted.

CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION

Draft articles 10 to 13

Draft articles 10 to 13 were adopted.

CHAPTER IV. RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Draft article 14

145. Mr. NOLTE, supported by Sir Michael WOOD, said that, as he understood it, the draft article did not in any way alter the scope of responsibility for aid or assistance in the commission of an internationally wrongful act by comparison with the corresponding article 16 in the articles on State responsibility. The Drafting Committee had simply been considering whether the reference to intention in the commentaries to the text on State responsibility should be reflected in the text of draft article 14. The result of the Drafting Committee’s discussion had been that that was not advisable. He had not understood the discussion to mean, however, that the commentary to draft article 14 should not refer to intention.

146. He asked whether the Special Rapporteur shared his understanding of the situation.

147. Mr. GAJA (Special Rapporteur) said that Mr. Nolte was correct that the result of the discussion had been that in the text on responsibility of international organizations there should be some reference, if only an indirect one, to the part of the commentary to article 16 on State responsibility that cited intention as one of the criteria applying to aid or assistance in the commission of an internationally wrongful act. He undertook to include such a reference in the commentary to draft article 14, which would be examined in due course by the Commission.

Draft article 14 was adopted.

²⁵³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 143 (paragraph (2) of the commentary to article 59).

Draft articles 15 to 19

Draft articles 15 to 19 were adopted.

CHAPTER V. CIRCUMSTANCES PRECLUDING WRONGFULNESS

Draft articles 20 to 27

Draft articles 20 to 27 were adopted.

PART THREE.

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I. GENERAL PRINCIPLES

Draft articles 28 to 33

Draft articles 28 to 33 were adopted.

CHAPTER II. REPARATION FOR INJURY

Draft articles 34 to 40

Draft articles 34 to 40 were adopted.

CHAPTER III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Draft articles 41 and 42

Draft articles 41 and 42 were adopted.

PART FOUR.

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Draft articles 43 to 50

Draft articles 43 to 50 were adopted.

CHAPTER II. COUNTERMEASURES

Draft article 51

148. Mr. CANDIOTI said that the French text of draft article 51, paragraph 1, should be verified to ensure that the negative formulation “*ne peuvent prendre de contre-mesures*” is aligned on the English words “may only take countermeasures”.

With that proviso related to the French text, draft article 51 was adopted.

Draft articles 52 to 57

Draft articles 52 to 57 were adopted.

PART FIVE.

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE CONDUCT OF AN INTERNATIONAL ORGANIZATION

Draft article 58

Draft article 58 was adopted.

Draft article 59

149. Mr. GALICKI pointed out that the first word in draft article 59, paragraph 1 (a), “that”, should be amended to the definite article “the”, to mirror the wording of draft article 58, paragraph 1 (a).

Draft article 59 was adopted, subject to that editorial amendment.

Draft articles 60 to 63

Draft articles 60 to 63 were adopted.

PART SIX.

GENERAL PROVISIONS

Draft article 64

150. Mr. CANDIOTI pointed out that in the second sentence of draft article 64, the English words “an organization” should read “the organization”, in line with the French, “*l’organisation*”.

Draft article 64 was adopted, with that editorial amendment to the English text.

Draft articles 65 to 67

Draft articles 65 to 67 were adopted.

151. The CHAIRPERSON said he took it that the Commission wished to adopt on second reading the titles and texts of the draft articles on responsibility of international organizations, as a whole, subject to editorial amendments to the English and French texts.

It was so decided.

152. Mr. GAJA (Special Rapporteur) welcomed the fact that the Commission had been able to adopt the text on second reading before the close of the first part of its sixty-third session, as that was a precondition for its adoption of the commentaries to the text in the next part of the session. The work was a collective endeavour that deserved to be pursued.

Organization of the work of the session (continued)*

[Agenda item 1]

153. After the customary exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-third session closed.

The meeting rose at 12.25 p.m.

* Resumed from the 3095th meeting.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-THIRD SESSION

Held at Geneva from 4 July to 12 August 2011

3098th MEETING

Monday, 4 July 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Constantin Economides, former member of the Commission

1. The CHAIRPERSON said that the second part of the sixty-third session of the International Law Commission was opening on a sombre note, as he had been informed of the death on 14 June 2011 of Constantin Economides, who had been a very active member of the Commission from 1997 to 2001 and from 2003 to 2006 and who had made a very valuable contribution to the Commission's work. For a long time he had been the Legal Adviser to the Greek Ministry of Foreign Affairs and had taken part in many conferences whose purpose had been the codification and progressive development of international law. He said that, on behalf of the Commission, he had sent a letter of condolence to the wife of Mr. Economides.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

Tribute to the memory of Mr. Francis Mahon Hayes, former member of the Commission

2. The CHAIRPERSON said that he had also received the sad news of the death of Francis Mahon Hayes, who had made a substantial contribution to the Commission's work. He had been a member from 1987 to 1991. Francis Mahon Hayes had been the Legal Adviser to the Irish Department

of Foreign Affairs before pursuing a full diplomatic career as his country's Ambassador to Denmark, Norway and Iceland, then as his country's Permanent Representative to the United Nations in Geneva and New York. He had also represented Ireland at several diplomatic conferences. He said that, on behalf of the Commission, he had sent a letter of condolence to the family of Francis Mahon Hayes.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

Expulsion of aliens (continued)* (A/CN.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

3. The CHAIRPERSON invited Mr. Kamto, the Special Rapporteur, to present his seventh report on the expulsion of aliens (A/CN.4/642).

4. Mr. KAMTO (Special Rapporteur) said that the purpose of the seventh report, which was short, was to outline the most significant recent developments concerning the topic which had occurred since the second addendum to the sixth report had been written.²⁵⁴ In addition to national legislation which had been proposed or adopted during that period, the judgment of the ICJ of 30 November 2010 in the *Ahmadou Sadio Diallo* case was of very great relevance to the topic under consideration. The report mentioned only two national developments, namely the initiative adopted in Switzerland at the end of 2010 and the rejection by the French Parliament in February 2011 of a draft law on deprivation of nationality. A third, more recent development had been the adoption in Denmark of a law on the same subject.

5. The people's initiative of 15 February 2008 on the expulsion of foreign criminals, which sought to amend the

* Resumed from the 3094th meeting.

²⁵⁴ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1-2.

Swiss Constitution, had been accepted by the Swiss people and cantons in a referendum held on 28 November 2010. The new constitutional clause provided for the automatic revocation of the right of residence by the competent administrative authorities and the expulsion from Swiss territory of aliens who had been convicted, in a decision which had become final, of murder, rape or any other aggravated sexual assault or any other form of violence such as robbery, trafficking in persons, drug trafficking or burglary and of aliens who had obtained social security or social assistance benefits by fraud. The expulsion measure was also accompanied by a ban on entering Swiss territory for 5 to 15 years, or 20 years in the case of persistent offenders. The new constitutional provision sought to limit the discretionary power currently enjoyed by the competent administrative authorities by introducing automatic revocation of the residence permit of an alien who had been convicted of the offences in question and automatic expulsion in consequence thereof. In practice, it removed the administrative authorities' margin of manoeuvre and their power to assess the situation of the individual concerned. The constitutional amendment of 28 November 2010 was therefore a step backwards, even by comparison with former legislation which, moreover, had been criticized because it created a "double punishment" by combining the main penalty, the prison sentence, with the ancillary penalty of expulsion, which was sometimes harder to bear than the main penalty.

6. In France, the idea of the new law had been put forward by the Head of State against the emotional background of the inauguration of the new prefect of the Department of Isère in the wake of some very violent incidents in July 2010 in a working-class neighbourhood of Grenoble, in the course of which some members of the police force had sustained casualties. The proposed text did not concern expulsion as such, but since it provided for deprivation of nationality which could lead to expulsion, he considered that it was of relevance to the topic, even though the draft law had been rejected by the Senate in February 2011.

7. On 24 June 2011, Denmark had adopted a law comparable to the Swiss constitutional amendment, in that it provided for the automatic expulsion of any alien resident in Denmark who had received a prison sentence in criminal proceedings. The issue had been highly controversial, for a substantial number of Members of Parliament had voted against the draft law and many NGOs had considered that it violated international law and that Denmark might be censured by the European Court of Human Rights.

8. The judgment delivered on 30 November 2010 by the ICJ in the *Ahmadou Sadio Diallo* case transcended that national practice which evidenced a tendency towards the tightening of legislation on the expulsion of aliens. The judgment would stand out in history on account of its juridical quality which, when all was said and done, was remarkable, although one of its most important aspects, namely that concerning the protection of an alien's right of ownership, was debatable. What made that judgment so important was that it addressed no fewer than seven legal issues raised by the expulsion of aliens: the notion of conformity with the law; the obligation to inform aliens

detained pending expulsion of the reasons for their arrest; the obligation to inform aliens detained pending expulsion of the grounds for that expulsion; the prohibition of the mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to alert, without delay, the consular authorities of the State of origin to the detention of their national; the property rights of the alien subject to expulsion; and recognition of the responsibility of the expelling State and its provision of compensation. Those points constituted the nub of the topic which the Commission had been examining for more than five years. In his seventh report, the Special Rapporteur reviewed them and, in each case, reproduced the relevant passages from the judgment and showed how the Court's position matched the arguments set out in the reports presented to the Commission on the subject of the expulsion of aliens. Since the Court's judgments were significant points of reference for codification, it seemed as if the Commission was on the right track. In particular, the seventh report showed that the draft articles proposed in line with the Commission's instructions to the Special Rapporteur rested on a sound and indisputable basis. Lastly, he invited the Commission simply to take note of the seventh report, which was purely informative and to leave it up to the Drafting Committee to decide whether to draw on it when it examined the draft articles which would be referred to it.

9. Mr. CANDIOTI drew attention to the fact that the seventh report also contained a chapter entitled "Restructured summary of the draft articles", which was very important because in it the Special Rapporteur had amended the titles and numbering of the draft articles.

10. Mr. KAMTO (Special Rapporteur) said that he had endeavoured to arrange all the draft articles in a more orderly fashion and to make them clearer and more coherent. The members of the Commission meeting in plenary session might wish to propose amendments to or to comment on the proposed plan for the draft articles which he had submitted to the Commission.

11. Mr. CANDIOTI said that the summary proposed by the Special Rapporteur should be sent to the Drafting Committee.

12. Sir Michael WOOD endorsed that proposal and thanked the Special Rapporteur for bringing the Commission up to date on recent developments. That information was very helpful. In taking note of the report, the Commission should not be deemed to have agreed or disagreed with the criticism contained therein, to which he did not fully subscribe.

13. Mr. McRAE said that the fact of taking note of the report was likely to have more implications than might be apparent, for it was tantamount to giving a mandate to the Special Rapporteur, who would probably include some of the passages from it in his commentary. In that connection, he wished to know precisely which provisions of the draft articles would, in the Special Rapporteur's opinion, conflict with the text of the Swiss people's initiative.

14. Mr. KAMTO (Special Rapporteur) said that the Swiss legislation did not conflict with any specific draft

article. During the debate on the sixth report, when the Commission had studied the grounds for expulsion and the practice of inflicting a “double punishment”, it had considered that that practice was open to criticism, because the fact of giving a person a prison sentence and then expelling him or her was the equivalent of imposing a double penalty, even if expulsion was not a criminal sentence, because it was not necessarily handed down by a court after a breach of the law, but could be ordered by an administrative authority. The commentary should therefore indicate that it was essential to avoid an expellee having to undergo “double punishment”. That was where a reference to recent Swiss practice could be relevant when drafting the commentary to the grounds for the expulsion of aliens.

15. The CHAIRPERSON said that she took it that the Commission wished to refer the restructured summary contained in the Special Rapporteur’s seventh report on the expulsion of aliens to the Drafting Committee.

It was so decided.

The meeting rose at 3.45 p.m.

3099th MEETING

Wednesday, 6 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his seventeenth report on reservations to treaties (A/CN.4/647 and Add.1).

2. Mr. PELLET (Special Rapporteur) said first of all that he deeply regretted the passing of two former members of the Commission. Constantin Economides had been a man of deep convictions and an excellent jurist, and Francis Mahon Hayes had been an elegant thinker and a distinguished diplomat.

3. Turning to the introduction of his seventeenth—and final—report, he expressed gratitude to the translation services for their great efficiency and hard work in translating it, as well as all the draft commentaries in the Guide to Practice. In the seventeenth report, he had dispensed with the traditional introductory remarks in which he outlined new developments with regard to reservations to treaties and took stock of reactions to previous reports and to the Commission’s latest work. Instead, he had gone straight to the heart of the matter by devoting the first section of the report to the reservations dialogue. He owed a debt of gratitude to Daniel Müller for his help in drafting that section.

4. The phrase “reservations dialogue” was not a term of art but an expression that he had coined in his eighth report,²⁵⁵ although he had outlined the underlying notion in his third report.²⁵⁶ The term “reservations dialogue” simply meant that, irrespective of the substantive and procedural rules applicable to reservations in the absence of specific provisions in a given treaty, contracting States or contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope and meaning of another party’s reservations or objections to a reservation.

5. While those were informal practices that it would be difficult to transpose to a legal context, they had many advantages that deserved to be highlighted. The Guide to Practice was a suitable context in which to do so because it was an informal “soft law” tool that combined *de lege lata* and *de lege ferenda* provisions with actual recommendations.

6. As the reservations dialogue was intended to take place outside the normal channels, he had preferred not to include guidelines on it in the body of the Guide to Practice but rather to touch on it in an annex, which could take the form of a recommendation, a resolution, conclusions or some other instrument linked to the Guide, but separate from it.

7. An important general point was that the reservations dialogue between States and international organizations was conducted in many different forms, using a wide variety of methods. It could take place well before reservations were formulated, when a treaty was still being negotiated. At that stage, a State or an international organization was at liberty to draw attention to any language that it found problematic and to indicate that it might enter a reservation. Its partners were also free to react to those concerns by expressing any reservations they might have to the reservation being contemplated. The dialogue could also take place, at a later stage, once the State in question had formulated its reservations, either on signing the treaty or when expressing its consent to be bound by it, if those steps occurred at different times. At that juncture, the other contracting States could react by formally accepting or objecting to the reservation, but they could also react informally by expressing their concerns, seeking

²⁵⁵ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, pp. 42–50, paras. 70–106.

²⁵⁶ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6.

* Resumed from the 3090th meeting.

clarification or endeavouring to persuade the author of the reservation to refrain from making it, or to reduce its scope. There was nothing to prevent the partners of the reserving State from contacting or resuming contact with that State even after the end of the 12-month period prescribed for formal reactions. The reservations dialogue covered all those eventualities and was extremely beneficial in that it prevented positions from becoming entrenched, fostered greater understanding among the partners and was likely to encourage them to take their treaty obligations seriously.

8. Of course, the reservations dialogue was not restricted to registering a protest against a reservation seen as questionable: it also provided an opportunity for the author of the reservation to explain and defend or modify its viewpoint. The dialogue should never be reduced to a monologue, although unfortunately, all too often it was. The reservations dialogue could likewise take the form of collective or coordinated reactions, a possibility discussed in paragraphs 21 to 27 of the report.

9. Thanks to its polymorphous nature, the reservations dialogue also had the advantage that it could take place both within and outside the Vienna regime. In paragraphs 4 to 7 of the report, he showed that it had occurred even under the traditional regime of unanimous acceptance of reservations by all contracting States and that it still occurred under such unanimity regimes as remained and in the context of reservations to the constituent instruments of international organizations that had to be accepted by the organization itself.

10. Acceptance and objection, as defined implicitly in the Vienna Conventions—it was the Guide to Practice that had filled the gaps in that area—often set off a reservations dialogue in the manner described in paragraphs 8 to 27. Objections, irrespective of whether they were designed to have a maximum or “super-maximum” effect, often offered their authors an opportunity not only to explain why they were against a reservation, but also to try to persuade the reserving State to modify or withdraw it. Reserving States were sometimes receptive to such suggestions. Unfortunately, that was all too seldom the case, although several examples of such receptiveness were given in the report. Alternatively, the reserving State could explain why it was keeping to the original wording of its reservation. Again, such explanations were not provided often enough.

11. The fact that, in a reservations dialogue, the States in question talked to one another and explained the reasons for their positions, thus providing some vital pieces of information, proved very useful when a dispute arose or when treaty monitoring bodies had to adopt a position on the permissibility or scope of a reservation.

12. The reservations dialogue was even more interesting when it took place outside the Vienna system, as he had tried to show in paragraphs 28 to 53 of the report. The dialogue could come in the guise of reactions to reservations that were neither acceptance nor objection but *sui generis* comments that were nonetheless taken into consideration by the author of the reservation, dispute settlement bodies or treaty monitoring bodies. For example, in its award of 30 June 1977 in the *English*

Channel dispute, referred to in paragraph 30 of the report, the arbitral tribunal had noted, with regard to article 12 of the 1958 Convention on the Continental Shelf, that

article 12, as the practice of a number of States ... confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such action amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned. (para. 39)

That passage confirmed the idea that outside the Vienna mechanisms for acceptance and objection, States could react in a less formal and more flexible manner. Some very sophisticated examples of such informal reactions were given in paragraphs 32 to 37. As paragraph 38 indicated, he was convinced that the examples given constituted only the tip of the iceberg and that some reservations dialogues were conducted in an even more informal manner.

13. The other form of reservations dialogue outside the Vienna system took place under the auspices of treaty monitoring bodies, above all those monitoring human rights treaties. For the past several years, those bodies had emphasized the benefits of the reservations dialogue, as paragraphs 40 to 45 made clear. The Human Rights Council of the United Nations also strove to encourage States that had made questionable reservations to withdraw or modify them, using persuasion rather than condemnation. In that connection, he drew attention to paragraphs 45 to 48 of the report. Paragraphs 49 to 52 contained a brief description of the relevant practice developed in European forums such as the Working Party on International Public Law (COJUR) and CAHDI.

14. In short, the reservations dialogue took many different forms, employed a wide variety of methods and had little in the way of a formal basis. It was therefore difficult to define, despite the existence of abundant practice that was fast expanding, principally under the impetus of European countries but with growing support on other continents. The Commission must not only address the practice but indeed encourage it, because of its patent advantages. At the same time, it was vital not to asphyxiate such a useful practice in legal formalism that might undermine its flexibility and spontaneity, and hence its effectiveness. The Guide to Practice was not characterized by an overly formalistic approach and, as he had indicated in paragraphs 58 to 61, it contained guidelines that tended to encourage the reservations dialogue. That was especially true of those that recommended that States and international organizations express the reasons for their reservations and objections whenever possible, or that they should react to reservations which they regarded as impermissible, despite the fact that the impermissibility of a reservation *ipso facto* prevented it from producing its effects. Such reactions did not change the legal situation or the legal status of the reservation in any way, but it was useful for States other than the reserving State to make their positions known. Guideline 2.5.3, which invited States and international organizations to undertake a periodic review of their reservations and to consider whether they still served their purpose, was fully in line with efforts to foster the reservations dialogue.

15. Since the guidelines to which reference was made in paragraphs 58 to 61 were only a part of the reservations dialogue, he was proposing a more systematic approach: to encourage States and international organizations to engage in the reservations dialogue whenever possible, and in whatever form they deemed appropriate. That was the purpose of the draft recommendation or conclusions proposed in paragraph 68 of the report. The text was comparable to the text of the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties,²⁵⁷ adopted in 1997. The new text had been drafted very cautiously in order not to hem in the reservations dialogue by confining its form and modalities, but instead to preserve the flexibility and spontaneity which ensured its effectiveness. He was not asking the Commission to accept the draft recommendation or conclusions without discussing the text, but a plenary sitting did not appear to be the right place to examine it in detail. He therefore suggested that, if a majority of members agreed, the text should be referred to the Working Group on reservations to treaties, which had done excellent work in revising the Guide to Practice.

16. Sir Michael WOOD said that he supported the Special Rapporteur's proposal to refer the draft recommendation or conclusions contained in paragraph 68 of the report to the Working Group on reservations to treaties.

17. Mr. NOLTE said that he also supported referral of the text in paragraph 68 to the Working Group on reservations to treaties. He had been surprised to see that the terms "key players" and "stakeholders" had been used in the report. They had not been employed so far, and it would be advisable to avoid such jargon.

18. On a more substantive point, he said that the reference in paragraph 15 of the report to "objections to an invalid reservation" suggested clarity as to whether a reservation was invalid. However, the very purpose of the reservations dialogue was to clarify this. He proposed that that phrase should read "objections to reservations which are considered to be invalid", thereby, in addition, aligning it with draft guideline 4.5.3, paragraph 2.

19. In paragraph 21, the Special Rapporteur referred to the many objections formulated to a reservation by Libya to the Convention on the Elimination of All Forms of Discrimination against Women on the grounds that the reservation was too imprecise and therefore invalid. Five years later, the Libyan Arab Jamahiriya had modified the reservation, making it more specific. The Special Rapporteur considered that this case was an example of a successful reservations dialogue. But if the reservation had indeed been invalid because it was incompatible with the object and purpose of the Convention, how could the Libyan Arab Jamahiriya modify that reservation five years later? The modification appeared instead to be a late reservation, the formulation of which was impermissible under guideline 2.3. He requested clarification of that point.

20. That apparent discrepancy raised the wider issue of the wisdom of guidelines 4.5.1, regarding the nullity of an invalid reservation, and 3.3.1, according to which there was no need to distinguish among the consequences of the

different grounds for non-permissibility. Although it was too late to change those general principles, the Commission should at least make it clear that States had the opportunity to modify reservations that were deemed by one or more objecting States to be invalid so as to preserve what might be their valid core. The Special Rapporteur seemed to acknowledge that possibility when he said in paragraph 33 of his seventeenth report that "[f]ull or partial withdrawal of a reservation that is considered invalid is unquestionably the primary purpose of the reservations dialogue". That understanding also seemed to underlie the State practice described in paragraph 34. Generally speaking, in paragraphs 30 *et seq.* and in the draft recommendation, more emphasis should be placed on dialogue to ascertain whether a particular reservation was valid.

21. While the examples of the reservations dialogue given in paragraphs 39 to 53 were certainly of great significance, they concerned two specific areas, namely human rights treaty monitoring bodies and coordination among European States. He wondered if there were any pertinent examples of the participation of international organizations, including their secretariats, in such a dialogue. The examples of CAHDI and COJUR were not the best, because they really illustrated the coordination of the views of States within an international organization and not the organization acting as such.

22. He fully agreed with the Special Rapporteur that the Commission should not try to formulate a legal framework or a "soft-law" instrument to regulate the reservations dialogue. Perhaps States could be reminded of the legal principles of *bona fides* and cooperation in treaty law, however.

23. He had the impression that the draft recommendation in paragraph 68 of the report primarily addressed the reservations dialogue from the viewpoint of the bodies monitoring human rights treaties, focusing on the validity of reservations. But the reservations dialogue went much further, in that it concerned permissible reservations and the withdrawal of impermissible reservations. The Commission should couch the draft recommendation in language that was suitably general and less oriented towards human rights issues.

24. Mr. SABOIA said that the seventeenth report dealt with a subject that had important consequences for the stability and optimal functioning of international instruments. The reservations dialogue provided supplementary guarantees to States and encouraged them to overcome their disagreements about reservations. He found the text of the draft recommendation or conclusions on the reservations dialogue, as contained in paragraph 68 of the report, to be perfectly acceptable. He endorsed the Special Rapporteur's proposal that it be referred to the Working Group on reservations to treaties.

25. Mr. McRAE asked whether the draft recommendation or conclusions were intended as a text for adoption by the General Assembly or by the Commission.

26. Mr. PELLET (Special Rapporteur), replying to that very astute question, said that for historical reasons dating back to 1997, he thought it prudent not to prejudge the form to be taken by the text in paragraph 68. Depending on what

²⁵⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

course of action the General Assembly decided to adopt on the 180 guidelines plus commentaries in the Guide to Practice, the text in paragraph 68 could be appended to the Guide or remain separate from it. Thus, while the draft recommendation in paragraph 68 was couched in terms similar to a draft resolution and he hoped the Commission agreed with the contents and that the General Assembly itself would adopt it as a draft resolution, he had deliberately left the question of the final form open.

27. The CHAIRPERSON said he took it that the Commission wished to refer the text in paragraph 68 of the report to the Working Group on reservations to treaties for further consideration.

It was so decided.

28. Mr. PELLET (Special Rapporteur) made a number of suggestions about how the Commission should approach its discussion of chapter IV, on reservations to treaties, of its draft report to the General Assembly on the work of its sixty-third session. The text ran to several hundred pages, so an orderly approach and economy of time were of the essence. He thanked all those who had helped to finalize the voluminous and complex text of chapter IV, including the members of the translation services who had drawn attention to certain problems of concordance.

29. After a procedural discussion in which Sir Michael WOOD, Mr. PELLET (Special Rapporteur) and Mr. NOLTE took part, the CHAIRPERSON suggested that the Working Group on reservations to treaties should convene immediately in order to consider the text in paragraph 68 of the Special Rapporteur's report that had been referred to it earlier in the meeting.

The meeting rose at 11.20 a.m.

3100th MEETING

Thursday, 7 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Owada, President of the International Court of Justice, and gave him the floor.

2. Judge OWADA (President of the International Court of Justice) said that he was delighted to address the Commission on the occasion of its sixty-third session. It was the third time that he had had the privilege of addressing that august body, an occasion which provided an opportunity for fruitful interaction between two key legal institutions of the United Nations, one working towards the codification and progressive development of international law, and the other adjudicating upon existing international rules and principles. He wished to take the opportunity to congratulate the members of the Commission who had been recently elected and the newly elected Chairperson, Mr. Maurice Kamto. As had become the custom, he would start his presentation with a report on the judicial activities of the Court over the past year. He would then discuss in more detail some salient legal points likely to be of particular interest to the Commission. Since July 2010, the Court had rendered eight decisions altogether: one judgment on the merits, one advisory opinion, one judgment on preliminary objections, two judgments on applications for permission to intervene, one order on an application for permission to intervene, one order on the admissibility of a counterclaim and one order on a request for the indication of provisional measures. As in previous years, those cases had involved States from all regions of the world and the subject matter had been wide-ranging. Despite the variety in the types of decisions, they all contained issues of substantive importance which shed interesting light on the jurisprudence of the ICJ.

3. On 6 July 2010, the Court had handed down its order on the admissibility of a counterclaim submitted by Italy in the case concerning *Jurisdictional Immunities of the State*. The principal case, filed by Germany in December 2008, concerned a dispute over whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims against it in Italian courts based on violations of international humanitarian law by the German Reich during the Second World War. In its counter-memorial, filed on 22 December 2009, Italy had presented a counterclaim “with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich”.²⁵⁸ In its order of 6 July 2010, the Court had concluded that the dispute that Italy intended to bring before the Court by way of its counterclaim related to facts and situations existing prior to the entry into force as between the parties of the European Convention for the peaceful settlement of disputes, the compromissory clause of which formed the basis of the Court's jurisdiction on the principal claim. For that reason, the Court had ruled that the counterclaim did not come within its jurisdiction *ratione temporis* as required by article 80, paragraph 1, of the Rules of Court, and was thus inadmissible (paras. 30–33 of the order).

4. On 22 July 2010, the Court had rendered its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, in response to a request made by the United Nations General Assembly, in its resolution 63/3 of

²⁵⁸ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, “Counter-memorial of Italy”, vol. I, p. 128, para. 7.1 (available from www.icj-cij.org).

8 October 2008, for an opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” In its advisory opinion, the Court had held that the declaration of independence of Kosovo adopted on 17 February 2008 had not violated international law. In dealing with the request from the General Assembly, the Court had first addressed the question of whether it possessed jurisdiction to give the advisory opinion requested. On that preliminary issue, the Court had considered that the question asked had been referred to it by the General Assembly, which was authorized to request it to give an advisory opinion on any legal question under Article 96, paragraph 1, of the Charter of the United Nations, and that because that question was a “legal question” within the meaning of Article 96 of the Charter of the United Nations and Article 65 of the Statute of the International Court of Justice, the Court had jurisdiction to give an advisory opinion in response to the request. The ICJ had then examined the question, raised by a number of participants on various grounds, as to whether it should nonetheless decline, as a matter of discretion, to exercise its jurisdiction to give an advisory opinion. After a detailed examination of the various arguments as to why the Court should exercise that discretion, it had concluded that there were “no compelling reasons for it to decline to exercise its jurisdiction”, a conclusion that the ICJ had consistently reached in its advisory jurisprudence. It had then carefully examined the precise scope and meaning of the question put to it by the General Assembly, in particular with regard to the reference to the “Provisional Institutions of Self-Government of Kosovo” in the request for an advisory opinion formulated by the General Assembly. The Court had stated that it was part of its judicial function to examine, *proprio motu*, the presumption of the question asked, namely whether the declaration of independence had been promulgated by the Provisional Institutions of Self-Government of Kosovo. It had also concluded that, in the present case, the question was not whether international law conferred a positive entitlement upon Kosovo to declare independence, but whether the declaration of independence had been adopted in violation of international law. The ICJ had then turned to the question whether the declaration of independence of Kosovo was in accordance with general international law. It had noted that State practice during the eighteenth, nineteenth and early twentieth centuries pointed clearly to the conclusion that international law contained no prohibition of declarations of independence. The Court had declared that the scope of the principle of territorial integrity was confined to the sphere of relations between States. It had then analysed three Security Council resolutions that had been cited by some participants as evidence for the proposition that the declaration of independence was prohibited by international law (para. 81). It had concluded that no general prohibition could be deduced from those resolutions since they addressed specific situations where declarations of independence had been made in the context of an unlawful use of force or a violation of a *jus cogens* norm. The ICJ had thus concluded that general international law contained no applicable prohibition of declarations of independence. The Court had then analysed whether the declaration of independence of Kosovo was in accordance with Security Council resolution 1244 (1999) of 10 June 1999. It had determined that the object and purpose of resolution 1244

was “to establish a temporary, exceptional legal regime which ... superseded the Serbian legal order ... on an interim basis” (para. 100). In order to determine to what extent the authors of the declaration of independence were bound by that temporary legal regime, the Court had carefully analysed whether the authors of the declaration of independence were, in fact, the “Provisional Institutions of Self-Government of Kosovo” and questioned the accuracy of its formulation. After analysing the content and form of the declaration, as well as the context in which it had been adopted, the Court had concluded that its authors were not the “Provisional Institutions of Self-Government of Kosovo” but rather “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration” (para. 109). On that basis, the Court had come to the conclusion that the adoption of the declaration of independence of Kosovo had not violated resolution 1244 (1999) on the following grounds: first, because the resolution and the declaration of independence operated on a different level (unlike resolution 1244 (1999), which established “a temporary, exceptional legal regime” in Kosovo, the declaration of independence was an attempt to determine the final status of Kosovo); secondly, because resolution 1244 (1999), which addressed “no specific obligations ... to other actors”, contained no general prohibition on declaring independence. Lastly, since the authors of the declaration of independence were not the Provisional Institutions of Self-Government of Kosovo, they were not bound by the constitutional framework established under resolution 1244 (1999) and, thus, their declaration of independence had not violated the framework established under that resolution. Consequently, the ICJ had held that the adoption of the declaration of independence had not violated any applicable rule of international law (para. 122).

5. On 30 November 2010, the ICJ had rendered its judgment on the merits in the case concerning *Ahmadou Sadio Diallo*. The case had been brought under the law of diplomatic protection, and dealt with the fundamental rights of Mr. Diallo, a Guinean citizen who had settled in the Democratic Republic of the Congo in 1964, as well as his direct rights as *associé* of the companies Africom-Zaire and Africontainers-Zaire, which were registered in the Democratic Republic of the Congo. In a previous judgment of 24 May 2007 on the preliminary objections raised by the Democratic Republic of the Congo, the Court had held that the application of Guinea was admissible “in so far as it concerns protection of Mr. Diallo’s direct rights as *associé* in Africom-Zaire and Africontainers-Zaire” (para. 98, (1) (a)) and “in so far as it concerns protection of Mr. Diallo’s rights, as an individual”, but that it was inadmissible “in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire” (*ibid.*, (2) (a)). In its judgment of 30 November 2010, the ICJ had first examined the admissibility of a claim alleging that Mr. Diallo had been the victim in 1988–1989 of arrest and detention measures. It had concluded that that claim was inadmissible because it had not been raised by Guinea until its reply to the preliminary objections of the Democratic Republic of the Congo, that it was not implicit in the original application and that it did not arise directly out of the question which was the subject matter of that application, which concerned events in 1995

and 1996. The ICJ had then turned to the claims relating to protection of Mr. Diallo's rights as an individual and to the arrest, detention and expulsion measures taken against Mr. Diallo in 1995 and 1996. In that regard, Guinea had argued, first, that Mr. Diallo's expulsion had breached article 13 of the International Covenant on Civil and Political Rights and article 12, paragraph 4, of the African Charter on Human and Peoples' Rights. On that point, the Court had observed that, in order to comply with those provisions, the expulsion of an alien lawfully in the territory of a State which was a party to those instruments must be decided in accordance with applicable domestic law and must not be arbitrary in nature. The ICJ had taken the view that the expulsion decree of 31 October 1995 had not complied with the law of the Democratic Republic of the Congo because it had not been preceded by consultation with the National Immigration Board, whose opinion was required by article 16 of the Legislative Order of 12 September 1983 concerning immigration control, and because it had not been "reasoned", as required by article 15 of the Legislative Order. Thus the Court had held that the expulsion had violated article 13 of the Covenant and article 12, paragraph 4, of the African Charter on Human and Peoples' Rights; that Mr. Diallo's right to have his case reviewed by a competent authority, in accordance with article 13 of the International Covenant on Civil and Political Rights, had not been respected; and that the Democratic Republic of the Congo had not demonstrated "compelling reasons of national security" to justify the denial of that right (para. 74). The Court had also held that Mr. Diallo's arrest and detention had violated article 6 of the Charter, concerning liberty and security of the person. It had found that the deprivations of liberty suffered by Mr. Diallo had not taken place in accordance with the procedure established by law, that they had been arbitrary, and that Mr. Diallo had not been informed, at the time of his arrests, of the reasons for those arrests or the charges against him. The Court had further found that the Democratic Republic of the Congo had violated article 36, paragraph (1) (b), of the Vienna Convention on Consular Relations by not informing Mr. Diallo, at the time of his arrest, of his right to request consular assistance from his country. On the other hand, with regard to the claim of Guinea that Mr. Diallo had suffered conditions in detention that constituted inhuman or degrading treatment, the ICJ had concluded that Guinea had failed to establish that such had been the case. The Court had then turned to a set of claims made by Guinea that Mr. Diallo's detention and expulsion had violated his direct rights as *associé* of the two companies he had established in the Democratic Republic of the Congo, Africom-Zaire and Africontainers-Zaire. After clarifying certain matters relating to the legal existence of the two companies and to Mr. Diallo's role and participation in them, the Court had first addressed the claim by Guinea that, in expelling Mr. Diallo, the Democratic Republic of the Congo had violated his right to take part and vote in general meetings. The Court had taken the position that the Democratic Republic of the Congo, in expelling Mr. Diallo, had probably impeded him from taking part in person in any general meeting, but that such hindrance had not amounted to a deprivation of his above-mentioned right. The ICJ had then addressed the argument by Guinea that, by unlawfully expelling Mr. Diallo, the Democratic Republic of the Congo had violated his rights relating to the

gérance (management) of the companies. The Court had concluded that the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to appoint a *gérant* must fail because the appointment of a *gérant* was the responsibility of the company (the general meeting), not a right of the *associé*. With respect to the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to be appointed *gérant*, as well as his alleged right not to be removed as *gérant*, the Court had concluded that there had been no possible violations because the interested party had in fact been appointed *gérant* and continued to be *gérant* of both companies. The Court had also rejected the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to exercise the functions of a *gérant*, concluding that while the performance of his duties as *gérant* might have been rendered more difficult by his presence outside the country, Guinea had not demonstrated that it had been rendered impossible. Turning to the contention by Guinea that, in expelling Mr. Diallo, the Democratic Republic of the Congo had violated his right to oversee and monitor the management, the Court had rejected that claim, finding that while it might have been the case that Mr. Diallo's detentions and expulsion from the Democratic Republic of the Congo had rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the management, wherever he might have been. Lastly, the Court had rejected the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to property over his *parts sociales* in Africom-Zaire and Africontainers-Zaire.

6. In the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, Costa Rica had, on 18 November 2010, filed an application invoking, in order to found the jurisdiction of the Court, article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) and the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice. The application had been filed in regard to an alleged "incursion into, occupation of and use by Nicaragua's army of Costa Rican territory as well as breaches of Nicaragua's obligations towards Costa Rica" (para. 1). On 8 March 2011, the Court had handed down its order on the request for the indication of provisional measures in the case. Costa Rica had claimed that Nicaragua had occupied the territory of Costa Rica on two separate occasions in connection with the construction of a canal across Costa Rican territory, as well as certain related works of dredging on the San Juan River. Pending its determination of the case on the merits, Costa Rica had requested the ICJ to order provisional measures indicating: first, that Nicaragua should not station troops or other personnel, engage in the construction or enlargement of a canal, fell trees, remove vegetation or dump sediment in the area concerned; secondly, that Nicaragua should suspend its dredging programme; and thirdly, that Nicaragua should refrain from any other action which might prejudice the rights of Costa Rica.

7. In its order, the Court had determined that the instruments invoked by Costa Rica appeared, *prima facie*, to afford a basis on which the Court had jurisdiction to rule on the merits, enabling it to indicate provisional measures

if it considered that the circumstances so required. The Court had also found that the rights to be protected by those requested measures—in particular the right to assert sovereignty over the disputed territory—were plausible, and that a link existed between the rights whose protection was being sought and the measures requested.

8. Having thus found that it had the power to indicate provisional measures, the ICJ had gone on to examine whether there was a risk that irreparable prejudice might be caused to the rights which were in dispute and whether such a risk was imminent. The Court had found that, given that Nicaragua intended to carry out certain activities, if only occasionally, in the disputed territory, a real risk of irreparable prejudice to title claimed by Costa Rica to sovereignty over the said territory did exist and that it was imminent, to the extent that there was a risk of incidents liable to cause irremediable harm in the form of bodily injury or death.

9. The Court had decided to indicate provisional measures to both parties, calling on each party to refrain from sending to, or maintaining in, the disputed territory any personnel, whether civilian, police or security, until such time as the Court had decided the dispute on the merits or the parties had come to an agreement on the subject.

10. On 1 April 2011, the Court had delivered its judgment on preliminary objections in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. In the case, Georgia claimed that the Russian Federation had violated the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Georgia had invoked the compromissory clause in article 22 of that Convention to found the jurisdiction of the Court. The ICJ had already, following a request by Georgia for the indication of provisional measures of protection in the same subject, ordered certain measures of protection in its order of 15 October 2008. The Russian Federation had raised four preliminary objections to the Court's jurisdiction under article 22 of the Convention: that there was no dispute between the parties regarding the interpretation or application of the Convention; that the procedural requirements of article 22 of the Convention had not been fulfilled; that the alleged wrongful conduct had taken place outside the territory of the Russian Federation, and thus the Court lacked jurisdiction *ratione loci*; and that any jurisdiction that the Court might have was limited *ratione temporis* to events which had occurred after the entry into force of the Convention as between the parties, namely after 2 July 1999.

11. The ICJ had examined the first preliminary objection by the Russian Federation in relation to events that had occurred during three distinct time periods. First, with respect to the period before the Convention had entered into force between the parties, namely 2 July 1999, the Court had concluded that even if a dispute about racial discrimination had been found to have existed during that period, it could not have been a dispute with respect to the interpretation or application of the Convention. Secondly, the Court had concluded that none of the documents or statements from the period of time between Georgia and the Russian Federation becoming parties to the Convention and the

outbreak of hostilities provided any basis for a finding that there had been a dispute between Georgia and the Russian Federation with respect to the interpretation and application of the Convention. Thirdly, with respect to the events which had taken place in 2008, in particular after the armed hostilities in South Ossetia that had begun during the night of 7 to 8 August 2008, the Court had observed that, while the claims by Georgia were primarily based on allegations of unlawful use of force, they also expressly referred to ethnic cleansing by Russian forces. Those claims had been made against the Russian Federation directly and had been rejected by the latter. The ICJ had therefore found that, on 12 August 2008, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under the Convention. The Court had accordingly dismissed the first preliminary objection by the Russian Federation.

12. In examining the second preliminary objection by the Russian Federation, concerning the procedural requirements of article 22 of the Convention, the Court had found, based on an analysis of the ordinary meaning of the phrase “[a]ny dispute ... which is not settled by negotiation or by the procedures expressly provided for in this Convention”, that article 22 established preconditions to be fulfilled before the seisin of the Court (para. 141). It had also noted that the *travaux préparatoires* of the Convention supported the conclusion it had reached when considering the ordinary meaning of the provision.

13. Having concluded that article 22 of the Convention imposed preconditions that had to be satisfied before resorting to the Court, the Court had considered whether those preconditions, including the precondition of negotiations, had been fulfilled. It had observed that, in the light of its finding that a dispute had only arisen in August 2008, immediately before the filing of the application, it had only been possible for the parties to be negotiating the matters in dispute during that period. After reviewing the facts in the record relating to that period, the ICJ had been of the view that, although certain claims and counterclaims made by the parties concerning ethnic cleansing might attest to the existence of a dispute as to the interpretation and application of the Convention, they did not amount to attempts at negotiations by either party. The ICJ had thus concluded that Georgia had not established that, between 9 and 12 August 2008, it had attempted to negotiate matters related to the Convention with the Russian Federation, or that Georgia and the Russian Federation had engaged in negotiations with respect to the latter's compliance with its substantive obligations under the Convention. Thus, the Court had upheld the second preliminary objection by the Russian Federation and held that article 22 of the Convention could not serve to found the Court's jurisdiction and that the case could not proceed to the merits phase, noting that it was not required to consider the third or fourth preliminary objections by the Russian Federation.

14. In the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, two requests for permission to intervene had been made by Costa Rica and Honduras, and the ICJ had rejected them in two separate judgments of 4 May 2011. On 25 February 2010, Costa Rica had filed an application for permission to intervene,

in which it stated that it sought to intervene as a non-party for the “purpose of informing the Court of the nature of [its] legal rights and interests and of seeking to ensure that the Court’s decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests”. In its judgment on the request, the ICJ had begun by discussing the legal framework for intervention, provided for under Article 62 of the Statute of the International Court of Justice and article 81 of the Rules of Court. It had then analysed each of the criteria which a State must meet in order to be permitted to intervene, namely the existence of an interest of a legal nature which might be affected by the decision in the case, the precise object of the intervention and any basis of jurisdiction between the State seeking to intervene and the parties to the case. Following an overview of those constituent elements, the ICJ had examined whether they were present in the case of Costa Rica. With respect to the “interest of a legal nature which may be affected”, the Court had noted that, although Nicaragua and Colombia differed in their assessment as to the limits of the area in which Costa Rica might have a legal interest, they recognized the existence of the interest of Costa Rica of a legal nature in at least some areas claimed by the parties to the main proceedings. The ICJ had then examined whether Costa Rica had established that its interest of a legal nature was one which “may be affected” by the decision of the Court in the main proceedings. It had concluded that Costa Rica had not done so, because the Court, when drawing a line delimiting the maritime areas between the parties to the main proceedings, would, if necessary, end the line in question before it reached an area in which the interests of a legal nature of third States might be involved. Thus, the ICJ had concluded that application for permission to intervene in the case filed by Costa Rica could not be granted.

15. As for Honduras, it had applied to the ICJ to be permitted to intervene in the case as a State party, or, if the Court did not accede to that request, as a non-party. After differentiating between the two types of intervention, the ICJ had noted that whatever the capacity in which a State intervened, it had to fulfil the condition laid down by Article 62 of the Statute of the International Court of Justice and demonstrate that it had an interest of a legal nature which might be affected by the future decision of the Court. It had thus turned to an examination of whether Honduras had fulfilled that condition. The area in which Honduras had specified that it had an interest of a legal nature which might be affected by the decision in the main proceedings was an area which had been the subject of the Court’s judgment of 8 October 2007 in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* and the dispute in question had been settled by that judgment as between Honduras and Nicaragua. The ICJ had therefore considered whether the 2007 judgment prevented it from granting Honduras permission to intervene.

16. The Court had decided that, by virtue of the authority of the *res judicata* of the 8 October 2007 judgment, Honduras could not have an interest of a legal nature in the area south of the bisector line established by the ICJ in that judgment. With respect to the area north of that bisector, the Court had concluded that Honduras

could have no interest of a legal nature which might be affected by the decision in the main proceedings for the simple reason that its rights over that area had not been contested either by Nicaragua or by Colombia. The ICJ had also found that Honduras had no interest of a legal nature which might be affected in the maritime areas it had identified in its application. The Court had held that Honduras had no interest of a legal nature in the effects that the decision of the Court in the main proceedings might have on the rights of Honduras under the bilateral treaty of 1986 between Honduras and Colombia,²⁵⁹ since the treaty was a matter between Honduras and Colombia only and it had no relevance to the Court’s determination of the maritime boundary between Nicaragua and Colombia. Thus, the Court had rejected the application by Honduras for permission to intervene.

17. On 4 July 2011, the ICJ had issued an order on the application for permission to intervene filed by Greece in the case concerning *Jurisdictional Immunities of the State*, in the context of a dispute between the parties over whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims against it based on violations of international humanitarian law by the German Reich during the Second World War. In its application, Greece had stated that it had an interest of a legal nature which might be affected by the future decision of the Court in the case because, in its view, Germany had “acquiesced to, if not recognized, its international responsibility vis-à-vis Greece for all acts and omissions perpetrated by the Third Reich” during the Second World War (para. 16). Unlike the applications for permission to intervene submitted by Costa Rica and Honduras in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, neither party to the main proceedings had filed an objection to the application by Greece. Thus, the ICJ had, in its order adopted on 4 July 2011, permitted Greece to intervene. With respect to the first criterion for intervention laid down in article 81, paragraph 2, of the Rules of Court, namely that the State seeking to intervene must have an interest of a legal nature which might be affected, the Court had observed that, in the judgment that it would render in the main proceedings, the Court might find it necessary to consider the decisions of Greek courts in the light of the principle of State immunity, for the purposes of making findings with regard to the request in the submissions by Germany concerning the question whether Italy had committed a breach of the jurisdictional immunity of Germany by declaring Greek judgments enforceable in Italy. The ICJ had considered that that was sufficient to conclude that Greece had an interest of a legal nature which might be affected by the judgment that would be handed down in the main proceedings.

18. With respect to the second criterion, Greece had stated that the precise object of its intervention was “to inform the Court of the nature of the legal rights and interests of Greece that could be affected by the Court’s

²⁵⁹ Maritime Delimitation Treaty between the Republic of Colombia and the Republic of Honduras (San Andrés, 2 August 1986), *Official Journal (Colombia)*, 135th year, No. 43815, 14 December 1999, p. 1 (Law No. 539 of 13 December 1999) (available from the National Printing Service of Colombia: www.imprenta.gov.co/portal/page/portal/IMPRENTA/Productos/Diario_Oficial).

decision in light of the claims advanced by Germany to the case before the Court” (p. 10 of the application). In its order, the Court had noted that, insofar as the object of Greece’s intervention was to inform the Court of its interest of a legal nature which might be affected, that object seemed indeed to accord with the function of intervention. With respect to the third and final criterion contained in article 81 of the Rules of Court, the Court had observed that it was not necessary to establish the existence of a basis of jurisdiction between the parties to the proceedings and the State which was seeking to intervene as a non-party; since Greece had made it clear that it was seeking to intervene as a non-party, it was not necessary for such a basis of jurisdiction to be established. The Court had thus granted Greece’s request to intervene.

19. In addition, in the previous year, three new contentious cases and one new application for permission to intervene had been filed. In addition to the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, two other contentious cases had been filed before the Court: first, on 20 July 2010, Burkina Faso and Niger had jointly submitted to the Court a territorial dispute relating to the boundary between them, pursuant to a special agreement that had entered into force in 2009 (*Frontier Dispute (Burkina Faso/Niger)*). Secondly, on 28 April 2011, Cambodia had filed a *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear*. In its application, Cambodia had asked the Court to adjudge and declare that “the obligation incumbent upon Thailand to ‘withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory’ ... is a particular consequence of the general and continuing obligation to respect the territorial integrity of Cambodia” (para. 45 of the application). On the same day, Cambodia had filed a request for the indication of provisional measures. The Court was currently deliberating on that request and would issue its order shortly.

20. Lastly, in the previous year, a third contentious case had been submitted to the Court, namely the case concerning *Whaling in the Antarctic*.

21. He would now speak in a personal capacity and his views would not necessarily reflect those of the ICJ. He would cover three points in relation to the cases he had mentioned.

22. The first question he would like to take up was the discretionary power of the Court, which allowed it not to grant a request for an advisory opinion. The Charter of the United Nations, like the Statute of the International Court of Justice, stated that the Court “may” give an advisory opinion. It was therefore not an obligation. The basic criterion that the Court had applied so far was the following: if it considered that there was a compelling reason not to render an advisory opinion, then it would decline to do so.

23. The historical evolution of the advisory opinion procedure showed that its origins lay not in the Statute of the International Court of Justice or in the Charter of the United Nations, but in article 14 of the Covenant of

the League of Nations. At that time, the Permanent Court of International Justice was not part of the League of Nations, even though the two bodies were closely linked. It was for the Council of the League of Nations to ask the Permanent Court for an advisory opinion with a view to facilitating the Council’s consideration of the matter before it. It was for that reason that the Permanent Court had found it impossible to give an advisory opinion on the *Status of Eastern Carelia*, which was disputed by Finland and Russia. The Permanent Court had given two reasons: the first was that Russia had not given its consent to the League of Nations becoming involved in its dispute with Finland. The second reason was that the Permanent Court would have had to rule on certain questions of fact and that, since Russia had refused to take part in any inquiry, it was doubtful whether there would be available to the Permanent Court materials sufficient to enable it to arrive at a conclusion on those questions.

24. With the establishment of the ICJ, the advisory procedure had been officially incorporated into the Statute of the International Court of the Justice and the Charter of the United Nations and the situation had changed somewhat. First, an advisory opinion could now be requested by the General Assembly or by the Security Council, or by other organs of the United Nations or specialized agencies authorized to do so, provided that the request related to “legal questions arising within the scope of their activities” (Art. 96, para. 2). The aim was to assist the work of those bodies, and the advisory opinion requested might not have a direct link with a particular dispute. Advisory opinions were therefore issued to the requesting bodies and not to the parties to a dispute. In consequence, the fact that a party had not accepted the jurisdiction of the Court was not relevant. The second difference was that under the Charter of the United Nations, the ICJ was the principal judicial organ of the United Nations. It was therefore an integral part of the United Nations system and functioned under Chapter VI of the Charter of the United Nations. Accordingly, it had an additional responsibility, namely the obligation to cooperate with the other parts of the system. Of course, if a matter that had been referred to the ICJ did not pertain to its judicial function, it did not have to consider it.

25. The ICJ interpreted the permissive wording of Article 65 of the Statute of the International Court of Justice (the Court “may” give an advisory opinion) as granting it the discretionary power to refuse to issue an advisory opinion. In practice, however, the Court had never done so.

26. In its 1956 advisory opinion in the case concerning the *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, the ICJ had raised for the first time the issue of the “compelling reasons” that could prevent it from complying with a request for an advisory opinion (p. 86 of the *Reports*). The Court had later referred repeatedly to the issue, but, since it had never refused to issue an advisory opinion, it had never had to clarify what those reasons might be. On the other hand, it had on more than one occasion rejected certain arguments relating to the existence of “compelling reasons” allegedly preventing it from issuing the advisory opinion requested.

27. The argument that was most often put forward in such cases was that the subject matter of the case about which the Court's advisory opinion had been requested concerned a bilateral dispute. As had been indicated earlier, originally the advisory procedure had been closely related to such disputes. The ICJ had not changed its position that the mere fact that the request related to a bilateral dispute was not a sufficient reason for it to refuse to give an advisory opinion. The reason was that the Court was not really giving its opinion to the parties to a potential dispute but to the requesting organ.

28. Another argument often advanced was the political nature of the dispute. That argument was not relevant to the ICJ, which, as a judicial institution applying international law, did not make judgments on the basis of political criteria. That sometimes created tensions within the Court, but it had always adhered to the strictly judicial character of its functions.

29. Another factor that the ICJ had to consider when deciding whether to give an advisory opinion or not was the issue of the interest of the requesting organ and of other concerned organs of the United Nations system. Since the Court was an integral part of the United Nations system, it was under the obligation to cooperate with the system as a whole in applying Chapter VI of the Charter of the United Nations (Pacific Settlement of Disputes). If the requesting organ was convinced that it needed the Court's opinion, the Court was obliged to take account of that. The ICJ could find itself in a delicate situation when the interests of several organs of the system were involved. In the Court's advisory opinion on the question of *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, requested by the General Assembly, the Court had expressly indicated that the General Assembly was competent to discuss certain issues which were before the Security Council. The General Assembly was therefore empowered to request an advisory opinion on the situation in Kosovo. Consequently, the ICJ had jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

30. The fact that the Court had jurisdiction did not mean, however, that it was obliged to exercise it, because it had the discretionary power to decline to give its opinion, as had been noted previously. The Court had to consider such delicate issues as the separation of powers within the United Nations. Article 12 of the Charter of the United Nations set clear limits on the powers of the General Assembly in relation to those of the Security Council. In that particular case, the ICJ had found that it was competent to interpret Security Council resolution 1244 (1999) at the request of the General Assembly, and the Security Council had raised no objection. One of the judges who had appended a dissenting opinion to the advisory opinion in question had written that it was important to evaluate

whether the requesting organ has or claims to have a sufficient interest in the subject matter of the request.

In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to cooperate does not exist and what is sometimes referred to as its duty to answer disappears. (separate opinion of Judge Keith, paras. 15–16)

Hence, although the Court had always responded favourably to a request for an advisory opinion, such requests often placed the Court in a difficult situation.

31. Turning to the second issue that he wished to raise in a personal capacity, namely applications for permission to intervene submitted by States, Judge Owada said that, in many cases, the Court had declined to grant such applications. The main reason was that it was often difficult to establish that, in the dispute in question, the requesting State had an interest of a legal nature, as required under Article 62 of the Statute of the International Court of Justice. In recent years, the ICJ had received the most applications for permission to intervene in the context of maritime delimitation cases. It had declined to grant applications on two grounds. The first was that, in accordance with Article 59 of the Statute of the International Court of Justice, the decision of the Court had no binding force except between the parties, so that, consequently, the third State that had submitted the application would not be bound by the decision of the Court. That was a formal reason. The second reason was more substantive. The Court could consider that the relevant legal interest of a third State was not likely to be affected by a future decision.

32. The possibility for a State that was not party to the dispute to intervene originated in the Conventions I of 1899 and 1907 for the Pacific Settlement of International Disputes. At that time, although the arbitral award was only binding for the parties who had concluded the "Compromis", when the issue related to the interpretation of a convention in which Powers other than the parties to the dispute had participated, each of those Powers was entitled to intervene in the case. Subsequently, the right to intervene had been extended to any third State that could establish that it had an interest of a legal nature in the case and that this interest might be affected by the Court's decision. One of the arguments put forward was that many countries had adopted an intervention procedure. That was true, but it was important to bear in mind that, in most cases, applications to intervene submitted to domestic courts were filed by parties to the dispute. For several years, the ICJ had chosen to interpret Article 62 of the Statute of the International Court of Justice as neutral with regard to whether the State applying for permission to intervene should be a party to the dispute in question. Nevertheless, the situation remained ambiguous and further reflection on the issue was needed.

33. The third point deserving of attention related to provisional measures that the ICJ could order under Article 41 of the Statute of the International Court of Justice. When addressing the International Law Commission, one of his predecessors had referred to the problem of the excessive use of provisional measures as a way of obtaining a *de facto* judgment on the merits before reaching the merits phase itself. It was a danger the Court definitely had to guard against. At the preliminary stage of the request for interim measures of protection, it was very difficult for the ICJ to decide whether it had jurisdiction, whether there was a dispute, whether there were rights to be preserved and what their substance might be. In fact, the Court had to make a *prima facie* determination without going into the merits of the case. The Court faced the

same difficulties in the context of preliminary objections, but it could, under article 79 of its Rules, decide to defer its decision until the merits phase. The same was not true in the case of a request for indication of provisional measures, where there might be an element of urgency.

34. The CHAIRPERSON thanked the President of the International Court of Justice for sharing his insights and observations, which would undoubtedly provide members of the Commission with food for thought.

The meeting rose at 12.40 p.m.

3101st MEETING

Friday, 8 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)

[Agenda item 13]

STATEMENT BY THE CHAIRPERSON OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

1. The CHAIRPERSON welcomed the representatives of the Council of Europe: Ms. Belliard, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), and invited them to address the Commission.

2. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) explained that CAHDI had been set up originally as a subcommittee of the European Committee on Legal Cooperation. In 1991, it had become a full committee, reporting directly to the Committee of Ministers of the Council of Europe. CAHDI was responsible for holding exchanges of views on questions of public international law, including the most topical issues. It might be asked to coordinate member States' positions on various topics of international law; on several occasions, the Committee of Ministers and the Steering Committee for Human Rights had requested it to provide legal opinions.

3. The membership of CAHDI was unique in that it brought together the legal advisers to the Ministries of Foreign Affairs of 55 States as well as the representatives of several intergovernmental organizations. A number of observer States and organizations also participated very

actively in its work, although they had no voting rights. That diversity greatly enriched its deliberations.

4. CAHDI was more than a coordinating body: it was also a discussion forum. The senior positions occupied by its members and their high level of commitment to the Committee's work lent undeniable credibility to its reports, opinions, comments and recommendations.

5. By convening twice a year, CAHDI was able to keep up to date on the subjects regularly on its agenda. That was particularly true of reservations and interpretative declarations concerning international treaties. Since States had only 12 months in which to react or to make representations to a reserving State after being notified of the latter's ratification of a given treaty, the Committee had to be capable of responding quickly.

6. The CAHDI agenda covered a wide range of subjects, and its meetings provided an opportunity for all the participants to exchange information on current developments and national practices. Based on those exchanges, CAHDI had created databases on such subjects as the organization and functions of the Office of the Legal Adviser in the Ministry for Foreign Affairs; State practice regarding State immunities; and national implementation of United Nations sanctions and respect for human rights.

7. At the 41st meeting of CAHDI—the first she had chaired—held in Strasbourg on 17 and 18 March 2011, a discussion of the immunity of States and international organizations had been particularly instructive. Mr. Joël Sollier, representing the International Criminal Police Organization (INTERPOL), had highlighted the importance of opening up channels of police and judicial cooperation that concurred not only with the neutrality of INTERPOL but also with general principles of international law governing immunity. He had explained that INTERPOL practice in that regard rested primarily on the precedent established by the ICJ in its judgment in the *Arrest Warrant* case, although the scope of that precedent was still unclear. At its 41st meeting, the Committee had also taken note of the rather disappointing level of accession to the United Nations Convention on Jurisdictional Immunities of States and Their Property and had emphasized how vital it was for more States to ratify the Convention.

8. As an advisory body, CAHDI was frequently called on by the Committee of Ministers of the Council of Europe to give an opinion on certain matters. At its 41st meeting, in response to a Committee of Ministers decision of 2 March 2011, CAHDI had held an exchange of views on the draft Council of Europe Convention on preventing and combating violence against women and domestic violence and had examined the compatibility of several of the draft Convention's articles with international law, including human rights law. After a very lively discussion, delegations had agreed that, in view of the Convention's importance, it should be adopted without delay, although some of its wording required clarification.²⁶⁰ CAHDI had recommended, and achieved, the amendment of the title—no small matter—and the clarification of certain

²⁶⁰ CAHDI, Meeting report, 41st meeting, Strasbourg, 17–18 March 2011 [CAHDI (2011) 5], Appendix X.

articles. At the end of the discussion, CAHDI had adopted a text that could be regarded as an opinion. The Committee of Ministers had adopted the Council of Europe Convention on preventing and combating violence against women and domestic violence on 7 April 2011 and it had been opened for signature on 11 May 2011.

9. CAHDI was addressed by several outside speakers at each of its meetings. At its 41st meeting, some extremely interesting presentations dealing with highly topical issues had been given, sparking lively and instructive exchanges of views.

10. Ms. Kimberly Prost, Ombudsperson²⁶¹ of the Security Council Committee established pursuant to resolution 1267 (1999) of 15 October 1999, had detailed the many challenges she faced, including the need to publicize the newly created Office of the Ombudsperson so as to facilitate access to it by persons on the Security Council's Consolidated Sanctions List and to cope with a lack of resources and problems with access to information. Mr. Jean-Claude Bonichot, the French judge at the Court of Justice of the European Union, speaking in his personal capacity, had addressed the problems posed by the accession of the European Convention on Human Rights. Mr. Erik Wennerström, CAHDI observer to the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights, had reported on progress in the Group's work. Mr. Hans van Loon, Secretary-General of The Hague Conference on Private International Law, had drawn attention to the difficulty of reconciling certain recent decisions of the European Court of Human Rights not to grant applications for the return of children to their country of residence with the provisions of the 1980 Convention on the Civil Aspects of International Child Abduction.

11. The work of the International Law Commission was regularly on the agenda of CAHDI and was usually discussed at length. The Council of Europe's comments and observations on the Commission's draft articles on the responsibility of international organizations had recently been forwarded to the Office of the Under-Secretary-General for Legal Affairs. With regard to the topic of reservations to treaties, CAHDI members were invited at its meetings to examine reservations and declarations made to international treaties concluded under the auspices of the Council of Europe and elsewhere and to announce their intentions with regard to objections. CAHDI had thus become one of the key players in the reservations dialogue.

12. At the March 2011 meeting of CAHDI, States had expressed their concerns and outlined the representations they had made with regard to the reservations by Pakistan to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The partial withdrawal by Malaysia and Thailand of their reservations to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the rights of the child had led to a discussion by CAHDI members of the legal consequences of partial withdrawal.

They had agreed that objections to the original version of a reservation were maintained if they related to an aspect of the reservation not covered by the withdrawal, but that objections formulated for the first time at the time of the partial withdrawal had no effect. Those conclusions were fully in line with the Commission's findings on the topic, as contained in the Guide to Practice. CAHDI looked forward to the outcome of the second reading of the guidelines and of the draft articles on the responsibility of international organizations. It would also follow with great interest the Commission's consideration of the topic of immunity of State officials from foreign criminal jurisdiction, since that was naturally of importance to the legal advisers to the Ministries of Foreign Affairs that made up its membership.

13. In conclusion, she said that the members of CAHDI were committed to furthering the role of public international law and respect for the rule of law in international relations.

STATEMENT BY THE DIRECTOR OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW, COUNCIL OF EUROPE; JURISCONSULT

14. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult), describing developments in the legal field at the Council of Europe in the past year, said that Turkey had held the rotating Chairpersonship of the Committee of Ministers from November 2010 to May 2011. During that period, priority had been given to reform of the Council of Europe, reform of the European Court of Human Rights, strengthening the supervisory machinery set up by the European Convention on Human Rights and accession of the European Union to the Convention.

15. In a major innovation in the Committee's *modus operandi* prompted by a concern for continuity, Ukraine, which had taken over the Chairpersonship from Turkey, was working in consultation with the United Kingdom and Albania, the States that would next chair the Committee, to promote the reform of the Council of Europe, something that was high on the agenda of its Secretary General.

16. On 20 January 2010, the Secretary General had presented to the Committee of Ministers a series of measures designed to revitalize the Council by streamlining its work. One measure to which priority was being given was a review of the Council of Europe's conventions with a view to: creating a common legal platform in the areas of human rights, the rule of law and democracy; identifying any conventions that had become obsolete or that needed to be updated; and developing measures to facilitate the European Union's accession to existing and future conventions of the Council of Europe. The Secretary General's preliminary report on the review would be submitted to CAHDI in September 2011.

17. Since he had last addressed the Commission, two new Council of Europe conventions had been opened for signature. The Third Additional Protocol to the European Convention on Extradition, aimed at simplifying and accelerating the extradition procedure when the person concerned consented to extradition, had been opened for signature in November 2010. So far, 11 States had signed and 1 State had ratified the Protocol, which

²⁶¹ The Office of the Ombudsperson was established by Security Council resolution 1904 (2009), of 17 December 2009, and Ms. Prost was appointed by the Secretary-General on 3 June 2010 (S/2010/282).

required three ratifications in order to enter into force. On 11 May 2011, the Council of Europe Convention on preventing and combating violence against women and domestic violence had been opened for signature. It was a landmark instrument at the European level in that it was the first legally binding text that offered a comprehensive framework for preventing such violence, ending the immunity of its perpetrators and protecting victims. It defined various forms of violence against women, including forced marriage, female genital mutilation, harassment and physical and psychological violence, and it established a monitoring mechanism to ensure effective implementation by States parties. So far it had been signed by 13 member States of the Council of Europe.

18. On 8 December 2010, the Committee of Ministers had adopted the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health. It was the first binding international instrument to criminalize the counterfeiting, manufacture and supply of medical products without authorization or in breach of medical safety requirements. It introduced sanctions and outlined measures to protect victims and to improve coordination at the national and international levels and would probably be opened for signature in October 2011.

19. Turning to relations between the Council of Europe and the European Union, he said that the accession of the European Union to the European Convention on Human Rights was a key priority. At its meeting in June 2011, the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights had made considerable progress towards the finalization of a revised draft accession agreement. The Group had also held a second round of consultations with representatives of civil society on the European Union's accession to all the additional protocols to the Convention, third-party interventions and the apportionment of responsibility.

20. One of the high-level meetings and conferences organized recently was the 30th Council of Europe Conference of Ministers of Justice, held in November 2010 in Istanbul, Turkey, and focusing on the need for modern, transparent and efficient justice, prison policy in today's Europe and data protection and privacy in the third millennium. The Turkish Chairpersonship of the Committee of Ministers had organized a High-Level Conference on the Future of the European Court of Human Rights in Izmir, Turkey, in April 2011. It had built on the progress achieved at the conference on the same subject held in Interlaken, Switzerland, in 2010 and had paved the way for crucial decisions on the Court's work and role in the long term.

21. The Council of Europe attached great importance to cooperation with the International Law Commission. Like the Commission, the Council was working to solve the legal problems facing contemporary society. Those efforts were consistently informed by the attachment to democracy, human rights and the rule of law shared by the members of the Council of Europe.

22. Mr. PELLET said he would be interested to know whether members of CAHDI discussed the Commission's work with a view to developing a coordinated or common

Council of Europe position. He asked how the work of CAHDI related to that of COJUR, since there seemed to be a certain amount of duplication between the two bodies. What expectations did members of CAHDI have of the Guide to Practice on Reservations to Treaties—to what extent were they likely to regard it as authoritative? Lastly, he would like to know when the European Union could be expected to become a party to the European Convention on Human Rights.

23. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that members of CAHDI usually discussed the Commission's work at their September meetings. Those discussions enabled members to develop a shared understanding of certain concerns and to agree on certain points, but their aim was not to develop common positions. In her opinion, there was no duplication of work between CAHDI and COJUR. There was some overlap between the issues discussed, but it provided different perspectives that shed new light on topics. With its broad membership, CAHDI was a valuable forum in that regard. As to the Guide to Practice, CAHDI members were awaiting the final version, which would perhaps confirm the opinions of some and cause others to reconsider their positions.

24. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that it was difficult to predict exactly when the European Union would become a party to the European Convention on Human Rights, since the accession process was lengthy and complex. Work was currently moving forward within the framework of the Informal Working Group established to negotiate an accession agreement. Once an agreement had been concluded, it would require ratification by the individual member States of the European Union. The ratification process would take place in accordance with the constitutional requirements of those States.

25. Mr. HASSOUNA asked whether the topical issue of the movement of persons across borders, including the question of expulsion of aliens, had been discussed within CAHDI.

26. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said the issue as such was not currently on the agenda of CAHDI. Nonetheless, certain aspects of the question could be addressed under an item devoted to cases before the European Court of Human Rights involving issues of public international law. Those discussions provided a valuable opportunity for States to share information and exchange views on such cases.

27. Mr. NOLTE asked for further details concerning the cases of partial withdrawal of reservations mentioned earlier, and, in particular, how States that considered a reservation to be contrary to the object and purpose of a treaty viewed its partial withdrawal.

28. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that some States had wondered whether they should renew their objection to a reservation that had been partially withdrawn, but had decided that it was not necessary as

long as the objection continued to apply to that part of the reservation which had not been withdrawn. There was general agreement that an objection could not be made at the time a reservation was partially withdrawn if one had not been formulated at the time the reservation had been originally made.

29. Ms. ESCOBAR HERNÁNDEZ said that Spain had considered that issue in connection with the partial withdrawal of the reservation made by Malaysia to the Convention on the Elimination of All Forms of Discrimination against Women. Spain had concluded that the reservation had been formulated at the proper time and was still valid, since its partial withdrawal had introduced no new elements.

30. Mr. NOLTE asked whether it was legal or political criteria that were used to determine whether a convention was obsolete.

31. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that currently only technical criteria were applied in reviewing the relevance of conventions. Among the conventions concerned by such review were those that had not entered into force 20 years after being opened for signature, those that were no longer being implemented and those that had been superseded by more recent conventions. However, it was up to member States or the Committee of Ministers to decide on follow-up measures in that regard.

32. Sir Michael WOOD raised the question of what practical steps CAHDI could take to encourage States, for example France and the United Kingdom, to speed up the process of ratifying the United Nations Convention on Jurisdictional Immunities of States and Their Property, and what the prospects were that more States would become parties to the Convention in the near future. The Council of Europe was renowned for its human rights work, but more should perhaps be done to publicize the important work it did in public international law through CAHDI and other bodies. The very valuable database on the organization and functions of the office of legal advisers to Ministries of Foreign Affairs deserved to be consulted more widely outside the Council of Europe. CAHDI might take steps to make its excellent website more accessible and develop promotional materials on the various activities undertaken by the Council of Europe in the field of public international law.

33. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), responding to the question on the United Nations Convention on Jurisdictional Immunities of States and Their Property, said that CAHDI had noted that the ratification process was slow but that there was no cause for pessimism as to its eventual outcome. It was her understanding that the French Parliament had recently authorized ratification of the Convention and that the instrument of ratification had been deposited. She encouraged the United Kingdom to take steps to have its Parliament do the same.

34. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that some actions had already been undertaken to publicize the Council of Europe's work in the field of

public international law. However, he agreed that further efforts could be made, and he took note of the suggestion regarding the production of information materials.

35. Mr. VÁZQUEZ-BERMÚDEZ asked what steps were being taken to promote the accession of non-member States to the Council of Europe's conventions, and which conventions might be considered of particular interest in that regard. He would also like to know which of the issues currently under consideration by the Council were likely to form the basis of future conventions.

36. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that the procedure for accession of non-member States to Council of Europe conventions had evolved significantly over the years. Initially, treaties were opened for signature by member States only, but it had now become possible for non-member States to be invited to become parties to some conventions. Additional recent developments included the opportunity for non-member States to participate in the negotiation of certain treaties and to sign conventions before they entered into force without the need for an invitation to do so. If a non-member State expressed a wish to become a party to a convention, an informal consultation process could be initiated in order to identify any potential obstacles. Those developments had contributed to an increase in the number of treaties to which non-member States had become parties. Future conventions were likely to include treaties on the trafficking of human organs and on the accession of the European Union to the European Convention on Human Rights.

37. Mr. PETRIČ said that the decision of the European Union to accede to the European Convention on Human Rights was a fundamentally sound one, but that the difficulties entailed had been underestimated. He asked what general ideas had been expressed at the High-Level Conference on the Future of the European Court of Human Rights organized by the Committee of Ministers.

38. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that the accession of the European Union to the European Convention on Human Rights was an idea that dated back to the late 1970s and was actually a requirement under article 6 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The Council of Europe and the European Union were currently engaged in complying with that requirement. A number of adaptations had proved necessary, primarily for two reasons. The first was that, until Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which envisaged the European Union's accession, had entered into force, the Convention had been a closed treaty aimed at member States only. Although it had a privileged status, the European Union was not a member State of the Council of Europe. The second reason was that the Convention was intended for States, and the European Union was not a State. Those problems were in the process of being solved by establishing mechanisms for cases that raised issues under both European Union law and the European Convention on Human Rights, to enable the Court of

Justice of the European Union to provide its opinion on an issue pending before the European Court of Human Rights and to ensure the participation of the European Union in the Committee of Ministers.

39. The two High-Level Conferences on the Future of the European Court of Human Rights had been premised on the view held by most Council of Europe member States that the provisions introduced by Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which had entered into force only on 1 June 2010, were necessary but not sufficient, and that it was crucial to explore additional ways of addressing the problems faced by the Court. The High-Level Conferences were steps in a longer process being carried out by the Council of Europe and its intergovernmental bodies. In order to afford the members of the Commission greater insight into the status of issues remaining to be resolved, he would transmit to it the conclusions of the two Conferences.

40. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that it had been known from the start of negotiations on the European Union's accession to the European Convention on Human Rights that practical and technical problems would arise, but also that every effort would be made to overcome them. What was important was to ensure that accession was accomplished under the best possible conditions and without impairing either the mechanism of the European Convention on Human Rights or the legal system of the European Union. Despite the difficulty of those adaptations, progress had already been made and would continue to be made.

41. As the Chairperson of CAHDI, she was regularly kept informed of developments regarding the future of the European Court of Human Rights. She had recently received a request for an opinion on the introduction of a simplified amendment procedure for provisions relating to organizational matters of the Court, aimed at ensuring greater flexibility. The Court currently had a workload of some 140,000 cases and the number was growing by some 20,000 cases a year. That had led to the proposal of such solutions as case screening, heightening awareness of the Court's decisions, promoting procedures for the amicable settlement of disputes and, ultimately, ensuring that the Court was regarded by petitioners as a supreme court. There was no doubt that the Court faced a number of challenging problems, and CAHDI was likely to be involved in addressing many of them.

42. Mr. MURASE said that he was gratified to hear that CAHDI had held a discussion on the United Nations Convention on Jurisdictional Immunities of States and Their Property. Eleven States had ratified the Convention thus far and 19 more ratifications were needed in order for it to enter into force. He hoped that CAHDI would promote the ratification process among member States of the Council of Europe.

43. At the sixty-sixth session of the General Assembly, the Sixth Committee was scheduled to discuss the form to be given to the draft articles on the law of transboundary aquifers. In his view, they should be adopted as a framework convention, and, to that end, at its sixty-sixth

session, the General Assembly should adopt them as a declaration, thereby recognizing the legal principles they contained. Perhaps members of CAHDI could hold a discussion on the draft articles.

44. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that CAHDI usually had an in-depth discussion of questions relating to the International Law Commission at its autumn meetings. If member States agreed, an exchange of views could be organized on topics likely to be taken up at the sixty-sixth session of the General Assembly.

45. Mr. CANDIOTI asked whether any opinions had been expressed in CAHDI or the Council of Europe on new topics that the International Law Commission could include in its long-term programme of work. If not, it would be useful for CAHDI to consider formulating suggestions in that regard.

46. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that CAHDI could address Mr. Candiotti's request during the exchange of views to be held at its September 2011 meeting. It could also place the United Nations Convention on Jurisdictional Immunities of States and Their Property on the agenda of that meeting. She wondered, however, whether the International Law Commission really needed new topics or whether its workload was already sufficiently full.

47. Mr. CANDIOTI said that the Commission was in the process of concluding work on three separate topics and needed to incorporate new ones in its long-term programme of work. It would therefore welcome any suggestions for new topics.

48. Ms. ESCOBAR HERNÁNDEZ said that cooperation with CAHDI and the Council of Europe could be taken as a model in the context of the Commission's methods of work, particularly in terms of creating synergies with other international organizations dedicated to strengthening the rule of law at the international level.

Draft report of the International Law Commission on the work of its sixty-third session

CHAPTER IV. Reservations to treaties (A/CN.4/L.783 and Add.1-8)

49. The CHAIRPERSON invited the Commission to begin its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.783/Add.3.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY

(b) *Text of the guidelines and the commentaries thereto*

1. *Definitions (A/CN.4/L.783/Add.3)*

1.1 *Definition of reservations*

Guideline 1.1 was adopted.

Commentary

Paragraph (1)

50. Mr. PELLET (Special Rapporteur) proposed that, in the French text, the word “*précise*” should be replaced with “*reflète*”, with the other language versions to be modified accordingly.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

Paragraph (7)

51. Sir Michael WOOD proposed that the final phrase, “in addition, this would excessively complicate the task of the depositary”, be deleted, as it referred to a very minor consideration.

52. Mr. PELLET (Special Rapporteur) said that he agreed, but reluctantly, to the proposal.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

53. Mr. PELLET (Special Rapporteur), drawing attention to the last footnote to the paragraph, suggested that, since an English translation of the work cited therein had been published in 2011, the English, not the French title of the work, be cited throughout in the English text.

Paragraph (10), with that drafting amendment to the English text, was adopted.

Paragraph (11)

54. In response to remarks by Sir Michael WOOD and Mr. PELLET (Special Rapporteur), the CHAIRPERSON said that the secretariat would ensure consistency in the way authors’ names were cited throughout the Guide to Practice.

Paragraph (11) was adopted.

Paragraph (12)

55. Mr. PELLET (Special Rapporteur) suggested deleting the phrase “As one member of the Commission pointed out” [*Comme l’a fait remarquer un membre de la Commission*] and amending the beginning of the second sentence to read: “It is, indeed, improbable that” [*Il est, à vrai dire, peu vraisemblable que*].

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

Paragraph (15)

56. Mr. NOLTE proposed the deletion of the final sentence, which was somewhat confusing and seemed superfluous.

Paragraph (15), as amended, was adopted.

Paragraphs (16) and (17)

Paragraphs (16) and (17) were adopted.

Paragraph (18)

57. Mr. PELLET (Special Rapporteur) pointed out that the references to *Multilateral Treaties ...*, contained in several footnotes, needed to be standardized throughout the Guide to Practice. It would also be useful if footnote references were updated to reflect the latest edition of the texts cited.

Paragraph (18) was adopted.

Paragraph (19)

58. Mr. PELLET (Special Rapporteur) suggested that the words “*soient entachées d’illicéité*” (“are tainted by impermissibility”) be amended to read “*ne soient pas valides*” (“are impermissible”). Changes to the French text alone included the replacement of the words “*cette illicéité*” with “*cette non-validité*”; of “*une réserve illicite*” with “*une réserve non-valide*”; and of “*déclarée illicite*” with “*déclarée non-valide*”.

Paragraph (19), as amended, was adopted.

Paragraphs (20) and (21)

Paragraphs (20) and (21) were adopted.

Paragraph (22)

59. Sir Michael WOOD proposed that the phrase “with regard to the expected effect of reservations” be deleted as its meaning was obscure.

60. Mr. PELLET (Special Rapporteur) said he could go along with that proposal.

Paragraph (22), as amended, was adopted.

Paragraph (23)

Paragraph (23) was adopted.

Paragraph (24)

61. Mr. NOLTE proposed that the word “treaty”, between the words “author of the” and “which lies”, be replaced with “reservation”, to bring it into line with the French text.

62. Sir Michael WOOD proposed, in addition, that the word “draft”, preceding “guidelines”, be deleted.

Paragraph (24) was adopted with those drafting amendments.

Paragraph (25)

63. Mr. PELLET (Special Rapporteur) suggested that the phrase “Some members of the Commission” [*Certains membres de la Commission ont*] be replaced by “It was” [*On a*].

Paragraph (25), as amended, was adopted.

Paragraphs (26) and (27)

Paragraphs (26) and (27) were adopted.

Paragraph (28)

64. Mr. NOLTE proposed that paragraph (28) be deleted because it was a general statement that applied to the Guide to Practice as a whole, not just to the definition of reservations in guideline 1.1.

65. Mr. PELLET (Special Rapporteur) said that he was against deleting the paragraph because it explained the difficulties involved in making a distinction between reservations and other unilateral statements and indicated that some degree of uncertainty would inevitably remain in that regard.

Paragraph (28) was adopted.

The commentary to guideline 1.1 as a whole, as amended, was adopted.

1.1.1 *Statements purporting to limit the obligations of their author*

Guideline 1.1.1 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

66. Mr. NOLTE proposed that the expression “the partners of the author of the reservation” should be replaced with “other contracting States or organizations”.

67. Mr. PELLET (Special Rapporteur) said that he could accept Mr. Nolte’s proposal.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

68. Mr. NOLTE pointed out the need to check whether reservations attributed to “Germany”, such as in the last footnote to the paragraph, had in fact been made by the former German Democratic Republic or the Federal Republic of Germany. He queried the phrase “widens its rights (and not its obligations)”, which was misleading and imprecise, and suggested that both instances of its use in paragraph (9) be deleted.

69. Sir Michael WOOD said that he, too, had had difficulty understanding the phrase “widens its rights (and not its obligations)”, which appeared twice in

paragraph (9). In the example relating to the immunity of State vessels, that phrase was incorrect, because the reserving State did in fact widen its obligations: it acquired an additional obligation of recognizing the immunity of all the ships of the other parties to the treaty.

70. Mr. PELLET (Special Rapporteur) said that the first use of the phrase was in a direct quote from a work by Renata Szafarz, which must remain unchanged. Paragraph (9) had to be read together with the explanation in paragraph (6) concerning two types of statements included under the general heading of “extensive reservations”.

71. Sir Michael WOOD said that the second type of statement listed in paragraph (6) referred to statements designed to impose on the parties new obligations not provided for by a treaty. If a State did that, then it also imposed new obligations on itself, because treaties were reciprocal. Therefore, in his view, Ms. Szafarz’s argument was wrong. Nonetheless, the Commission should not tamper with the quotations from her work. However, the phrase “because the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners” should be amended to read “because the reserving State widens its rights, increasing by the same token the obligations of its partners”. There, the Commission was expressing its own view and merely paraphrasing, not quoting, Ms. Szafarz.

It was so decided.

72. Mr. CANDIOTI proposed that, in the first sentence, the expression “socialist countries” should be replaced with “Eastern European countries”, a more neutral phrase reflecting contemporary usage.

73. Mr. NOLTE said he had always interpreted the expression “socialist countries” as being broader than “Eastern European countries”, encompassing Cuba for example, and he would prefer to retain it.

74. Mr. MELESCANU said that he supported the proposal made by Mr. Candiotti, although he would like it to be slightly modified to read “the countries of Eastern and Central Europe”.

75. Mr. GALICKI said that he was in favour of maintaining the phrase “socialist countries” because it referred not only to a group of countries but also to the period in history during which the reservation in question had been made and to the political and economic attitude of its authors towards vessel ownership.

76. Mr. SABOIA said that he failed to understand the relevance of citing a specific political regime. Nowhere else was reference made to the political reasons underlying an author’s reservation or objection. He proposed replacing “socialist countries” with “several other countries”, thus eliminating any reference to political ideology or geographical location.

77. Mr. NOLTE said he could accept Mr. Saboia’s proposal if it was not taken as a general rule. Collective reservations or positions had historically been taken by a group of countries that could not be reduced to Eastern

Europe; moreover, the Commission should not purge references to the socialist past from its terminology.

78. Mr. PELLET (Special Rapporteur) said that he was not in favour of establishing a general rule whereby the political systems of countries could not be mentioned. In general, that aspect could be germane, and in the specific example relating to the immunity of State vessels, it was particularly revealing to see that the States that had entered what qualified as an “extensive reservation” were socialist States.

79. The CHAIRPERSON, speaking as a member of the Commission, said that the reference to “socialist” States was indeed historically important, given that they usually took positions as a bloc. The manner in which a State’s ideological choices determined its behaviour was not irrelevant.

80. Mr. McRAE said that, if it was true that socialist countries typically made extensive reservations, then it would indeed be appropriate to retain the word “socialist”.

Paragraph (9), as amended by Sir Michael Wood, was adopted.

The meeting rose at 1.05 p.m.

3102nd MEETING

Monday, 11 July 2011, at 3 p.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caflich, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters²⁶² (A/CN.4/638, sect. D, A/CN.4/643,²⁶³ A/CN.4/L.794²⁶⁴)

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the members of the Commission to begin their consideration of the topic

²⁶² At its sixty-second session (2010), the Commission adopted draft articles 1 to 5 and the commentaries thereto (*Yearbook ... 2010*, vol. II (Part Two), pp. 185–190, paras. 330–331) and took note of draft articles 6 to 9 provisionally adopted by the Drafting Committee (*ibid.*, p. 180, para. 297).

²⁶³ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

²⁶⁴ Mimeographed; available from the Commission’s website, documents of the sixty-third session.

of the protection of persons in the event of disasters. She reminded them that, before listening to the Special Rapporteur’s introduction of his fourth report on the topic, they needed to revisit draft articles 6 to 9, on which the Drafting Committee had completed work in 2010 and of which the Commission had taken note at its 3067th meeting, on 20 July 2010. She drew the Commission’s attention to the draft articles, contained in document A/CN.4/L.776,²⁶⁵ and invited members to adopt them one by one.

Article 6. *Humanitarian principles in disaster response*

Article 6 was adopted.

Article 7. *Human dignity*

Article 7 was adopted.

Article 8. *Human rights*

2. Mr. PELLET, supported by Mr. CAFLISCH, said that the use in the French text of the word “*touché*” to mean “affected” seemed inappropriate. He preferred to see the English term translated as “*affecté(e)*” when it was used to refer to both persons and States.

3. Mr. NOLTE said that the term occurred quite often and that the change should be made throughout the text.

4. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he intended, in due course, to propose a provision on the definitions and expressions used, and that the phrase rendered in English as “affected State” would be included there. The change proposed by Mr. Pellet, which he himself supported, could then be made throughout the text.

It was so decided.

Article 8 was adopted, subject to that editorial correction to the French text.

Article 9. *Role of the affected State*

Article 9 was adopted, subject to an editorial correction to the French text.

5. The CHAIRPERSON said she took it that the Commission wished to adopt the report of the Drafting Committee on the protection of persons in the event of disasters, the complete text of which was contained in document A/CN.4/L.776.

It was so decided.

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

6. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the protection of persons in the event of disasters (A/CN.4/643).

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, as Secretary-General Ban Ki-moon had noted when he had opened the third session of the Global Platform for

²⁶⁵ Mimeographed; available from the Commission’s website, documents of the sixty-second session.

Disaster Risk Reduction in May 2011, in Geneva, no city or country was immune from disasters.²⁶⁶ They indiscriminately struck the most developed and best prepared countries as well as the poorest and most vulnerable ones. In 2010, the Centre for Research on the Epidemiology of Disasters of the Catholic University of Louvain had estimated that some 373 natural disasters worldwide had caused nearly 296,800 deaths, affected close to 208 million people and cost nearly US\$ 110 billion.²⁶⁷

8. The proliferation and escalation of natural disasters had prompted States, intergovernmental and non-governmental organizations and scholars to analyse the various aspects of the issue and look for appropriate responses. The General Assembly, at its sixty-fifth session, had adopted no less than a dozen resolutions on disasters, including resolution 65/264 of 28 January 2011, entitled “International cooperation on humanitarian assistance in the field of natural disasters, from relief to development”. In those resolutions, some provisions recurred regularly. Others, more topical, had been adopted for the first time, such as those in resolution 65/135 of 15 December 2010, entitled “Humanitarian assistance, emergency relief, rehabilitation, recovery and reconstruction in response to the humanitarian emergency in Haiti, including the devastating effects of the earthquake”. On 6 April 2011, the Security Council had adopted a statement by its President, entitled “The question concerning Haiti”.²⁶⁸ In that statement, the Council had noted that the recovery of Haiti was a long-term challenge and had called on the international community to continue to support the Haitian authorities to ensure that the most vulnerable population groups had access to basic social services and to justice. It had also hailed the efforts of donors and called on them to honour all their financial commitments without delay. It had stressed the links between recovery efforts, national security, the rule of law and the credibility of democratic institutions. It had stated that security and development were closely linked and interdependent and had reiterated the need for security to be accompanied by economic and social development. In the Council’s view, rapid and tangible progress in the recovery and reconstruction of Haiti was fundamental to achieving lasting stability.

9. With the quinquennium drawing to a close, the time was ripe to take stock, however briefly, of the Commission’s work on the subject. In the four years since he had been appointed Special Rapporteur, he had submitted four reports, one a year. The first, submitted in 2008, had been of a preliminary nature.²⁶⁹ In it he had given an overview of the relevant legal sources and of earlier attempts at codification and progressive development of the law pertaining to the subject. The report had also outlined the main legal issues to be examined. In his second report,²⁷⁰

submitted in 2009, he had analysed the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis* as well as issues related to the definition of the term “disaster” as it applied to the topic, and he had embarked on a study of the fundamental duty to cooperate. In 2010, in his third report,²⁷¹ he had examined the principles underlying the protection of persons in the event of disasters, including humanity, neutrality, impartiality and non-discrimination, as well as the question of the primary duty of the affected State to protect persons within its territory. On that subject, when introducing his third report in July 2010, he had said that he intended to propose in his fourth report one or several provisions detailing the scope and limits of the exercise by a State of its primary duty as the affected State.²⁷² He had kept that promise.

10. In his second and third reports, he had also made specific proposals for draft articles on the scope of the topic, the definition of the term “disaster” and the duty to cooperate, as well as on humanitarian principles in disaster response, human dignity and the primary responsibility of the affected State. Regarding the latter, he had proposed wording, contained in draft article 8, paragraph 2, affirming the principle of consent of the affected State. After having been examined in detail by the Commission in plenary,²⁷³ the provision had been sent to the Drafting Committee which, for lack of time, had not been able to consider it.

11. In his fourth report, he was proposing three new draft articles: on the duty of the affected State to seek assistance where its national response capacity was exceeded (art. 10); on its duty not to arbitrarily withhold its consent to external assistance (art. 11); and on the right of the international community to offer assistance (art. 12).

12. The broad concept of protection that he had proposed since his first report called for recognition of the tensions between protection and the principles of sovereignty and non-intervention (or non-interference). In all of his four reports, he had underlined the importance of those two fundamental principles and, by extension, of the consent of the affected State. The tensions, however, had been mirrored in the Commission’s discussions of the first three reports, and especially of the draft articles on the duty to cooperate (art. 5) and on the primary responsibility of the affected State (art. 9). Nevertheless, the divergences of view had been overcome and the draft articles proposed in the second and third reports had received the general approval, not only of Commission members, but also of representatives in the Sixth Committee. Thus, in just two years, the Commission had been able to adopt by consensus nine draft articles dealing with formidable issues of principle. Those nine draft articles, plus the three new provisions he was proposing in his fourth report—if they were adopted, as he hoped they would be—would serve to underpin the whole set of draft articles on the topic, with the remainder covering more operational aspects. The Commission would then be able to move forward swiftly in its work on a topic that had been included in its programme of work, at the request of the United Nations Secretariat, under the heading of “new

²⁶⁶ *Proceedings of the Third Session of the Global Platform for Disaster Risk Reduction and World Reconstruction Conference, Geneva, 8–13 May 2011*, p. 4 (available from www.preventionweb.net/globalplatform/2011/documents/GP2011-Proceedings.pdf (accessed 28 December 2016)).

²⁶⁷ See United Nations International Strategy for Disaster Reduction, Press release, 24 January 2011 (available from www.unisdr.org/files/17613_2011no3.pdf (accessed 28 December 2016)).

²⁶⁸ S/PRST/2011/7.

²⁶⁹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

²⁷⁰ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

²⁷¹ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

²⁷² *Ibid.*, vol. II (Part Two), pp. 184–185, para. 329.

²⁷³ *Ibid.*, pp. 183–184, paras. 316–324.

developments in international law and pressing concerns of the international community as a whole”.²⁷⁴

13. Turning to the three draft articles proposed in his fourth report, he recalled that after the adoption of draft article 9 (Role of the affected State), which articulated the duty of the affected State, by virtue of its sovereignty, to ensure the protection of persons and the provision of disaster relief and assistance on its territory, it was now necessary to consider the obligations of that State in situations when the magnitude or duration of a disaster exceeded its response capacity. To that end, it was necessary, first and foremost, to recall the core principles of State sovereignty and non-interference, implied in the requirement of consent of the affected State, as clearly set out in draft article 9, paragraph 2. The principles of sovereignty and non-interference and the requirement of the consent of the affected State were to be considered, not in isolation, but rather in the light of the responsibilities borne by States in exercising their sovereignty. Such obligations could be horizontal, in relation to other States, or vertical, in relation to the populations or persons residing on their territory and placed under their jurisdiction. The scope of those obligations and how they related to the basic principles of sovereignty and non-interference and to the requirement of the consent of the affected State were central to the fourth report, which sought solutions that struck a balance between those two imperatives.

14. Draft article 10 (Duty of the affected State to seek assistance), as it appeared in paragraph 45 of the Special Rapporteur’s fourth report, read:

“The affected State has the duty to seek assistance, as appropriate, from among third States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations if the disaster exceeds its national response capacity.”

Through that wording, the rights of the affected State were acknowledged and upheld in at least three regards. First, the obligation to seek assistance arose only when the State in question was not able to do what was required by the situation. It was a reaffirmation of the principle already enunciated in draft article 9 concerning the primary role of the affected State in the direction and supervision of disaster relief operations. As was stated in paragraph 49 of the fourth report, the Government of a State was in the best position to determine the severity of a disaster situation and the limits of its national response capacity. That position was in line with the “margin of appreciation” principle adopted by the European Court of Human Rights, which held that “national authorities enjoy a wide margin of appreciation under article 15 [of the European Convention on Human Rights] in assessing whether the life of their nation is threatened by a public emergency” (*A. and Others v. the United Kingdom*, para. 180).

15. Secondly, as was indicated by the phrase “as appropriate” and, in the English version, the word “among”, for which there was no equivalent in Spanish and French, the affected State had the freedom to seek assistance from any other entity which, in that State’s

view, could provide such assistance in the form that best suited the specific requirements of the situation and most fully respected the State’s sovereignty. A State was not obliged to seek assistance from all entities or even from all those that stood ready to provide it. Humanitarian assistance, as defined in paragraph 1 of the resolution on humanitarian assistance adopted by the Institute of International Law at its Bruges session in 2003, signified “all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfilment of the essential needs of the victims of disasters”.²⁷⁵ In draft article 10, the term “assistance” reflected the broad ambit of operational aspects of the provision of humanitarian protection and underscored the affected State’s right to decide on the scope and nature of the assistance that were best suited to the fulfilment of its responsibilities under international human rights law and customary international law.

16. Thirdly, referring to the affected State’s obligation to “seek” assistance rather than to an obligation to “request” assistance was a way of stressing the basic principle according to which an affected State was not obliged to accept all offers of assistance. The term “seek” appeared in article III, paragraph 3, of the 2003 Bruges resolution of the Institute of International Law, which read: “Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.” At the same time, draft article 10 restated the purpose of the draft articles under review as contained in draft article 2, namely, to meet the essential needs of those affected by the disaster, with full respect for their rights. It was also an expression of the duty to cooperate enunciated in draft article 5, as it assumed a link between the affected State and third parties, including other States and intergovernmental and non-governmental organizations.

17. Paragraph 36 of the fourth report indicated that the duty to cooperate was incumbent not only upon third States but also upon affected States. The instruments mentioned in paragraphs 36 to 39 of his report, on cooperation, suggested that the vertical exercise of sovereignty included, for the affected State, the obligation to seek assistance when its response capacity was exceeded. As the General Assembly had noted in the preamble to its resolution 45/100 of 14 December 1990, “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”. The centrality of the principle of human dignity had been strongly affirmed in draft article 7 as adopted by the Commission and was made apparent yet again in the duty to seek assistance.

18. Draft article 11 (Duty of the affected State not to arbitrarily withhold its consent), as contained in paragraph 77 of the Special Rapporteur’s report, affirmed that duty, logically enough, immediately following the reference to the duty to seek assistance contained in draft article 10. As had been stressed earlier, the provision

²⁷⁴ *Yearbook ... 2006*, vol. II (Part Two), p. 185, paras. 256–257, and p. 206, annex III.

²⁷⁵ Institute of International Law, *Yearbook*, vol. 70 (2003), Session of Bruges (2003), Part II, p. 265 (available from www.idi-ii.org).

represented a delicate balance between the requirements of protection and the principles of sovereignty and non-interference which underlay the need for the consent of the affected State.

19. General Assembly resolution 45/100, which had already been cited, alluded to cases where the position of disaster victims had been worsened due to a denial that the situation constituted a disaster or because the appropriate relief or offers thereof had not been consented to, or had been consented to belatedly. Assistance to persons affected by a disaster was indispensable, especially if the inability or unwillingness of the affected State to respond adequately and effectively jeopardized, or even violated, the rights and dignity of those affected. Even though, generally speaking, consent presupposed the possibility of refusing humanitarian assistance, restrictions on the right to refuse such assistance appeared in various legal regimes for protecting persons, such as international human rights law, the law concerning internally displaced persons and international humanitarian law—three domains analysed in paragraphs 59 to 66 of the fourth report. That analysis led to the conclusion, contained in paragraph 70 of the report, that in order to effectively discharge its obligation to provide protection and assistance, a State could not invoke its fundamental right of consent if that resulted in a lack or reduction of protection and assistance when external assistance was needed and available.

20. Whether a decision not to accept assistance was arbitrary depended on the circumstances and should be determined on a case-by-case basis. Practice in that regard was inconclusive and therefore of little value in distilling a general rule. Obviously, the lack of a clear need to provide assistance could be a reason for a refusal that was not arbitrary. Another reason a refusal might not be arbitrary was when certain criteria were not met—for example, if the humanitarian principles cited in draft article 6 were not respected.

21. Furthermore, a decision to reject humanitarian assistance implied an obligation of the affected State to furnish the assisting State with legitimate grounds for its decision. Finally, the affected State must not unjustifiably extend the time frame for deciding whether to accept an offer of humanitarian assistance. The first conclusion was most apparent in the context of international humanitarian law, where, according to the commentary to article 70 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), agreement may only be refused “for valid reasons, not for arbitrary or capricious ones”.²⁷⁶ Furthermore, the commentary to article 18 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), provided that “[t]he authorities ... cannot refuse such relief without good grounds”.²⁷⁷ Regarding the second conclusion, the commentary to article 70 of Protocol I stated that “[i]n concrete terms, the delay can only really be justified if it is impossible for reasons

of security to enter the territory where the receiving population is situated”.²⁷⁸ It was crucial to provide relief swiftly. The affected State’s decision with regard to outside assistance or offers of assistance needed to be communicated to all parties concerned as quickly as possible. That was why, in the preamble to its resolutions 43/131 of 8 December 1988 and 45/100 of 14 December 1990, the General Assembly had noted that “in providing humanitarian assistance ... rapid relief will avoid a tragic increase in the number of victims”. According to article 3, paragraph (e), of the 2000 Framework Convention on civil defence assistance, “offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time”.

22. Based on the preceding considerations, the two paragraphs contained in draft article 11 read:

“1. Consent to external assistance shall not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.

“2. When an offer of assistance is extended pursuant to draft article 12, paragraph 1, of the present draft articles, the affected State shall, without delay, notify all concerned of its decision regarding such an offer.”

23. Draft article 12, entitled “Right to offer assistance” and contained in paragraph 109 of the report of the Special Rapporteur, consisted of the following single paragraph:

“In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State.”

While draft articles 10 and 11 concerned the duties of the affected State, draft article 12 dealt with the right of State and non-State actors to offer assistance. It recognized the international community’s legitimate interest in protecting persons in the event of disasters, which had been identified as far back as 1758 by de Vattel,²⁷⁹ quoted in paragraph 14 of the preliminary report. Even if that interest needed to be viewed in the broader context of the primary responsibility of the affected State, the offer of assistance was an important expression of the solidarity, based on the principles of humanity, neutrality, impartiality and non-discrimination, evoked in draft article 6. The primary responsibility of the affected State and the interest of non-affected States and non-State actors in protecting persons in the event of disasters were complementary to the right of non-affected States to offer assistance. Such offers were the practical manifestation of solidarity and a logical corollary of the recognition that the protection of persons in the event of disasters was an inherently global matter, confirming the central role of the affected State as bearing the primary responsibility for the protection of its population. That dual nature of disaster response—as the primary responsibility of the affected State, on the one hand, and as an event of

²⁷⁶ International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht, Kluwer, 1987, p. 819, para. 2805.

²⁷⁷ *Ibid.*, p. 1479, para. 4885.

²⁷⁸ *Ibid.*, p. 826, para. 2846.

²⁷⁹ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III, book II, Washington, D.C., Carnegie Institution of Washington, 1916, chap. I, pp. 114–115.

interest for the international community as a whole, on the other—was highlighted in paragraph 13 (b) of the 2005–2015 Hyogo Framework for Action, which stated that “in the context of increasing global interdependence, concerted international cooperation and an enabling international environment are required to stimulate and contribute to developing the knowledge, capacities and motivation needed for disaster risk reduction at all levels”.²⁸⁰ Such a holistic approach had long been part of the evolution of international law, including international humanitarian law, as was noted in paragraphs 85 to 87 of the fourth report of the Special Rapporteur. Aside from the law of armed conflict, it had inspired more recent developments in international law, as evidenced by the treaties and other international instruments described in paragraphs 88 to 95 of the report. In that connection it was worth citing article IV, paragraph 1, of the 2003 Bruges resolution of the Institute of International Law: “States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character.”²⁸¹

24. The interest of the international community in protecting persons in the event of disasters could be effectively channelled through the timely intervention of international organizations and other humanitarian actors, with due respect for the principles cited in draft article 6 and the core principles of sovereignty and non-intervention manifested in the requirement of the consent of the affected State. Paragraphs 97 to 104 of the fourth report listed the relevant texts, including General Assembly resolutions 36/225 of 17 December 1981, 43/131 and 46/108 of 16 December 1991, which deemed the Secretary-General competent to call on States to offer assistance to victims of natural disasters and similar emergency situations. In resolution 43/131, the General Assembly also acknowledged the essential role of non-governmental humanitarian organizations in providing assistance. The disasters that had recently afflicted various regions of the world, including the tsunami that had hit Asian countries in 2004 and the earthquakes in Haiti and Japan in 2010 and 2011, had highlighted the existence of extensive and consistent practice of States in offering assistance to affected States. After the earthquake and tsunami that had struck Japan in early 2011, a total of 28 international organizations had offered humanitarian assistance.

25. Finally, it was also important to mention what was not in draft article 12. While the text recognized the right to offer assistance, it in no way required the affected State to accept such an offer. The provision of assistance on the affected State’s territory remained subject to that State’s consent. The draft article should also not be interpreted as recognizing the principle that all offers of assistance were legitimate. An offer of assistance could in no way

be subject to the acceptance by the affected State of conditions that entailed any limitation whatsoever of its sovereignty. The draft article simply asserted that offers of assistance were not in themselves internationally wrongful acts and could not be construed as interference in the internal affairs of the recipient State. The same point was made in the commentary to article 18 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), according to which the International Committee of the Red Cross (ICRC) was entitled to offer its services without such a step being considered as interference in the internal affairs of a State or as infringement of its sovereignty, whether or not the offer was accepted.²⁸² Principle 25 of the Guiding Principles on Internal Displacement provided that offers of assistance should not be regarded as unfriendly acts or as interference in a State’s internal affairs.²⁸³ It was thus quite clear that the affected State could make its acceptance of an offer of assistance subject to respect by the donor of certain conditions that guaranteed the full exercise of the affected State’s sovereignty—conditions that would be examined in his next report.

26. Mr. SABOIA said that the fourth report, which was concise but drew on international legal sources and the practice of various international and regional organizations, provided a solid foundation for the proposed draft articles. In the chapter on the responsibility of the affected State to seek assistance when its national response capacity is exceeded, and especially in paragraph 31, the Special Rapporteur had carefully articulated and balanced the principles of sovereignty and non-interference and the requirement of State consent, on the one hand, with the principle of the affected State’s responsibility to seek assistance if its response capacity was exceeded, on the other. He had developed and illustrated that line of reasoning in paragraphs 32 to 45, drawing on case law, practice and the international instruments that made it possible to regard the obligation to seek assistance as a rule of international law, as was the case in draft article 10. As paragraph 44 explained, the duty to “seek” rather than to “request” assistance implied that the affected State continued to play the leading role in overseeing and coordinating aid efforts and that the assistance sought and provided was in line with the principles of humanity, impartiality and non-discrimination set forth in the draft articles that had already been considered.

27. The following chapter dealt with the duty of the affected State not to arbitrarily withhold its consent to external assistance. The duty to cooperate, as set forth in Articles 55 and 56 of the Charter of the United Nations, formed the legal basis of most obligations relating to human rights and economic, social and humanitarian cooperation. Such cooperation must, of course, be a two-way street. The Special Rapporteur had abundantly demonstrated how important it was for the affected State and the international community to cooperate in good faith to provide the necessary relief to populations affected by

²⁸⁰ Hyogo Declaration 2005, Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005, A/CONF.206/6 and Corr.1, chap. 1, resolution 2 (“Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters”), p. 9.

²⁸¹ Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above), p. 271.

²⁸² ICRC, *Commentary on the Additional Protocols of 8 June 1977* ... (see footnote 276 above), p. 1480, para. 4892.

²⁸³ Report of the Representative of the Secretary-General, Mr. Francis M. Deng (E/CN.4/1998/53/Add.2), Addendum, p. 13, para. 2.

disasters. He gave many examples of provisions dealing with the duty not to arbitrarily withhold consent. Several of the examples came from international humanitarian law, including the Geneva Conventions for the protection of war victims and their additional Protocols of 8 June 1977, or the law on displaced persons. Draft article 11, as proposed in paragraph 77 of the fourth report, articulated that duty and contained a cross reference to draft article 12. He suggested that the phrase “in conformity with the principles established in these draft articles” be added after the words “external assistance”, in order to stress the importance of the principles of impartiality and non-discrimination and the primary role of the affected State.

28. In the final chapter, contained in paragraphs 78 to 109 of the report, which dealt with the right to offer assistance in the international community, the Special Rapporteur argued convincingly that this right stemmed from the idea that the protection of persons in a given country was a legitimate concern, not only of that society and the State in question but also of the international community as a whole, just as was true of human rights protection. He also emphasized the fact that offers of assistance should not be considered unfriendly acts or interference in the affected country’s internal affairs, as long as the assistance offered conformed to the basic principles that safeguarded the integrity of the affected State’s sovereignty and its primary role. The dual nature of disasters, which concerned not only the affected country but also the international community as a whole—on the basis either of solidarity or of the enlightened self-interest of non-affected States—was exemplified by the International Health Regulations (2005)²⁸⁴ mentioned in paragraph 82. Those regulations, which were mandatory, doubtless arose from an obligation that had a solid basis in national legislation—not to endanger the health of others—but they also contained elements relating to prevention and assistance to disaster victims. In conclusion, he said that all the proposed draft articles should be referred to the Drafting Committee.

29. Mr. MELESCANU said the Special Rapporteur was right to point out that the events of the past year demonstrated the significance of the Commission’s work on the topic. In paragraph 27 of his report, the Special Rapporteur noted that in 2010, some 373 natural disasters—including the recent earthquake and tsunami in Japan, the flooding in Colombia and elsewhere and the storms in the United States—had killed over 296,800 people, affecting nearly 208 million others and costing nearly US\$ 100 billion, according to the Centre for Research on the Epidemiology of Disasters of the Catholic University of Louvain.

30. The first part of the report under discussion dealt with comments by Governments: at the sixty-fifth session of the General Assembly, those comments had focused on the nine draft articles on the protection of persons in the event of disasters prepared by the Commission thus far. Generally speaking, Governments had welcomed the rapid progress made and stressed the importance and timeliness of the topic.

²⁸⁴ WHO, Fifty-eighth World Health Assembly (Geneva, 16–25 May 2005), Resolutions and decisions (WHA58/2005/REC/1), resolution WHA 58.3, “Revision of the International Health Regulations”, annex, article 9, pp. 16–17.

31. Regarding the duty to cooperate set out in draft article 5, he supported the idea of addressing cooperation with international and non-governmental organizations. Provisions on the specific issues that such cooperation might entail would be extremely valuable. The principle of non-discrimination should certainly be included in draft article 6, which should make it clear that differential treatment of persons in different situations, mainly particularly vulnerable persons, did not constitute discrimination. He supported the provision according to which the territorial State had the primary duty of protecting persons and providing humanitarian assistance on its territory. Nonetheless, it was important to strike a balance between State sovereignty and human rights protection.

32. Turning to the following chapters of the report under discussion, he welcomed the fact that the Special Rapporteur had adopted a very prudent and balanced approach to some of the most important issues raised, taking into account the views of States as well as existing practice.

33. As for the affected State’s duty to seek assistance when its response capacity was exceeded, that aspect of the text was the natural and logical extension of draft article 9, which dealt with sovereignty and the duty to ensure protection in the event of disasters. In support of that approach, which was based on the principles of sovereignty and non-interference, the Special Rapporteur cited decisions of the ICJ; General Assembly resolution 46/182 of 19 December 1991, which contained guiding principles for assistance in disaster situations; and a resolution adopted by the Institute of International Law at its Bruges session in 2003. He also rightly noted that the affected State had a clear responsibility with regard to individuals on its territory, advancing convincing evidence in support of his position: for example the provisions of the International Covenant on Economic, Social and Cultural Rights, the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities. From his analysis of the documentation, the Special Rapporteur concluded that “the ‘internal’ aspect of sovereignty, reflected in an affected State’s primary responsibility towards persons within its territory, may encompass a duty to seek external support where national response capacities are overwhelmed” (para. 39). That position had been affirmed by the Inter-Agency Standing Committee (IASC) in its *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, published by the Brookings–Bern Project on Internal Displacement.²⁸⁵ The principle of human dignity was also affirmed in draft article 7 as provisionally adopted by the Drafting Committee.

34. The Special Rapporteur considered that, as a matter of international law, the affected State had the right to refuse an offer of assistance. He added, however, that that right was not unlimited. In the preamble to its resolutions 43/131 and 45/100, the General Assembly had made it abundantly clear that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”. However, the main

²⁸⁵ IASC, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, the Brookings–Bern Project on Internal Displacement, September 2011 (available from www.brookings.edu/).

question was to what extent States were free to give or withhold their consent. In the field of humanitarian law on armed conflicts, Protocols I and II to the Geneva Conventions for the protection of war victims were held to imply that consent could not be withheld arbitrarily, as otherwise their provisions would be deprived of their meaning. A similar formulation appeared in the resolutions adopted in 1989²⁸⁶ and 2003²⁸⁷ by the Institute of International Law, as well as in a report prepared in 1995 by Dietrich Schindler for the United Nations Educational, Scientific and Cultural Organization (UNESCO).²⁸⁸ The analysis just outlined indicated that the rejection of humanitarian assistance was not “arbitrary” when certain criteria were not met (for example, “neutrality” and “impartiality” implied that the assistance offered had no political connotations and that nothing was expected in return). Furthermore, the decision to reject humanitarian assistance implied an obligation on the part of the affected State to at least furnish legitimate grounds to substantiate its decision. Draft article 11 as proposed in the report reflected international practice in the area of humanitarian assistance. Although the Commission should adopt it, he thought that paragraph 2 of the draft article should expressly state that the reasons for a refusal must be given. The Drafting Committee might examine that proposal at the same time as it considered draft article 11.

35. As for the international community’s right to offer assistance, the Special Rapporteur had devoted the final part of his fourth report to the support that other States and international organizations could provide to the affected State. He had adopted a holistic approach and, in paragraph 84 of his report, he explained his point of view very well. The approach was based on various provisions found in documents such as Convention I of 1907 for the Pacific Settlement of International Disputes, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, and other instruments, including regional ones, such as the 1991 Inter-American Convention to Facilitate Disaster Assistance.

36. The Special Rapporteur had also studied the issue of offers of assistance by international organizations. International rules and practice in that regard were examined in the final paragraphs of the fourth report, which included many examples of practice. He himself fully supported the Special Rapporteur’s conclusion in paragraph 106 that “the right to offer assistance is not limited to non-affected States, but applies also to international organizations whose mandate may be interpreted as including such offers, and other humanitarian organizations”.

37. The fourth report ended with draft article 12, according to which States, the United Nations and other competent

intergovernmental and non-governmental organizations had the right to offer assistance to the affected State in responding to a disaster. He supported the idea of referring the draft article to the Drafting Committee.

38. Mr. PELLET said that, on the whole and with minor exceptions, he had no major objections to the three draft articles proposed by the Special Rapporteur. He was, however, troubled by three methodological problems. The first concerned the relationship between the three draft articles and humanitarian law. According to draft article 4, as adopted by the Commission in 2010, the “draft articles do not apply to situations to which the rules of international humanitarian law are applicable”.²⁸⁹ That provision seemed very sensible, as it would not be good to cover in the same set of draft articles the protection of persons in the event of armed conflict and the protection of persons in the event of other types of disasters. He therefore wondered why the Special Rapporteur relied so heavily on instruments that were applicable only in time of war, thus creating a problem of coherence that would need to be addressed in the commentaries. The second methodological problem was more serious: the fourth report seemed highly theoretical, even though the Special Rapporteur had shown at the outset to what extent the stakes were very real. With the exception of paragraph 105, which contained some references to actual disasters, the whole exposition focused either on what the Special Rapporteur deemed appropriate, which was commendable but certainly less useful than examples of practice, or on texts adopted by respectable and authoritative entities. However, practice could not be reduced simply to a series of texts; it was made up not simply of what the General Assembly, the Institute of International Law or the ICRC might have to say, but also of the actual attitudes of States whose land and inhabitants had suffered disasters—for example, the reluctance of the Government of Myanmar to accept assistance after the flooding in that country—and the reactions of other States, NGOs, and so on. The Special Rapporteur hardly mentioned such matters, which was regrettable. The Commission would thus do well to take seriously the advice given to it and referred to in paragraph 24 of the report, and to follow it in drafting the commentaries that would appear in the final version of the articles. Thirdly, he was also surprised and a little bit disappointed at the near-absence in the report of the new and, in his view, auspicious concept of the responsibility to protect. The Special Rapporteur alluded to the concept in paragraph 81, *inter alia*, but did not give it all the attention it deserved, whereas it could and even should be the guiding principle of the entire set of draft articles. It would then be possible to refocus the commentaries to future draft articles, firm up arguments and stop being needlessly cautious.

39. He had always disapproved of the inclusion in the Commission’s programme of work of that politically delicate topic, which to him seemed to lend itself much more to diplomatic negotiation than to codification by a body of independent experts. However, since the Commission was seized of it—had seized it, in actual fact—it might as well take a bold and stimulating plunge into progressive development, shunning excessive caution and procrastination. On that basis, he was ready to approve the general thrust of the draft articles proposed by the

²⁸⁶ Institute of International Law, *Yearbook*, vol. 63 (1989), Session of Santiago de Compostela (1989), Part II, resolution on the protection of human rights and the principle of non-intervention in internal affairs of States, p. 338.

²⁸⁷ Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above).

²⁸⁸ International Colloquium on the Right to Humanitarian Assistance, Paris, 25–27 January 1995, D. Schindler, “The right to humanitarian assistance: right and/or obligation?” (SHS-95/CONF.805/6), rule 6, p. 3.

²⁸⁹ *Yearbook* ... 2010, vol. II (Part Two), pp. 185–190, paras. 330–331.

Special Rapporteur, even though he was uneasy with the methodology used and would have liked to see a more resolute approach.

40. Having said that, he wished to see a few more nuances in the texts proposed. To begin with, he was disturbed by the idea—which came up repeatedly in the report—that the affected State should seek assistance if it was unwilling to assist its imperilled population: that seemed bizarre. If the State chose not to use its own resources, then why, and above all by what right, should it appeal for international solidarity? In paragraph 37, where the Special Rapporteur quoted a statement made on behalf of the Nordic countries, and again in paragraph 71, in which he expressed a similar idea, he seemed to concede that a State whose population was struck by a disaster such as those defined in draft article 3 could refuse to use its own resources to assist the population. Yet it certainly could not do so, in his own view, since such was the very essence of the responsibility to protect—a State must protect its people—and one could not acknowledge, even implicitly, that it might not. It was also difficult to reconcile that view with draft article 9, paragraph 1, on the role of the affected State. Accordingly, he did not approve of equating, in draft article 11, paragraph 1, situations in which the State lacked the capacity to handle a situation with those in which it lacked the will to do so. Obviously a State might lack resources, for which it could not be blamed, but it did not have the right to lack will: it must be willing to assist the affected populations. The current wording of draft article 11, paragraph 1, implied that a State could foist its responsibility to protect onto the international community or other States, something that would be incompatible with draft article 9, paragraph 1, to which Mr. Melescanu had drawn attention.

41. Regarding draft article 11, he wished to comment on three other details. First, it was necessary to define what “all concerned” meant in the context of the draft articles; he understood that the Special Rapporteur would do that. Secondly, notifying all concerned of the affected State’s decision did not suffice; it was also necessary to substantiate the decision, and there he entirely agreed with Mr. Melescanu. Thirdly, it would make much more sense to reverse the order of draft articles 11 and 12, first because draft article 11 cited draft article 12 and secondly because it seemed logical to mention the offer of assistance that was the subject of draft article 12 before referring to the reactions to such an offer, which were addressed in draft article 11.

42. He had no objections to draft articles 10 and 12, except that he found the underlying logic rather tortuous and, unlike Mr. Melescanu and Mr. Saboia, he was unconvinced by the subtle distinctions made in paragraph 44. Still, the right result was obtained, since the Special Rapporteur conceded that an affected State finding itself short of resources had an obligation to seek external assistance, the only caveat being that it was perhaps not appropriate for it to have recourse first to the United Nations, whose primary mission was not to provide disaster relief. There remained two details on which he wished to comment. First, in paragraph 95 of the French version of the fourth report, article IV of the 2003 resolution on humanitarian assistance adopted by the Institute of International Law was misquoted. Paragraph 2 of the article should read: “*Les États et les organisations*

ont le droit d’offrir une assistance humanitaire aux victimes se trouvant sur le territoire des États affectés, sous réserve du consentement de ces derniers.”²⁹⁰ In the French version of all the draft articles in the report, it would be better to replace the word “*touché*” with the more appropriate term “*affecté*”. It was to be hoped that the Drafting Committee and the Special Rapporteur would agree. Secondly, in the *A. and Others v. the United Kingdom* case cited in paragraph 49 of the report, the European Court of Human Rights had recognized, in paragraph 173 of its decision, the wide margin of appreciation enjoyed by States in assessing whether the nation was threatened by a public emergency, but had added: “Nonetheless, Contracting Parties do not enjoy an unlimited discretion.” That did not contradict what the Special Rapporteur had written but rather confirmed the need to seek a balance between State sovereignty and basic humanitarian considerations, in other words, between a liberal element—sovereignty—and a “welfarist” element—solidarity, to paraphrase the title of a recent book by Emmanuelle Jouannet, soon to be published in English as *The Liberal-Welfarist Law of Nations: A History of International Law (Le droit international libéral-providence: Une histoire du droit international)*.²⁹¹ He would like draft articles 10, 11 and 12 to be referred to the Drafting Committee.

43. Sir Michael WOOD, referring to Mr. Pellet’s comment that the responsibility to protect should be a guiding principle of the text, said that it seemed to him, given the context, that the reference was to the territorial State’s duty to protect its own population: Mr. Pellet was not thinking of the new concept of a “responsibility to protect”, which the Commission had already rejected.

44. Mr. PELLET said that in English, the reference should be to a “duty to protect”. He, for one, had never rejected the concept of a responsibility to protect: while the issue was primarily one of the territorial State’s responsibility to protect its population, the international community also had the duty to help the State to protect its population and, if necessary, to oblige it to do so. He disagreed entirely with Sir Michael when he said that the concept was to be rejected. On the contrary, it was useful and fit in perfectly with the topic, and the Special Rapporteur seemed to have had it in mind when he prepared his report, even if he had, unfortunately, neglected to mention it outright.

45. Mr. WISNUMURTI said that he agreed with Sir Michael. The Commission had discussed the concept of the responsibility to protect at length²⁹² and had decided not to use it for the current undertaking. It was important to remember that the responsibility to protect had very specific parameters, being used in the context of genocide, crimes against humanity and war crimes.²⁹³

²⁹⁰ Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above), p. 270.

²⁹¹ E. Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law*, Cambridge University Press, 2014.

²⁹² See *Yearbook ... 2008*, vol. II (Part Two), pp. 133–134, paras. 247–250, and *Yearbook ... 2009*, vol. II (Part Two), p. 135, para. 153, and p. 137, para. 164. See also *Yearbook ... 2008*, vol. I, 2978th to 2982nd meetings, pp. 129–184, *passim*.

²⁹³ 2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139. See also the Secretary-General’s report entitled “Implementing the responsibility to protect” (A/63/677) and General Assembly resolution 63/308 of 14 September 2009.

46. Mr. VASCIANNIE said that, in the given situation, the Special Rapporteur needed to reconcile the responsibility to protect with domestic sovereignty. In his report, the Special Rapporteur did in fact affirm the responsibility to protect without, as Mr. Pellet had noted, openly stating that he was doing so.

47. Mr. NOLTE said that Mr. Pellet's attitude seemed contradictory: he had opposed the consideration of the current topic because it was political in nature, linked to the ongoing political debate over the status of the responsibility to protect in international law, but now that the topic was included in the Commission's programme of work, he wished the Commission to treat the responsibility to protect as a guiding principle. He himself thought that the Special Rapporteur had been very wise to avoid mentioning the politically controversial idea of the "responsibility to protect" while including its main elements, which originated elsewhere—the obligation to protect, in the field of human rights, the principles of cooperation and solidarity, in other fields—in order to apply them to the topic at hand. The fact that the Special Rapporteur did not explicitly mention the concept of the responsibility to protect meant, not that he rejected its core elements, but rather that he was applying them intelligently to the topic of the protection of persons in the event of disasters.

48. Mr. PETRIČ voiced a plea for the debate on the approach taken by the Special Rapporteur in his fourth report not to be reopened, at the risk of seeing the work on the topic grind to a halt. The Commission had already decided to focus on natural disasters and not on humanitarian law, the laws of war or the concept of the responsibility to protect. The resulting approach, taking into account the implications of that decision, was perfectly balanced and the only one that would enable the Commission to continue its work on the topic.

49. Mr. MURASE thanked the Special Rapporteur for his excellent fourth report and said that before commenting on it, he wished to refer to the disaster that had struck Japan in March 2011, from which much could be learned. During the past four months, Japan had truly felt the great value of international solidarity and assistance. Soon after 11 March, when the country had been devastated by an earthquake and the tsunami that followed it, the Government of Japan and the population had received help and encouragement from countries around the world. To update the figures cited by the Special Rapporteur in paragraph 104 of the report, he said that Japan had thus far received offers of assistance from 161 countries and 43 international organizations. It had received huge quantities of relief supplies, sizeable monetary donations and hands-on help from a large number of disaster relief teams from many countries, regions and organizations, all of which were to be heartily thanked. The Japanese people would never forget that the world had stood by them when they were most in need.

50. It was deeply regrettable that the nuclear accident in Fukushima had caused such anxiety in Japan and abroad. Japan apologized to the international community for the human factors that had led to the accident and was relieved to have escaped an even greater catastrophe, doubtless thanks to the authorities, which had mobilized the best

resources available to them under the circumstances. The Government of Japan had presented a report²⁹⁴ to the Ministerial Conference on Nuclear Safety,²⁹⁵ organized by the International Atomic Energy Agency from 20 to 24 June 2011, in which it had emphasized the importance of conducting a preliminary assessment of the situation in disaster areas, thereby sharing with the international community the lessons learned from the accident. He was certain that the Government of Japan would pursue its efforts to strengthen international nuclear safety by disseminating adequate information in a prompt and transparent fashion.

51. The experience of Japan showed that the principles of solidarity and international cooperation were a cornerstone of the entire set of draft articles; as he understood them, then, the articles proposed by the Special Rapporteur were hortatory, facilitative and promotional in nature, rather than obligatory or enforceable. It would obviously be inappropriate for the Commission to try to formulate norms in terms of a rigid legal relationship between rights and obligations. Its goal was not to seek to establish State responsibility for the breach of an obligation or to apply sanctions in case of non-fulfilment of that responsibility. The basic goal, rather, was to facilitate the protection of persons in the event of disasters. Thus, the Special Rapporteur was right to use the term "duty" rather than "obligation": in his own view, the notion of "duty" fell somewhere between a moral dictate and a legal obligation.

52. Those few countries that refused external assistance or, at best, were selective about accepting it remained, of course, a source of concern. Everyone knew that those countries—there was no need to name them—had leaders who did not care that hundreds of thousands of people were starving, even in normal conditions. In such cases, it was tempting to apply a strict enforcement approach rather than soft, facilitative and promotional approaches. But that would not solve the problem of how to facilitate relief activities, since it was almost impossible to hold those States accountable. The issue should be considered from a broader perspective rather than in the context of the current topic. The Commission had rightly decided that the notions of humanitarian intervention and responsibility to protect were not relevant to its work on that topic.

53. If the Commission preferred not to use the term "obligation" in draft article 12, it should also refrain from using the term "right". To talk of a legal right would be to go beyond the practice of States and international organizations. While States could certainly offer assistance, such offers were made not to exercise a legal right but as expressions of international goodwill and cooperation. Therefore, the title of draft article 12 should be simply "Offer of assistance", and in the text of the draft article, the words "shall have the right to offer assistance" should be replaced by the words "can offer assistance".

²⁹⁴ "Report of Japanese Government to the IAEA Ministerial Conference on nuclear safety: The accident at TEPCO's Fukushima nuclear power stations" (available from http://japan.kantei.go.jp/kan/topics/201106/iaea_houkokusho_e.html, accessed 28 February 2017).

²⁹⁵ "IAEA Ministerial Conference on Nuclear Safety, 20–24 June 2011", report by the Director General (available from www.iaea.org/About/Policy/GC/GC55/GC55InfDocuments/English/gc55inf-10_en.pdf, accessed 28 February 2017).

54. An important aspect of protecting victims of natural disasters was surely to encourage a sense of solidarity with the people affected. Material and financial assistance and cooperation were valuable, but expressions of solidarity could be equally precious. In that connection, he wished to cite the example of an Ambassador of a small island State in Asia that had been devastated by a tsunami in 2004. In order to show his country's solidarity with Japan, he had voluntarily reported for duty in Tokyo at a time when many diplomats and businesspeople were fleeing the city for fear of radioactive contamination, leaving the Japanese with a sense of abandonment. Soon after his arrival, the Ambassador had visited evacuation centres in the affected area; his Government had donated US\$ 1 million and 3 million bags of tea to the victims and had sent 15 members of the military to participate in clean-up operations in the tsunami-stricken area. With those actions, the State in question had gone beyond its basic diplomatic duties and won the respect of the Japanese nation.

55. Given that a great many rules for conducting relief operations already existed, the Commission should not become involved in detailed rule-making and should leave that to bodies responsible for relief activities. However, it was important to stress that speed was crucial for rescue work, as the survival rate of victims trapped under earthquake rubble fell sharply after 72 hours. It was also necessary to remove legal obstacles so that rescue teams and rescue dogs could arrive at the scene as early as possible. Mention should perhaps also be made of the fact that disaster relief teams should be self-supporting so that they did not place additional burdens on disaster-affected areas.

56. Volunteers and NGOs were indispensable in relief activities. As he had proposed once before, well before new disasters actually occurred, a competent international organization should establish a roster of qualified and reliable NGOs that could be accredited to conduct relief operations. Those organizations should meet internationally accepted standards for competent, reliable and effective relief organizations, and any affected State could choose suitable organizations from the roster. Such a mechanism might alleviate some of the concerns of affected States about the competence of assisting organizations and speed up the admittance of relief workers into disaster areas. The Government of Japan had conducted negotiations with neighbouring countries regarding cooperation on disaster management, a subject on which agreement had been reached on 9 April 2011 at a Special ASEAN–Japan Ministerial Meeting.²⁹⁶ Furthermore, on 22 May 2011, China, Japan and the Republic of Korea had concluded a trilateral cooperation agreement on disaster management²⁹⁷ in order to make maximum efforts to enhance disaster prevention and to strengthen relief capabilities and the disaster assistance system. Under the agreement, when a grave disaster occurred in one of the three countries, the two others would evaluate the situation, identify the needs of the affected country and dispatch emergency rescue teams and relief supplies as quickly as possible on the basis

of requests by the affected country. The affected country in turn would facilitate cooperation by admitting disaster relief teams and supplies as swiftly as possible to the extent permitted by national legislation and taking into account international practices and the situation on the ground. In conclusion, he said that a framework convention would facilitate and promote the conclusion of similar bilateral, trilateral and regional agreements between neighbouring countries. He had initially been sceptical of the topic's relevance but was now convinced that, through its work, the Commission would be able to make a contribution to the international community.

57. Mr. PETRIČ thanked Mr. Murase for a statement that had been as compelling as it had been moving and said he welcomed the good progress made by the Special Rapporteur, whose fourth report took a balanced approach that would enable the Commission to move forward with its work. Mr. Murase had been right to emphasize the importance of solidarity, which was a cornerstone of the topic under consideration—namely, how to react when, following a natural disaster, thousands of people were hungry, displaced or in danger of dying? It should also be recalled that in Ethiopia, more than a million people had died in a year from hunger but also through the negligence of the authorities, who had not taken the necessary measures, had refused to admit that a disaster was occurring and had not requested, much less accepted, assistance that, once sent, in the end could not be distributed. That situation differed greatly from the case of Japan, in that in Ethiopia, the solidarity expressed had been stymied.

58. The Commission's objective was to establish rules to ensure that in the event of a natural disaster, the affected population could receive assistance. To reach that goal, and in fact to make any progress towards it, it needed to use a balanced approach. That was what it had done at its previous session in adopting four very important draft articles. The Commission should also keep in mind that the primary obligation to provide assistance lay with the affected State, on the grounds of its sovereignty but also for practical reasons. Dispatching aid without that State's consent and cooperation could pose problems and even be counterproductive. In his fourth report, the Special Rapporteur proposed three draft articles which, by establishing certain limits, including on the affected State's sovereignty, made it possible to send aid despite any concerns or fears that the State might have. The texts, whose wording could surely be improved, were perfectly in line with the outcome expected by the Commission: they were headed in the right direction and thus deserved support. According to draft article 10 (Duty of the affected State to seek assistance), in situations like those mentioned earlier—Ethiopia and Myanmar—the State would be obliged to seek assistance, and that was laudable. As for draft article 11 (Duty of the affected State not to arbitrarily withhold its consent), while the word "arbitrarily" might need to be fleshed out further in the commentary, the text was an important step forward, as it set boundaries for the decision-making powers of the affected State in the event of natural disasters without compromising its sovereignty. According to paragraph 2 of the draft article, when an offer of assistance was extended pursuant to draft article 12, paragraph 1, the affected State should, without delay, notify all concerned of its decision regarding such an offer.

²⁹⁶ See <http://asean.org/chairman-s-statement-on-the-special-asean-japan-ministerial-meeting-jakarta-9-april-2011/>.

²⁹⁷ See the website of the Trilateral Cooperation Secretariat (<http://tcs-asia.org>) and the statement from the 22 May 2011 summit (available from http://tcs-asia.org/bbs/board.php?bo_table=catg&wr_id=1469&sca=217).

In short, the best way for the affected State to avoid being accused of failing in its duty not to arbitrarily withhold its consent was to respond in a transparent manner. Draft article 11 was thus both prudent and realistic, and it, too, was headed in the right direction. As for draft article 12 (Right to offer assistance), one could perhaps even speak of a “duty of solidarity”, but at least the text enunciated the right to offer assistance—which, of course, had nothing to do with interference in a State’s internal affairs.

59. The Special Rapporteur had noted in his fourth report that the topic of natural disasters had aroused significant interest within the international community, and that was quite understandable. Indeed, the view that the international community should take action when people were victims of natural disasters like those mentioned was gaining ground, while the older notion of sovereignty, according to which no one should under any circumstances intervene in the internal affairs of a State, was gradually losing ground. The Commission should not move too far in that direction, however, at the risk of being counterproductive. He concluded by congratulating the Special Rapporteur on his fourth report, which was a significant step forward on a topic that was important, sensitive and timely. The report struck the proper balance between the recognized principles of international law relating to the protection of persons in the event of natural disasters and the need to assist disaster victims and to ensure that their dignity and human rights were respected at a time when that mattered the most.

The meeting rose at 5.55 p.m.

3103rd MEETING

Tuesday, 12 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Adoke, Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/638, sect. D, A/CN.4/643, A/ CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourth report on the protection of persons in the event of

disasters (A/CN.4/643). She welcomed the new member, Mr. Adoke, and said that his colleagues looked forward to working with him.

2. Mr. NOLTE thanked the Special Rapporteur for his rich and balanced fourth report, which provided an excellent basis for the Commission’s deliberations. It recalled the dramatic situations that underlay the abstract term “disaster” and the Commission’s responsibility to formulate appropriate and balanced rules to deal with them.

3. The way Commission members responded to the fourth report depended to some extent on the final formulation to be given to the role of consent, a question that was still before the Drafting Committee in the context of draft article 8, paragraph 2. While he agreed in principle with the requirement of consent by the affected State to the provision of humanitarian assistance by other States or actors, he was not in favour of formulating such a requirement in an absolute way: for example, there might be exceptional situations in which the affected State could not give its consent.

4. He endorsed the basic approach taken by the Special Rapporteur in draft articles 10 to 12, in particular the premise that an affected State had a duty to seek assistance, a duty arising from its primary responsibility to ensure the protection of all persons in its territory. The reference in paragraph 33 of the report to General Comment No. 12 (1999) of the Committee on Economic, Social and Cultural Rights on the right to provide adequate food²⁹⁸ was pertinent in that regard. However, the statement by the Special Rapporteur in paragraph 40 of his fourth report that “where the national capacity of a State is exhausted, seeking international assistance may be an element of the fulfilment of an affected State’s primary responsibilities” was somewhat weak; where national capacity was exhausted, seeking international assistance was the duty of an affected State. The Special Rapporteur ultimately seemed to recognize that fact, yet in draft article 10 he indicated that the affected State had the duty to seek assistance “as appropriate”. The words “as appropriate” should be used only with reference to the mode of implementation of the duty to seek assistance.

5. The duty to seek assistance embodied in draft article 10 could not and should not be separated from the corollary duty, expressed in draft article 11, not to withhold consent, and the right to offer assistance set out in draft article 12. Where a disaster exceeded the capacity of a State, that State had the duty to seek assistance from other States and relevant actors, which had the collateral right to offer such assistance; in both cases, the affected State had the duty not to withhold consent arbitrarily. Separating those interrelated and collateral rights and duties could lead to artificial distinctions in practice and to formalistic arguments in emergency situations.

6. If it was true, as the Special Rapporteur suggested in paragraph 44 of his report, that “a duty to ‘seek’ assistance implies the initiation of a process through

²⁹⁸ *Official Records of the Economic and Social Council, 2000, Supplement No. 2 (E/2000/22-E/C.12/1999/11)*, Report on the twentieth and twenty-first sessions of the Committee on Economic, Social and Cultural Rights, annex V, p. 102.

which agreement may be reached”, then not withholding agreement arbitrarily must be a duty during that process, and not only upon its completion.

7. The reference in draft article 12 to the right to offer assistance should be accompanied by encouragement to offer assistance on the basis of the principles of cooperation, international solidarity and human rights. While it would be going too far to recognize a specific legal obligation of third States or organizations to give assistance, recent debates had yielded at least an acceptance of the responsibility of other States and organizations to protect all human beings whose life or basic human rights were immediately threatened. Without wishing to reopen the divisive debate on the responsibility to protect, he felt it was important to emphasize the common ground on that concept that existed within the international community.

8. Turning to draft article 11, paragraph 2, he suggested that the words “notify all concerned of its decision regarding such an offer” should be replaced by the words “give reasoned responses”. That would better capture the purpose, which was to ensure that the observance of the duty not to withhold consent arbitrarily could be objectively assessed. As currently worded, paragraph 2 seemed not to take account sufficiently of the broader, negotiated approach to the provision of international aid advocated in paragraph 44 of the report. A more process-oriented version of the duty to give reasons for not accepting an offer of assistance would thus be preferable, in his view.

9. He agreed with Mr. Pellet that the Commission should not consider situations in which a State was unwilling to use its available resources in the context of the duty not to withhold arbitrarily its consent to offers of assistance. The primary duty of every affected State to “ensure the protection of persons and provision of disaster relief and assistance on its territory”, established in draft article 9, implied that such a State must use its available resources to ensure the protection of persons.

10. For those reasons, he suggested that draft articles 10 to 12 should be merged to form the following new draft article:

“1. In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations have the right to offer humanitarian assistance to the affected State, and are encouraged to do so in the spirit of the principles of cooperation, international solidarity and human rights.

“2. The affected State has the duty to seek humanitarian assistance from among other States, competent international organizations and relevant non-governmental organizations, if a disaster exceeds its national response capacity.

“3. The affected State shall not withhold consent to external assistance arbitrarily, and give reasoned responses to offers of assistance.”

11. His proposal was formulated in the holistic spirit suggested by the Special Rapporteur. It commenced with the general rule whereby the right to offer assistance

existed in every disaster situation, irrespective of the ability of the affected State. It continued with the special rule that the duty of the affected State to seek assistance arose in the event that it was unable to provide the necessary assistance. It ended with rules that applied to both the general and the special rule, articulating the obligations not to withhold consent arbitrarily and to give reasoned responses to offers of assistance.

12. The rationale behind his proposal was not disagreement with the Special Rapporteur’s basic approach and reasoning, but rather a desire to find a formulation that better expressed the Special Rapporteur’s intentions. He agreed that draft articles 10 to 12 should be referred to the Drafting Committee.

13. Mr. VASCIANNIE thanked the Special Rapporteur for his thought-provoking report on an important and sensitive issue. States had commented on the timeliness of the project, and the Special Rapporteur had advanced the work at a commendable pace.

14. At the risk of methodological incorrectness, he would comment first on draft article 12, which asserted the right of States, the United Nations and other entities to offer assistance to a State affected by a disaster. While the provision was acceptable and could be sent to the Drafting Committee, one might quibble about the definition of “relevant non-governmental organizations”. On the other hand, it was correct to say that general international law accorded States the right to offer assistance to another State that was facing a disaster. Under the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, for example, the capacity to enter into international relations was one of the defining features of the State; it would therefore be rather peculiar if a State could not approach another State merely to offer assistance. Draft article 12 could therefore be regarded as superfluous or, at most, as merely playing a confirmatory role.

15. Taking things a little further, one could say that in the absence of a specific prohibition applicable, for example, during wartime, all legal persons, including multinational corporations or even very wealthy individuals, might have the right to offer assistance to an affected State. As long as draft article 12 was limited to a right to offer help, its scope could be widened to confirm that all legal persons had that right.

16. On the other hand, draft article 12 did not imply permission to interfere in the internal affairs of the affected State: it merely set out a right to offer assistance, which the affected State could refuse. As Hohfeldian analysis of legal relationships between rights and duties suggested,²⁹⁹ the right of one State to offer assistance corresponded to a duty or obligation of the affected State to consider the offer, but not necessarily to accept it.

17. Draft articles 10 and 11 were, from his standpoint, more controversial than draft article 12. In essence, draft article 10 placed upon the affected State a duty to seek

²⁹⁹ W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, Yale University Press, 1919, reprinted in 1920, p. 36.

assistance if the disaster exceeded its national response capacity. The Special Rapporteur emphasized the “margin of appreciation” left to the affected State in assessing whether a disaster in fact exceeded its response capacity. On the positive side, draft article 10 required the affected State to accord importance to the human rights of victims during times of disaster. The Special Rapporteur’s line of argument in paragraph 33 of the report was that the International Covenant on Economic, Social and Cultural Rights proclaimed a right to food, and States were duty-bound to exercise every effort to satisfy that right. Thus, where a disaster occurred and the right to food was compromised, the affected State had a duty to seek assistance to satisfy that right.

18. However, that approach was somewhat problematic. To begin with, the provision of the International Covenant on Economic, Social and Cultural Rights on the right to food was regarded by several States as largely programmatic or hortatory. It indicated that States would take “appropriate steps” to ensure the right to food, but that was qualified by the reference to “international co-operation based on free consent”. The broad terms of the Covenant could not be translated into a specific commitment on the part of the affected State to “seek assistance” in times of disaster, if necessitated by its national capacity. That subtle but important distinction was highlighted by the following questions.

19. Why did the right to food under the International Covenant on Economic, Social and Cultural Rights impose a duty on the affected State to seek assistance but not a duty on non-affected States to give assistance? How could the relevant provision of the Covenant impose a specific commitment on the affected State but no commitment on other States parties to the Covenant? If the answer was that non-affected States were free to give consent in the granting of assistance, then, logically, affected States were free to give consent to the seeking of assistance. The right to food set out in the Covenant had apparently not been intended by States to form the basis of a duty to seek assistance in times of disaster. The extension of that right was difficult to justify as a matter of legal interpretation: draft article 10 was therefore vulnerable to the accusation of problematic extrapolation from rules not intended for disaster relief.

20. Furthermore, the Special Rapporteur’s approach in draft article 10 might raise an issue of classification, namely whether the rule proposed therein represented the codification of international law or its progressive development. In the former case, more numerous and unequivocal instances of treaty and other State practice should have been offered in support. The Special Rapporteur had emphasized the number and significance of recent instances of disaster in his introduction to the report. However, before accepting that there was a rule requiring States to seek assistance, the Commission should ascertain whether those recent instances gave support to or weakened the view that such a rule existed *de lege lata*. In that regard, Mr. Pellet’s criticisms of the methods and use of sources in the report were cogent.

21. To be fair, the Special Rapporteur did take into account some elements of State practice, but they were

limited and did not reach the level of generality required for recognition of a rule of customary law. By the same token, certain broad concepts relating to aid, such as humanity, cooperation and the “internal” aspect of sovereignty, were not sufficiently specific to provide the basis for a binding rule of law.

22. Alternatively, perhaps framing a duty to seek assistance might constitute an instance of progressive development, worthy of support on policy grounds. One virtue of the rule set out in draft article 10 was that it emphasized the protection of human rights in difficult situations and afforded certainty to the affected States about their duty to seek assistance *a priori*.

23. However, there were also disadvantages with draft article 10 as progressive development. First, it seemed contrary to State sovereignty to require or compel a State to seek assistance if it did not want to do so. It had been suggested that the term “duty” was not as strong in law as “obligation”, but that was debatable: both terms indicated that the addressee of the duty or the obligation was compelled, as a matter of law, to seek assistance. That type of compulsion seemed not to be consistent with the will of States at the current stage of development of international law: most States were unlikely to agree to have their freedoms limited in that manner.

24. Secondly, if a legal requirement such as that in draft article 10 was imposed, the affected State would have not only the burden of trying to cope with a disaster, but also the duty of deciding whether it must seek help. If it did not seek help, based on a rather vague “margin of appreciation”—a concept not yet crystallized in disaster law—the State would be subject to State responsibility. Thus, in the midst of a disaster, a State would need to worry about possibly breaking the law by choosing not to receive assistance from certain countries. Developing countries had long complained about “tied” aid; draft article 10 would introduce the new concept of legally “required” aid, which could be counterproductive.

25. He was therefore not in favour of draft article 10 in its current form and would suggest that the mandatory phrase “has the duty to seek assistance” should be replaced with the words “should seek assistance”. That would highlight the desirability of having affected States seek assistance and remove the controversial compulsory requirement.

26. There were at least three major problems with draft article 11, paragraph 1. First, it seemed contrary to existing law, under which States could withhold consent to external assistance. Secondly, the mandatory character of the provision went against established notions of State sovereignty. Thirdly, even as *lex ferenda*, the rule could create difficulties for States that might wish to refuse assistance from States or other entities that they regarded with disdain, whether their reasons for doing so were valid or not. The affected State might perceive external assistance as a kind of Trojan horse that opened it up to unwanted pressure.

27. In the circumstances, and to ensure a balance between human rights protection and State sovereignty,

he would again suggest that the mandatory component should be removed by replacing the words “shall not” with “should not”, so that the provision read: “Consent to external assistance should not be withheld arbitrarily if the affected State is unable or unwilling to provide the assistance required.”

28. Draft article 11, paragraph 2, could remain as proposed by the Special Rapporteur, because the requirement that an affected State specify its decision without delay was reasonable and helped to emphasize the urgency associated with disaster relief, without compromising significantly the rights of the State over its territory.

29. In most cases, affected States would act reasonably and seek assistance in the face of disaster. Similarly, donor countries and other entities would provide assistance without ulterior motives. Perhaps the difference of opinion on the issues in that area of the law was really about cases in which States acted in ways that were not terribly logical. He would prefer to come down on the side of existing law, with some marginal adjustments, primarily because existing law protected weaker countries from the possibility of abuse. If States wished the law to evolve in the light of changing realities, it was up to them to promote that development, whether through the concept of the responsibility to protect or by other means.

30. Mr. NOLTE requested clarification of Mr. Vasciannie’s use of the term “compulsion”: he had understood him to say that the duty to seek assistance implied compulsion. It was an important question in the light of his underlying concern about the protection of weaker States against abuse. If by “compulsion” Mr. Vasciannie meant the use of force, then there was clearly a misunderstanding, because the Special Rapporteur had not intended the concept of a duty to seek assistance as authorization to force aid on an unwilling State.

31. Mr. VASCIANNIE said that he had by no means wished to suggest that compulsion implied the use of force. He had been referring to compulsion in the legal sense, meaning that failure to uphold the duty to seek assistance would give rise to State responsibility under draft article 10 as currently worded.

32. Mr. PETRIČ said that Mr. Vasciannie’s statement had alerted the Commission to a serious problem. The main issue at stake was the protection of victims of disasters, not the sovereignty of States. The Commission seemed generally to agree on the desirability of regulation, possibly codification or even progressive development, so that assistance could be provided to persons in situations of disaster. Under normal circumstances, States would cooperate, ask for help or offer help. Nevertheless, as Mr. Vasciannie had observed, irregular situations would also arise, in which, indifferent to the need to protect human life, States did not take action, ignoring or refusing help. It was precisely the purpose of the law to regulate irregular situations, and it was on that aspect of the topic that the Commission should concentrate.

33. Mr. VASCIANNIE, recalling Mr. Petrič’s remark at the previous meeting about Ethiopia in the 1980s, said that even if the Commission had formulated articles

that would have required Ethiopia to seek assistance, the Government of Ethiopia would have disregarded those provisions. The existence of a provision stipulating that a State must seek assistance would thus have been of no immediate practical significance. It would have been of legal significance, however, and therein lay the problem. If Ethiopia did not seek assistance when disaster struck and five months later, a powerful State accused it of violating international law and suggested action to remedy the situation, it was then that the prospect arose of compulsion taking the form of the use of force. If the Commission followed that route, it might lead to a situation in which a State that had decided not to seek assistance because the offering State was known to have ulterior motives could end up facing the barrel of a gun for reasons that had nothing to do with disaster relief. The use of the phrase “should seek assistance” would indicate that the Commission regarded it as desirable that an affected State should seek help, but did not open up the prospect of legal liability being incurred by a State that chose not to accept the assistance offered.

34. Mr. MELESCANU said that draft article 9 had already established the obligation of a State, by virtue of its sovereignty, to ensure the protection of persons and the provision of disaster relief in its territory. That meant that if a State’s own possibilities were exhausted, it should look for outside support. That logical premise had nothing to do with a right or duty of interference, but was based on the principle that a State was under an obligation to take care of its citizens. Thus, once it had no means of doing so, it was entitled to seek assistance, which could be refused, although not arbitrarily. He urged the Commission not to revisit the fundamental principles underpinning the draft articles.

35. Mr. DUGARD concurred with Mr. Vasciannie that, even if the Commission had produced a text on the protection of persons in the event of disasters prior to the disaster in Ethiopia, the Government of Ethiopia would have ignored it. The possibility that a Government might not abide by an instrument it drafted should not, however, deter the Commission from doing the right thing. Since it was the Commission’s function to codify and progressively develop international law, it could set forth guidelines indicating how States ought to behave. Some of the Commission’s projects clearly had some impact on the conduct of States: witness the articles on State responsibility for internationally wrongful acts,³⁰⁰ even though they did not yet exist in treaty form.

36. Mr. HMOUD said that the draft articles would act as a deterrent insofar as they would make a State think twice before rejecting an offer of assistance. The legal provisions drafted by the Commission entailed consequences, because they were usually cast in mandatory language. He would not have agreed to the drafting of the current draft articles if he had thought that they might permit the use of force; however, as Mr. Wisnumurti had said at the previous meeting, the responsibility to protect could be invoked only when a violation of international

³⁰⁰ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

humanitarian law had occurred. It might nevertheless be advisable for the articles to contain some assurances that the principles of State sovereignty and non-interference would be respected.

37. Mr. VASCIANNIE said that Mr. Melescanu's suggestion that draft article 10 was a logical extension of draft article 9, because the duty to ensure protection implied the duty to seek assistance, reflected a somewhat teleological approach. While States had a duty to protect the right to life, a violation of the right to life did not automatically give rise to a duty to seek assistance from another country. Although the two rights were related, they were separate and distinct. His own acceptance of a duty to ensure protection did not necessarily mean that he accepted a duty to seek external assistance.

38. In reply to Mr. Dugard, Mr. Vasciannie explained that he was not suggesting that the mere fact that Ethiopia might have disregarded a provision signified that the Commission should not adopt that provision. In addressing the difficult question raised by Mr. Petrič, his own answer was that, by accepting the rule currently being discussed, the Commission might raise the prospect of the rule's abuse. Not only might the duty to seek assistance be disregarded, it might also give rise to other problems in international law. Mr. Petrič seemed to be trying to minimize that difficulty by saying that the Commission was not discussing State sovereignty but the protection of human beings. The truth was, however, that the two notions went hand in hand, or were perceived to be interrelated by States. The Commission could not therefore completely ignore the link. The report contained several statements about the need for consent, non-intervention and State sovereignty that should be integrated in the text of the draft articles rather than placed in the commentary.

39. He agreed with Mr. Hmoud that rules laid down by the Commission could serve as a deterrent, but he still thought that they might be subject to abuse. The General Assembly and the Secretary-General of the United Nations had been of the opinion that the responsibility to protect did not justify the right to intervene in the context of disaster relief. That finding should be reflected in the draft articles.

40. Mr. GALICKI said that draft articles 9 and 10 dealt with a very delicate issue. Accordingly, the commentary should make it clear that they constituted progressive development rather than codification and represented an attempt to reconcile two opposing trends. Laying down an unconditional legal duty in draft article 10 might cause that draft article to remain a dead letter, whereas making it less rigid might prove beneficial to the whole codification exercise. The Commission had to remember that the draft articles had to be applied in practice and had to be useful to States.

41. Mr. WISNUMURTI said that he agreed with Mr. Murase's comment at an earlier meeting that the Commission should not draw up articles establishing across-the-board legal obligations that were not supported by international practice. He also agreed with Mr. Melescanu that draft article 9 was very important because it embodied the principle of the responsibility of an affected State and

established a balance between State sovereignty and the protection of human rights. However, it was inappropriate to cite that provision in support of the use of the term "duty" in draft articles 10 and 11. By suggesting the replacement of "shall" with "should", Mr. Vasciannie had proposed a compromise that might offer some common ground in addressing a very sensitive issue.

42. Mr. SABOIA said that while he agreed with the views expressed by Mr. Petrič, he also shared Mr. Vasciannie's concern that a rule requiring States to accept assistance might be abused, especially in the case of weaker countries. In his introduction to the fourth report and in the report itself, the Special Rapporteur had emphasized that affected States retained a wide margin of choice with regard to the source of assistance and could opt for a reliable source. A qualifying phrase might be introduced indicating that the offer of assistance had to be "made in accordance with the principles of the present draft articles", since that would reinforce the idea that the assistance must be impartial and neutral.

43. Another argument in favour of the Special Rapporteur's approach was that, if the affected State was unable to provide relief and refused to accept external assistance, the extent of the disaster and its effects in terms of the loss of human life might be so great as to enable the United Nations to invoke human rights principles and other potent arguments. After the floods in Myanmar, for example, it had taken a visit from the Secretary-General to convince the Government to accept outside relief.

44. Mr. NOLTE observed that Mr. Vasciannie had criticized the Special Rapporteur for not having presented enough practice in support of the duty to seek assistance. He was sure that the Special Rapporteur could point to many cases where States that had been overwhelmed by a disaster had asked for assistance and where that request had demonstrably been made out of a sense of legal obligation. Conversely, Mr. Vasciannie might be asked to give examples of State practice where the pretext of supplying relief in a natural disaster had been used for illicit purposes.

45. Mr. VASCIANNIE said that there were many instances of countries having sought assistance, although out of a sense of legal obligation: States had simply known that they had the right, not a duty, to seek assistance. Japan and Myanmar afforded examples in that context.

46. Mr. FOMBA, said that, as Mr. Pellet had remarked at an earlier meeting, the fourth report had not mentioned the responsibility to protect. However, that responsibility deserved attention, even if such an approach would imply somewhat bolder progressive development. The philosophy underlying the topic was certainly that of the responsibility to protect. Appropriate answers to the questions of who should protect victims in the event of a disaster, on what legal basis and subject to what conditions and limitations had to be sought both *de lege lata* and *de lege ferenda*. The responsibility to protect comprised two obligations: on the one hand, the obligation of the affected State to protect and assist the stricken population and, on the other, the obligation of the international community to assist the weakened affected State or, where necessary,

to compel it to accept assistance. The following scenarios were possible: the affected State was able and willing to act, in which case the problems and the legal implications were minimal; the affected State was willing but unable to act, in which case the main legal issue was determining the basis for as well as the ways and means of providing assistance to the affected State; the affected State was able but unwilling to act, in which case it was necessary to decide how to define that situation in legal terms. Was there any foundation in international law for the idea of refusal of assistance to an endangered population, and, if so, what were the legal consequences? Could the State be compelled to accept assistance, directly or through an intermediary? The door was wide open to the progressive development of international law there, the point being to distinguish what was desirable from what was feasible. He was sure the Special Rapporteur had not lost sight of those complex questions. He had wisely opted for an objective, realistic approach, proposing a balanced, acceptable set of draft articles, and he himself was in favour of their referral to the Drafting Committee.

47. He wished to draw attention to a text not mentioned in the fourth report, namely the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Article 1 (*k*) thereof defined “internally displaced persons” as persons who had become displaced, *inter alia*, as a result of natural or human-made disasters. Article 5, paragraph 1, spoke of a primary duty and responsibility for providing protection and humanitarian assistance to internally displaced persons. Article 5, paragraph 4, made it incumbent upon States to take the necessary measures to protect and assist persons who had been internally displaced owing to natural or human-made disasters, including climate change. Article 5, paragraph 2, laid down the obligation to cooperate on the basis of the concerned State’s consent. Article 5, paragraph 12, safeguarded the principles of the sovereignty and territorial integrity of States. Article 12, paragraph 3, made States liable for making reparation to internally displaced persons for damage when a State party refrained from protecting and assisting internally displaced persons in the event of natural disasters.

48. Mr. HUANG said that first-hand experience of disasters in his own country had given him a deep understanding of the issues involved. In that connection, he could recommend a Chinese film entitled “Aftershock”, which depicted events surrounding two major earthquakes in China and provided new perspectives on disasters, disaster assistance and the protection of affected persons. The film showed that in the face of a major catastrophe, values such as morality, love and tradition were more powerful than abstract talk of duties, rights and responsibilities.

49. Turning to the substance of the report, he said that it was important to clarify the key questions involved. In his view, there were three basic issues that needed to be addressed: the definition of disasters, the provision of assistance and the question of rights, duties and responsibilities.

50. To begin with, there were three entirely different types of disaster: those that were unpredictable, sudden and large-scale, such as earthquakes, tsunamis and floods;

those that were the result of climate change, desertification and ecological degradation, such as drought and famine; and, lastly, those that were caused by social strife, such as famine and refugee influx. It was the first type of disaster that the Commission should be discussing. Disasters of that nature could strike any country, regardless of its wealth or resources, whereas the second type occurred only in poor and underdeveloped countries, a development issue that should be addressed by the Millennium Development Goals. The third type related more to issues of peace and security and called for political solutions.

51. Clearly, different disasters required different responses. The response to sudden disasters involved three stages. During the first stage, when the overwhelming requirement was to save lives, talk of human rights was meaningless. During the second stage, the key priority was the resettlement of victims, an effort that required vast amounts of external material assistance. The third stage focused on post-disaster reconstruction, which was a development issue requiring long-term input.

52. Secondly, with regard to the provision of assistance, he wished to mention two successful Chinese models. The first, based on self-reliance, was exemplified by the response to the devastating earthquake that had struck the city of Tangshan in 1976. Disaster relief and reconstruction had been carried out using solely local resources, and within 30 years a prosperous new city had emerged. The second model was based on a combination of self-help and international assistance and was illustrated by the reaction to the major earthquake that had hit the city of Wenchuan in 2008. The Government of China had immediately triggered its emergency response mechanism, committed large sums to the relief operation and mobilized the entire country. As part of its disaster relief and reconstruction efforts, it had also accepted assistance from international sources. Reconstruction work had been completed ahead of schedule, and economic development had surpassed pre-earthquake levels. Nevertheless, the primary responsibility for disaster relief lay with the affected State, and the critical factor in the success of disaster-relief efforts was the assistance provided by the affected State, not international assistance.

53. The third issue that must be considered was that of duties, rights and responsibilities. He noted that draft article 10 indicated that the affected State had the duty to seek external assistance if the disaster exceeded its national response capacity, while draft article 12 stated that the international community had the right to offer assistance to the affected State. In his view, however, the relationship between the affected State and the international community should not be defined in terms of rights and duties, but should be considered from the perspective of international cooperation. The assistance provided by a large number of countries to Japan following the recent earthquake there was a display of humanitarian spirit and not an indication that the disaster exceeded the country’s response capacity. At the same time, an affected State had the right to opt for self-reliance; the rejection of external assistance should not be viewed as erroneous or contrary to human rights. Furthermore, offers of assistance to affected States should also take into account those States’ capacity to receive and utilize such assistance. A number of States had expressed

their willingness to provide help following the Wenchuan earthquake, but the local conditions were such that it had not been possible to accept all the international assistance offered. No accusations should be made against affected States on that basis.

54. The provision of assistance should be viewed as a responsibility rather than a right. In reality, many of the problems confronting African States were not the result of a failure to seek assistance but rather of a failure on the part of developed countries to provide adequate assistance. At the same time, some countries had imposed political conditions on disaster relief with a view to subverting the Governments of affected countries. Such behaviour was tantamount to intervening in the domestic affairs of those States and ran counter to the humanitarian spirit. It was for that reason that Ethiopia and Myanmar had rejected assistance.

55. In his view, affected States had a right but not a duty to seek assistance. Other States or the international community as a whole should have a moral responsibility or duty to provide assistance. On the basis of that understanding, he proposed that draft articles 10 and 12 be amended to indicate that affected countries had the right to seek assistance from the international community if the disaster exceeded their capacity to respond to it and that other States and the international community should have the responsibility to help affected countries, but should not attempt to interfere in their domestic affairs.

56. Mr. DUGARD said that Mr. Huang had raised a number of interesting issues. As far as he himself was concerned, the mere mention of the principle enshrined in Article 2, paragraph 7, of the Charter of the United Nations—namely, non-interference in the internal affairs of States—was like a red rag to a bull. Under the apartheid regime in South Africa, that article had been a central feature of government foreign policy and had been used to support the argument that no State should be allowed to interfere in its racial policies. He had been under the impression that mention of Article 2, paragraph 7, was no longer fashionable, but he had been proved wrong. He would be interested in hearing Mr. Huang say more about the politicization of the famines in Ethiopia and Myanmar. It was his recollection that in both those cases the assistance offered by the international community had been rejected out of hand. The events of that time needed to be clarified: one should not say that those disasters had been politicized without providing further evidence.

57. Mr. VASCIANNIE said he wondered whether, in the light of Mr. Dugard's comments concerning Article 2, paragraph 7, of the Charter of the United Nations, Mr. Huang or Mr. Dugard could elaborate on whether there was a duty for non-affected States to give assistance in the event of disasters.

58. Mr. DUGARD said that Mr. Vasciannie had raised an interesting point that required further consideration. He hoped that the Special Rapporteur would take it up.

59. Mr. NOLTE said that the corollary of the duty to seek assistance was the duty to consider such a request, not the duty to provide assistance.

60. Mr. PETRIČ said he hoped that at some time in the future, non-affected States would have a duty to provide assistance and not simply the right to do so. At present, however, the issue under discussion was the duty of affected States not to reject assistance arbitrarily. That was a modest first step in the right direction.

61. Mr. HMOUD thanked the Special Rapporteur for his well-researched fourth report, which tackled several of the core issues that needed to be addressed. While other entities existed to address the operational aspects of relief, the Commission was the appropriate body to determine the norms to be applied when the legal protection of persons was challenged by the positions of certain actors. A balance needed to be struck between the rights and obligations of the different actors in order to enhance that protection, but a balance meant that there were no absolute rights and that actors could not advance their rights in order to escape their obligations towards others. The overarching aim of the Commission's task was to secure legal protection for affected individuals during a disaster situation, and the balance of rights and obligations must be established in the light of that objective.

62. A second general point to bear in mind was that a violation of the obligations contained in a legal instrument triggered the legal responsibility of certain actors. Such violations of international law should not be ignored in a disaster situation. When a State or an international organization realized that its international responsibility would be incurred as a result of such a violation and that it could not benefit from a lack of legal clarity, that realization should serve as a deterrent to the commission of a violation and an incentive to adhere to the law.

63. A third consideration was that the principles of State sovereignty and non-intervention were well established in international law, and the current exercise should not be viewed as derogating from those principles. Sovereignty entailed not only rights for States but also obligations, including in the context of disaster situations. As asserted in draft article 9, an affected State, by virtue of its sovereignty, had the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. Furthermore, the principles of neutrality and impartiality enunciated in draft article 6 protected the affected State against intervention not only by actors who might incur international responsibility but by non-State actors as well. An affected State could curtail the rights of a certain actor if the latter violated the principle of non-intervention or any humanitarian principle. In fact, the report overemphasized the assurances given to affected States against potential infringement of their sovereignty or of the principle of non-intervention by other actors.

64. A strong basis existed for developing in the draft articles a rule relating to the duty of the affected State to seek assistance. The existing international legal framework seemed oriented towards the creation of such an obligation, but it was simply a fact that when a State was unable to fulfil its primary responsibility for protecting the individuals in its territory in the event of a disaster, it had to seek outside assistance. Failure to establish the duty to seek assistance would result in a legal vacuum, thereby defeating the aim of the draft articles,

which was to ensure legal protection. While it might be argued that the duty to cooperate encompassed the duty to seek assistance, the former was more concerned with the operation and management of the affected State's disaster response, which was a mutual relationship, than with the specific obligation to seek assistance, which was an individual undertaking.

65. He agreed with the Special Rapporteur that there was a margin of appreciation for the affected State to determine the nature and content of the assistance it sought, which implied that the affected State had the right to choose the actors from whom it sought assistance. As with any other sovereign right, its enjoyment was conditional on its non-abuse by the affected State.

66. Turning to the text of draft article 10, he said that he agreed with the Special Rapporteur's preference for the word "seek" over "request", since a request for assistance suggested that the affected State might be inclined to accept whatever offer of assistance was made to it, while "seek" implied a more proactive approach.

67. With regard to draft article 11, he agreed with the premise that the affected State had the right, when offered assistance, to determine the type of assistance to which it would consent, irrespective of whether its capacity to provide relief had been exhausted. Nevertheless, that right was not absolute, and there was ample legal basis for developing the duty of the affected State to consent to assistance when it had no strong reasons, such as reasons of national security, to withhold such consent. It should be pointed out, however, that the interest of the international community in the protection of persons in the event of disasters had not yet developed to the point that the duty covered by draft article 12 constituted an *erga omnes* obligation.

68. There appeared to be some confusion in the report between the unwillingness of the affected State to assist individuals who were in its territory when a disaster occurred and the unwillingness of the affected State to accept external assistance. Draft article 11 stipulated that a State could not arbitrarily withhold its consent to external assistance when it was unable or unwilling to provide the assistance required. An affected State that was unwilling to provide assistance in its territory to affected individuals might, by virtue of its human rights obligations, incur international responsibility for wrongful acts. Under draft article 11, it would incur additional international responsibility if it arbitrarily rejected an offer of assistance.

69. In that case as well, the State had sovereign discretion in assessing the nature of the offer of assistance to which it would consent and in determining the actors from whom it would accept such an offer. That was of practical importance, since in certain situations States might reject an offer of assistance from actors whose motives were other than humanitarian in nature.

70. With regard to draft article 12, he noted that, while there was not a sufficient basis in international law for imposing a general obligation on donors to provide assistance, the duty to cooperate embodied in draft article 5 could provide a basis for the establishment of such an obligation. However, that was not the subject of

draft article 12, which appeared to have been drafted with a view to imposing an obligation on the affected State that would arise from the establishment of a right accorded to third-party actors. He did not agree that all third-party actors should be given equal treatment in the formulation of that right. The treatment in draft article 12 of NGOs as subjects of international law with direct rights *vis-à-vis* States would give rise to legal difficulties and cause major practical problems for the implementation of the draft articles. Such treatment could, for example, trigger the responsibility of an affected State that rejected an offer of assistance from an NGO. There was no rule—not even an emerging rule—in international law that pointed in that direction. In emergency situations, where the response, including offers of assistance, had to be rapid, and where a large number of "relevant" NGOs were present to assist with the disaster, such a rule could put the affected State in a difficult position. In such cases, the affected State would first have to ensure that the offer of assistance from the NGO was genuinely humanitarian in nature, which it did not have the luxury of time to investigate; then, if it declined the offer, it would have to risk committing an internationally wrongful act. As currently worded, draft article 12 would undermine the ability of the State to protect the individuals in its territory, thus defeating the purpose of the draft articles. Consequently, he did not support extending to NGOs the right to offer assistance. As an alternative, he suggested that the wording of draft article 12 might be amended to eliminate the concept of a right altogether, providing instead that third-party actors "may" offer assistance, thus constituting an authorization rather than a right.

71. In conclusion, he recommended referring draft articles 10, 11 and 12 to the Drafting Committee.

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

CHAPTER IV. Reservations to treaties (continued)* (A/CN.4/L.783 and Add.1–8)

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)*

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)*

(b) Text of the guidelines and the commentaries thereto (continued)*

72. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.783/Add.3.

1.1.1 Statements purporting to limit the obligations of their author (concluded)* (A/CN.4/L.783/Add.3)

*Commentary (continued)**

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

The commentary to guideline 1.1.1, as a whole, as amended, was adopted.

* Resumed from the 3101st meeting.

1.1.2 *Statements purporting to discharge an obligation by equivalent means*

73. Mr. CANDIOTI proposed that the pronoun “it” [*il*] be replaced with “the author” [*l’auteur*], in order to avoid confusion.

74. Mr. PELLET (Special Rapporteur) suggested that, in that case, the amended text should be “the author of the declaration” and not just “the author”. The problem in French of choosing between the pronouns “*il*” and “*il ou elle*”, when they referred to States and international organizations, had arisen with regard to other guidelines as well. It had not seemed appropriate to use the politically correct phrase “*il ou elle*” to refer to a State or an international organization.

Guideline 1.1.2, as amended, was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

75. Mr. NOLTE proposed that the word “probably”, which he considered redundant, be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

76. Sir Michael WOOD proposed that, in the final sentence, the word “must” be replaced with “may” or “should”, depending on the meaning the Special Rapporteur wished to convey.

77. Mr. PELLET (Special Rapporteur) said that as States had the obligation to settle their disputes peacefully, he saw no problem with the word “must” in the English version. To avoid confusion, he suggested replacing the phrase “must resort to a means of peaceful settlement” with “must settle their disputes in accordance with general international law” [*devront régler leur différends conformément au droit international général*].

78. Sir Michael WOOD said that, in the English version, it would be sufficient to replace the word “must” with “should”.

79. Mr. CAFLISCH said that to replace “must” with “should” would be a mistranslation of the French term “*devront*”. The French text should remain as currently worded. The English translation, on the other hand, was not limited to the word “must”: “*devront*” could be translated as either “may” or “shall”, but definitely not as “should”.

80. Sir Michael WOOD said that there might well be an obligation on States to settle disputes that could pose a threat to international peace and security, but it was hard to believe that there was an obligation on them to settle any difference of opinion they might have concerning a reservation to a treaty. For that reason, he would prefer the word “should”, which fit the context very well.

81. Mr. CAFLISCH said that by that reasoning, the French text should employ the word “*devraient*”. Regardless of the term chosen, the two language versions should not differ markedly from each other.

82. Mr. PELLET (Special Rapporteur) suggested that the final sentence should be reformulated to read: “Where assessments differ, the usual rules to resort to means of peaceful settlement apply.”

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 1.1.2, as amended, was adopted.

1.1.3 *Reservations relating to the territorial application of a treaty*

Guideline 1.1.3 was adopted.

Commentary

Paragraph (1)

83. Mr. PELLET (Special Rapporteur) suggested that paragraph (1) be amended to read: “As its title indicates, this guideline concerns unilateral statements by which a State purports to exclude the application of certain provisions of a treaty *ratione loci*: the State consents to the application of certain provisions *ratione materiae* except in respect of one or more territories to which the excluded provisions of the treaty would otherwise apply under article 29 of the Vienna Conventions.”

Paragraph (1), as amended, was adopted.

Paragraph (2)

84. Mr. PELLET (Special Rapporteur) suggested that, in the first sentence of the French text, the word “*seront*” should be replaced by “*seraient*”.

Paragraph (2) was adopted with that minor drafting amendment to the French text.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

85. Mr. KEMICHA proposed that, in the French text, the word “*lequel*” should be replaced with “*laquelle*”.

Paragraph (5) was adopted with that minor drafting amendment to the French text.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

86. The CHAIRPERSON said that paragraph (11), which had already been deleted in an earlier version of

the draft report, had inadvertently remained in the French text. The paragraph should therefore be deleted to bring it into line with the English version.

Paragraph (11) in the French text was deleted.

The commentary to guideline 1.1.3, as amended, was adopted.

1.1.4 *Reservations formulated when extending the territorial application of a treaty*

Guideline 1.1.4 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

87. Sir Michael WOOD proposed that the word “definitive” in the first sentence should be deleted, as the Commission usually spoke of “consent to be bound” without any qualifiers.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

88. Mr. PELLET (Special Rapporteur) proposed that, in the French text, the expression “*compte tenu*” should be replaced with either the word “*moyennant*” or with the word “*avec*”, which would align it with the English text.

Paragraph (5) was adopted with that minor drafting amendment to the French text.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to guideline 1.1.4, as amended, was adopted.

The meeting rose at 1 p.m.

3104th MEETING

Wednesday, 13 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Adoke, Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia,

Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/638, sect. D, A/CN.4/643, A/CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the fourth report on the protection of persons in the event of disasters.

2. Sir Michael WOOD said that he agreed with the members who had underscored the fact that the report under consideration, which was concise yet informative, arrived at an appropriate balance among the various interests at stake. That was no mean achievement since the sensitive nature of the issues involved had been illustrated at the previous meeting. The Special Rapporteur had once again demonstrated both his diplomatic and his legal skills. The three draft articles that he was now proposing were central to the overall draft and complemented those which had been adopted the previous year.

3. Mr. Vasciannie had put forward some tightly argued and challenging objections to draft articles 10 and 11. He himself understood those concerns and agreed that the Commission did need to be cautious in all its work. That work sometimes had more impact than might be expected or even, perhaps, than it deserved. Obligations under international law were increasingly the subject of litigation, including in domestic courts, and as courts looked closely at the Commission’s work, it bore a heavy responsibility.

4. He agreed with virtually everything that had been said during the exchange of views at the previous meeting. If Mr. Vasciannie’s proposed amendments to draft articles 10 and 11 were adopted, they would deprive those provisions of all real significance and render the topic virtually meaningless.

5. The fact was that the Commission was engaging, in part at least, in progressive development. Mr. Vasciannie’s references to State sovereignty were rather one-sided and did not acknowledge the modern view of sovereignty, namely that it carried obligations as well as rights. It was rather old-fashioned to refer to “weaker countries” and “powerful countries”. On the whole, the draft articles were taking shape in a balanced manner, and the three draft articles proposed in the fourth report were essential to that balance.

6. Mr. Dugard had been correct in saying that the Commission should not be deterred by the possibility that States might disregard their obligations; other members had rightly indicated that the risk in question was exaggerated. The Commission had already taken good note of the Secretary-General’s statement that the notion of “responsibility to protect” did not extend to natural

disasters, and it had already decided that the “responsibility to protect” within the meaning of the 2005 World Summit Outcome³⁰¹ had no place in its work³⁰² on the topic. Fears about non-compliance or abuse must not deter it from stating in the draft articles what it considered to be right.

7. It was encouraging that, as could be seen from the first part of the Special Rapporteur’s fourth report, the Commission’s work on the topic so far had generally been well received in the Sixth Committee. Many interesting and thoughtful remarks had been made in New York. It was to be hoped that good note would be taken of them and that they would be borne in mind when the time came to revise the draft articles that had already been adopted.

8. One of the difficulties with the Commission’s traditional working methods was that comments from Governments and international organizations generally reached it after it had adopted the draft articles concerned on first reading. Years could pass before the second reading, and when States were asked to comment on the full set of draft articles adopted on first reading, they might feel obliged to repeat what they had said at an earlier stage (if they could recall it). That process might have made sense in the past, when the workload of legal advisers to Ministries of Foreign Affairs had been lighter.

9. The example set in 2009 by the Special Rapporteur on the responsibility of international organizations might be a good one to follow in appropriate cases. In his seventh report,³⁰³ Mr. Gaja had proposed amendments to some draft articles adopted in previous years *before* the Commission had adopted the full set of draft articles on first reading. That had made it easier for States to comment on the first-reading text, because at least some of their points had already been taken into consideration. He encouraged the Special Rapporteur to take the same course of action. Purists might object that this approach departed from an orderly progression from first to second reading, but that was not the case. That manner of proceeding improved the first-reading text. It was more efficient and took greater account of States’ opinions.

10. At the previous meeting, Mr. Pellet had made some interesting comments on the methodology employed so far. First, it was true that the Commission should not overemphasize the influence of international humanitarian law on its work, but where it had drawn inspiration from that field of law, it should acknowledge that fact. Perhaps more should be done to explain why the Commission had found that source useful, even though the draft articles did not apply to situations covered by international humanitarian law, as was made plain by draft article 4.

11. Secondly, it had been said that the report contained insufficient references to practice and relied instead on

abstract texts and reasoning. However, it was an area in which practice was sadly plentiful, but not always easy to piece together and document. Moreover, in a new area of law that had been developing rapidly for some years, practice was not necessarily the best guide. In those circumstances, the assessment of practice might be particularly difficult and subjective, as had been demonstrated at the previous meeting by the revealing exchanges on certain historical examples. That was why the Commission must pay careful attention to the texts adopted by States and by organizations such as the International Federation of Red Cross and Red Crescent Societies (IFRC), which were a distillation of the practice followed by those with considerable experience in the field.

12. The third methodological point concerned the duty to protect. He was unsure that he had fully grasped the criticism made in that respect, but enough had been said on the subject during the discussions at the previous meeting.

13. Turning to the three draft articles proposed by the Special Rapporteur in his fourth report, he said that first, like any other obligation under international law, the duty to seek assistance must be performed in good faith. The State’s efforts to secure assistance must be genuine and must be addressed to those who were likely to be willing to provide it, without regard to irrelevant political considerations.

14. Secondly, it was implicit in the word “seek” that the affected State must take positive steps to request assistance. As Mr. Hmoud had said, the term meant that the State needed to be proactive; it was not sufficient for it to launch a *pro forma* appeal addressed to no one in particular.

15. Thirdly, how should one interpret the threshold established by the phrase “if the disaster exceeds its national response capacity”? The “margin of appreciation” used by the European Court of Human Rights in a different context (*A. and Others v. the United Kingdom*) was not particularly helpful and should not feature in the commentary. Greater objectivity was required. Once again, the notion of good faith came into play.

16. Fourthly, should the test be that the disaster “exceeds [the] national response capacity”? By the time that was known to be the case, it was, almost by definition, too late. Wording along the lines of “appears likely to exceed the national capacity” might be better.

17. Fifthly, Mr. Nolte was right: the words “as appropriate” were inappropriate in draft article 10.

18. All those points could be considered by the Drafting Committee or dealt with in the commentaries.

19. Draft article 11 set forth the fundamental duty of the affected State not to withhold its consent arbitrarily. The adverb “arbitrarily” could be replaced with “unreasonably”, a more general term less open to legal quibbling. Still, the draft article, which he strongly supported, conveyed the basic idea. The text prompted four further comments. First, whichever word was used—“arbitrarily” or “unreasonably”—the commentary should

³⁰¹ 2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139. See also the Secretary-General’s report entitled “Implementing the responsibility to protect” (A/63/677) and General Assembly resolution 63/308 of 14 September 2009.

³⁰² See *Yearbook ... 2008*, vol. II (Part Two), pp. 133–134, paras. 247–250, and *Yearbook ... 2009*, vol. II (Part Two), p. 135, para. 153, and p. 137, para. 164. See also *Yearbook ... 2008*, vol. I, 2978th to 2982nd meetings, pp. 129–184, *passim*.

³⁰³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610.

explain as carefully and clearly as possible what it meant in practice in the context. For example, any refusal of consent for purely political reasons and which harmed the public interest should be deemed arbitrary.

20. Secondly, he shared the doubts expressed by Mr. Pellet at the previous meeting about the reference to cases where the affected State was “unwilling” to provide the requisite assistance. The Commission should not assume that the affected State would shirk its basic duty to secure the protection of persons and provision of disaster relief in its territory, a duty embodied in draft article 9. In the light of that draft article, it would be strange to refer only to cases where the affected State was “unable” to provide the necessary assistance. Both terms could be omitted in draft article 11, which would simply read, “Consent to external assistance shall not be withheld arbitrarily”. Of course, where outside assistance was unnecessary, it would not be arbitrary to withhold consent.

21. Thirdly, as others had said, the text must make it clear that reasons had to be given for any refusal of consent. Failing that, it was hard to see how the affected State’s good faith and the absence of arbitrary conduct could be assessed.

22. Lastly, some thought should be given to whether any exceptions to the rule regarding consent should be allowed. For example, the affected State might not be in a position to give its consent because it was so overwhelmed by the disaster that there was no functioning government. In that exceptional but not impossible situation, the population still needed protection. Even if no explicit mention were made of that eventuality in the draft articles themselves, it should be borne in mind and referred to in the commentaries.

23. Draft article 12 (Right to offer assistance) might state the obvious, but the reasons for that were clear and well explained in the report. However, he agreed with the point made by Mr. Hmoud at the previous meeting concerning the reference to NGOs in that draft article and possibly elsewhere. He also endorsed Mr. Pellet’s suggestion that the order of draft articles 11 and 12 should be reversed to take account of the temporal progression from the offer of assistance to the question of consent.

24. Moving on to three methodological points of his own, he pointed out that the Commission had not yet dealt with the duty to prepare for natural disasters, having decided to examine that aspect at a later stage. Since it was one of the most important duties of States in respect of disasters, it needed to be considered sooner rather than later. Secondly, it might be wise to rethink the position of international organizations in the draft articles, since they were playing an increasingly prominent role in disaster relief, especially when they were given specific powers, functions or responsibilities. They might even have responsibilities related to the exercise of what was sometimes termed “international territorial administration”.

25. Thirdly, the Sixth Committee had encouraged Commission members to remain in close contact with those working in the field of protection. The Special Rapporteur himself had been in touch with a range of people. The time

had come for all the members of the Commission to build up their networks. The previous week, some had made a good start by visiting the IFRC. Perhaps a more structured, long-term dialogue with the IFRC should be undertaken.

26. He supported the referral of the three draft articles proposed in the Special Rapporteur’s fourth report to the Drafting Committee.

27. Mr. McRAE said that the main challenge for the Commission was to move beyond the mere expression of broad basic principles in order to articulate the rights and responsibilities of the various actors who would help to ensure that the protection of persons in the event of disasters was not left to the discretion of States, which must be reminded that they had duties as well as rights.

28. The Special Rapporteur had achieved the correct balance in the relationship between the Commission’s work on the topic and the “responsibility to protect”. When the Special Rapporteur had presented his preliminary report, he himself had been among those who had said that if the Commission intended to take a position on the responsibility to protect, it would be opening up an extraneous issue and inviting responses based on differing views of that notion rather than on any commitment to the protection of persons. On the other hand, if it were to spell out obligations in that sphere, it would make an indirect but much more useful contribution to the development of the notion of the responsibility to protect than by directly invoking it.

29. As had been pointed out at the previous meeting, the fourth report focused more on a State’s duty to protect its own population than on States’ responsibility to act when the population of another State was under threat. That had produced considerable tension in the Commission, with many members advocating an explicit or implicit reaffirmation of the principle of non-intervention. The Special Rapporteur had managed to sidestep the problem and had found a way of placing obligations on the affected State deriving from the duty to preserve life and dignity and to cooperate. He had thus found a way to avoid a possible impasse.

30. The central question with regard to the draft articles was whether they should be binding. The duty set forth in draft article 10 (Duty of the affected State to seek assistance) was not a substantive obligation and applied only in limited circumstances. In addition, it was difficult to see whether that requirement was consistent with State practice, due to the lack of analysis thereof.

31. Ethiopia and Myanmar had frequently been mentioned during the debates at the two previous meetings. An analysis of the situation in Myanmar would show that neighbouring States had in fact provided assistance and that Myanmar and those States had probably discussed that assistance. Such discussions might well have satisfied the requirements of draft article 10. In Ethiopia, on the other hand, had aid of any kind been provided by another State? If a State accepted assistance in the event of a disaster, it was unlikely to be held responsible for failing to seek help. Furthermore, as Mr. Hmoud had pointed out, nothing in the draft article indicated from whom the assistance had to be sought or received.

32. He was not trying to play down the events in Ethiopia and Myanmar, but if one looked at the facts, one might conclude that draft article 10 simply described what happened in reality. In addition, given the fairly minimal requirements imposed by draft article 10, concerns about State responsibility might turn out to be far fewer than suspected. It would therefore be appropriate, as an exercise in progressive development, to adopt draft article 10 and to refer in the commentary to its relationship with practice, on which further research undoubtedly needed to be done, and to the limited scope of the obligation.

33. In the case of draft article 11 (Duty of the affected State not to arbitrarily withhold its consent), Mr. Vasciannie's concerns about potential responsibility were more substantial. The correct approach would be not to minimize the obligation, but to clarify and delimit it. As other members had pointed out, the problem lay in the idea expressed by the word "arbitrarily". In what circumstances might an affected State be held responsible for arbitrarily rejecting an offer of assistance? It was impossible to leave draft article 11 as it stood without defining in greater detail what was arbitrary and what was not. It was necessary to go beyond the reference to "strong and valid reasons" in the fourth report. As other members had noted, draft articles 11 and 12 were closely linked. A State exercising its right under draft article 12 to offer assistance which was then rejected by the affected State might invoke the responsibility of the affected State by claiming that its refusal was arbitrary within the meaning of draft article 11. What was meant by arbitrary might also be clarified by looking more closely at the right recognized in draft article 12.

34. In that connection, two important clarifications had to be made in respect of draft article 12. First, the right to offer assistance should not encompass assistance to which conditions that were unacceptable to the affected State were attached. Assistance which clearly, from the way it was offered, had political objectives or was tantamount to interference in the affected State's internal affairs could not be deemed a legitimate exercise of the right to offer aid recognized under draft article 12. Secondly, the aid offered had to be consistent with the provisions of the draft articles (as Mr. Saboia had suggested) and, in particular, it should not be offered or delivered on a discriminatory basis. If those qualifications were made to draft article 12, a firm basis would be laid for indicating what would not be arbitrary within the meaning of draft article 11. In short, a State which rejected conditional or discriminatory aid would not be considered to be acting arbitrarily.

35. Draft article 12 could be improved by the inclusion of a provision to the effect that "Any such assistance offered shall not be subject to conditions and shall be in accordance with the principles of these draft articles, including in particular the principle of non-discrimination". That would substantially clarify matters for affected States that were confronted with offers of various types of assistance from various sources. Rejection of assistance that did not comply with that additional provision would not be arbitrary within the meaning of draft article 11. The scope of the provision could be made clear in the commentary.

36. That did not mean that those were the only criteria for determining arbitrariness: the Special Rapporteur referred to grounds of national security, for example. There was another circumstance that would justify rejection by the affected State. When a State refused assistance because it did not need it, perhaps because it was already receiving sufficient aid from other sources, it could not be regarded as acting arbitrarily. Perhaps that was obvious, but it would be wise to mention it in the commentary to draft article 11. If the Commission were to adopt draft article 11, it would have to define more clearly the circumstances in which an affected State could refuse offers of assistance and be sure that it had the freedom to do so.

37. As to the duty of the affected State to explain the reasons for its decision, especially if it rejected assistance, he questioned the need for such explanations to be given to NGOs. It was unreasonable to impose on an affected State the additional burden of having to explain to potentially dozens of NGOs why it was turning down their aid. Mr. Hmoud had suggested that one solution would be to exclude NGOs from the list of entities entitled to offer assistance under draft article 12. Rather than going that far, the Commission might indicate that the affected State's obligations under draft article 11 did not apply to NGOs.

38. Another question was whether draft article 11 should apply to States that were unwilling to supply the requisite assistance themselves, or only to those that were unable to do so. It would be tempting to delete the reference to the former, as Mr. Pellet had suggested, but that would not alter very much, since the purpose of draft article 11 was to ensure the protection of persons affected by disasters by limiting the affected State's ability to refuse help. The best way of guaranteeing that protection was for the affected State to accept assistance regardless of the reasons why it needed help. That suggested that draft article 11 should cover cases where the State was unwilling to furnish assistance itself and that the question of affected States' responsibility for failing to provide assistance to persons within their territory when they were capable of doing so should be dealt with elsewhere. That was why draft article 11 must not be changed with respect to that point.

39. Finally, the draft articles seemed to apply to situations when a State was affected by a disaster and other States offered their assistance. But what about disasters affecting a group of States? Did the same provisions apply, with each State being treated as if it were a separate affected State? That question had implications for draft article 11. In paragraph 49 of the fourth report, the Special Rapporteur suggested that when a disaster affected neighbouring States, it might not be so easy for each individual State to assess the disaster's severity, and national response capacity might differ depending on whether the response was coordinated. He would like to know whether, in his future reports, the Special Rapporteur intended to address the question of disasters affecting several States.

40. He was in favour of referring all the draft articles under consideration to the Drafting Committee, which was best placed to consider the various restructuring proposals made. At the present stage, he would simply say that he was not in favour of merging draft articles 10 to 12.

Although they were interrelated, they covered different topics to which it was preferable to devote a separate article, each accompanied by its own commentary.

41. Mr. PERERA said that, in his treatment of a topic that required a carefully balanced and nuanced approach on account of the competing principles and interests involved, the Special Rapporteur had headed in the right direction and had avoided the main pitfalls.

42. As the Special Rapporteur had said when introducing his fourth report, he had tried to find a balance between two poles of tension without sacrificing either. He had also been careful not to introduce elements or notions of a political nature that could have mired the Commission's work in interminable controversy.

43. In dealing with the affected State's duty to seek assistance when its national response capacity was overwhelmed, the Special Rapporteur drew on the guiding principles annexed to General Assembly resolution 46/182, which affirmed that, in the context of disaster response, "[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations" (para. 3). He correctly concluded that the implementation of international relief was contingent upon the affected State's consent.

44. The Special Rapporteur thereafter injected the necessary elements of balance by pointing out that the core principles of sovereignty and non-intervention and the requirement of the affected State's consent must themselves be considered in the light of States' responsibilities in exercising their sovereignty. He then analysed the scope of the affected State's duties towards persons in its territory.

45. Draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report, were linked through the interaction of the duties of the affected State and of the international community towards disaster victims and the principles of sovereignty and territorial integrity and the requirement of the affected State's consent.

46. He agreed with the Special Rapporteur that in draft article 10, it was more appropriate to speak of a duty to "seek" assistance than of a duty to "request" assistance. The Special Rapporteur had provided cogent reasoning for that preference by saying that "a duty to 'seek' assistance implies a broader, negotiated approach to the provision of international aid" (para. 44) and that the term implied the initiation of a process through which agreement might be reached. He himself endorsed the conclusion that a duty to seek assistance ensured the protection of affected populations and persons while satisfying the core requirement of State consent. Nevertheless, he also agreed with Sir Michael that the State must actively seek assistance in good faith. The draft article would be improved by making it explicit that it was up to the affected State to determine whether the disaster exceeded its national response capacity and whether it had sufficient resources to meet protection needs. Those decisions lay within the affected State's sovereign domain, and explicitly saying so would be consistent with the overall approach and with the thrust of the previous draft articles, especially draft article 9. With a

view to the discussions within the Drafting Committee, he said he also supported the proposal made by Mr. Vasciannie at the previous meeting to use hortatory language.

47. With regard to the affected State's duty not to arbitrarily withhold its consent to outside assistance, draft article 11 upheld the proposition that sovereignty also entailed obligations and that while the affected State had the right to refuse an offer of assistance, that right was not unlimited—a notion underscored in previous reports. It was fully consistent with efforts to find middle ground between an absolute consent regime and a regime that completely dispensed with the consent requirement. In order to arrive at that middle ground, the draft article must first state the well-established condition that international assistance could be furnished only if the affected State requested it or consented to it. The requirement that consent must not be withheld arbitrarily should follow that provision so as to maintain the draft article's requisite balance. In that connection, he agreed with Sir Michael and Mr. McRae that the term "arbitrarily" had to be explained and that it was necessary to say why the provision of international assistance was subject to certain conditions.

48. As the debate at the previous meeting had shown, draft article 12 raised a number of issues calling for careful consideration. The Special Rapporteur had provided material which demonstrated that an offer of humanitarian assistance must not be regarded as unlawful interference in the internal affairs of the affected State when it had "an exclusively humanitarian character" and when humanitarian assistance was provided by intergovernmental organizations and NGOs "working with strictly humanitarian motives". Paragraphs 95 and 98 of the report referred to the 2003 resolution on humanitarian assistance of the Institute of International Law³⁰⁴ and to General Assembly resolution 43/131 on humanitarian assistance to victims of natural disasters and similar emergency situations, respectively. Those elements must be reflected in draft article 12 and, there again, he endorsed Mr. McRae's comments concerning political conditions. However, he also agreed with those who had drawn attention to the difficulties of formulating a draft article which embodied the "right" to offer assistance. That posed particular problems, for the text sought to cover not only States but also the competent intergovernmental organizations and relevant NGOs. That would impose on the affected State, in the immediate aftermath of a disaster, the immense burden of ensuring that such a right was not misused, as had unfortunately been the case in Sri Lanka after the tsunami in 2004. National efforts to cope with disaster situations must be supported by a "duty" to offer assistance under the umbrella of international cooperation and solidarity. He agreed with those who had taken the view that offering assistance in a disaster situation did not amount to the exercise of a legal right, but was rather a matter of international solidarity and cooperation. Mr. Murase had captured the essence of such solidarity when he had said, with reference to the events of March 2011 in Japan, "the world stood by us when we were most in need" (3102nd meeting above, para. 49). That expressed the essence of international cooperation better

³⁰⁴ Institute of International Law, *Yearbook*, vol. 70 (2003) ... (see footnote 275 above).

than a recital of dry statistics. In conclusion, he said he was in favour of referring the draft articles under consideration to the Drafting Committee.

49. Mr. AL-MARRI said that disasters had been occurring at an unprecedented pace, striking highly advanced countries like Japan just as hard as less advanced countries such as Haiti. They had produced protracted emergency situations in which assistance was needed not only at the time of the disaster, but for much longer periods. It was sometimes hard to distinguish between natural disasters and those brought on by armed conflicts or the collapse of States. The report mentioned disasters but avoided any mention of armed conflicts or the rebuilding of a country's institutions and regime. Similarly, it did not define disasters in terms of their nature or magnitude but rather sought to find ways of enabling a State to manage them. In that connection, it was essential to underscore the principles of State sovereignty and non-interference and the need to obtain a State's consent in order to mobilize international assistance.

50. The topic under consideration had been placed on the Commission's agenda in 2007,³⁰⁵ and progress had been made, in that nine draft articles would be completed in the near future, including one on the affected State's duty to seek assistance when it was unable to manage a crisis, using its own resources. The purpose of the "duty to seek assistance" was to enable a State to select the kind of help it needed, something that tied in with the principles of sovereignty and non-interference. In his fourth report, the Special Rapporteur mentioned not only the need to obtain the affected State's consent but also certain criteria that applied. A State's offer must be examined promptly but need not be accepted with undue haste. Offers that were not sufficiently well grounded, were politically motivated rather than being focused on the rights and needs of the persons affected, or were not in line with the principles set forth in draft article 6 could be refused, as stated by the Special Rapporteur in paragraph 73 of his fourth report. The aid offered by specialized governmental organizations and international NGOs differed from that offered by private bodies. It was in that context that the provisions of the three draft articles—draft article 10 on the duty of the affected State to seek assistance, draft article 11 on the duty of the affected State not to arbitrarily withhold its consent and draft article 12 on the right to offer assistance—had to be examined.

51. The draft articles already adopted had been favourably received by States and some international organizations. It had been suggested that the notions of human dignity and humanity and their relationship with the human rights of persons affected by disasters, mentioned in draft article 6, should be clarified. The fact that the term "disaster" had been defined in draft article 3 had made it easier to draw up draft articles on serious disasters. It had also been suggested that the affected State should always receive international assistance and not only in the event of what were deemed to be major disasters. Emphasis had been placed on the need to safeguard an affected State's right to manage and organize aid while protecting its sovereignty,

rights and independence, and on the obligation of other States to respect the principle of non-interference. It should be noted with regard to the principle of neutrality embodied in draft article 6 that the principle of non-alignment was broader and more appropriate, the principle of neutrality being narrower and pertaining exclusively to the sphere of armed conflicts.

52. The fourth report set forth the rights and duties of affected States, namely the principle of consent, restrictions on refusal and the obligation to respond promptly to an offer of assistance. The Special Rapporteur should take account of the consequences of the affected State's refusal of assistance that was offered in good faith and of its rejection of a call for assistance from victims. He could also mention the refusal of certain States to seek or accept assistance. He would then be able to suggest that if an affected State did not have the necessary resources, it had the duty to seek or accept international assistance or to authorize its provision. Was a State responsible if it turned down assistance, given that that refusal might constitute an internationally wrongful act if it resulted in the violation of the stricken population's human rights? That clearly seemed to be the case if the State, which bore a responsibility to protect its citizens, deprived victims whose life was in danger of the food, shelter and medicine that international assistance could supply. Taking those factors into account, it would be wise to define the role of the international community, which must not remain idle when disaster victims needed basic protection. While solutions had to be found for instances when a State shirked its responsibility to assist victims, notions such as humanitarian intervention or mandatory protection could not be addressed, because they applied in the context of preventing crimes against humanity or genocide. As the Special Rapporteur pointed out in paragraph 70, consent could not be invoked by a State as a fundamental right if it resulted in a lack or reduction of protection and assistance when external assistance was needed and available. He himself therefore proposed that this question be examined in greater detail and that the consequences of refusal in that context be spelled out, especially if it led to the death or displacement of helpless individuals who were dependent upon a State that had taken such a decision quite unlawfully.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)*

53. The CHAIRPERSON invited Mr. Pellet, Special Rapporteur, to introduce the addendum to his seventeenth report on reservations to treaties (A/CN.4/647/Add.1).

54. Mr. PELLET (Special Rapporteur) said that the final part of his seventeenth and final report was divided into two sections, the first of which was entitled "Dispute

³⁰⁵ *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 375, and p. 100, para. 378 (h).

* Resumed from the 3099th meeting.

settlement in the context of reservations”, and the second, “Guide to practice—Instructions”, which might seem surprising. First of all, the title of the first section did not reflect its contents. In 1997, in his second report,³⁰⁶ he had announced that he intended to propose an annex to the Guide to Practice, to be devoted to dispute settlement, and in 2010 he had again expressed that intention before the Sixth Committee, where that announcement had aroused strong interest, especially among the Nordic States—that was hardly surprising—but also among African and Latin American States. The further he had progressed with that part of his report, the more he had come to realize that it would be better to be less ambitious: the entire first section, entitled “The issue”, set out his hesitations. For the reasons given in paragraphs 71 to 76 of his seventeenth report, it was unusual for the Commission to include dispute settlement clauses in its draft articles. There were general reasons, but also reasons specific to the law on reservations and the fact that the Guide to Practice was not a treaty. It would accordingly be incongruous to attach to it any compulsory or even optional dispute settlement machinery, even though examples of such machinery twinned with soft law instruments did exist. In the end, as he had indicated at the end of paragraph 77, he had taken the view that such a solution would be inappropriate, as it would be too cumbersome and formal: dispute settlement was not synonymous with compulsory dispute settlement. As paragraph 79 suggested, it would probably be wise for the Commission to do the same as it had for the reservations dialogue and to refer the issue either to States or to the General Assembly, although, as he had noted in paragraph 100, it seemed preferable to leave it to the latter to decide how to proceed. That being so, there would be little point in recommending that States should resolve their disputes regarding reservations by peaceful means, for the same recommendation could be made in respect of any dispute. He had therefore endeavoured to explain the reasons for going further than that in paragraphs 80 to 82 of his seventeenth report. There, he noted, first, that the reservations dialogue was an initial response to uncertainties or differences of opinion regarding reservations; secondly, that it was not always successful and left unresolved disputes which, while they did not pose an overall threat to international peace and security, could have substantial practical implications; and, thirdly, that States had only formal equality in such disputes. The issues which had occupied the Commission for 17 years were terribly technical: he was sure that the Commission’s members would not contradict him there. The major developed or emerging States had the human and technical resources to draft their reservations and objections in keeping with their own interests, to analyse the other parties’ reservations and to reflect on the appropriate means of reacting. Small, poor States could not do as much, for obvious reasons, which meant that most of the time reservations and objections came solely from industrialized countries. He had gradually arrived at the conclusion that it would be wise to establish an optional assistance mechanism rather than a dispute settlement mechanism, and he therefore proposed that the Commission should recommend the establishment of a reservations and objections to reservations assistance

mechanism. He had drawn on the arrangements for the systematic consideration of certain reservations introduced under the auspices of CAHDI at the Council of Europe and the European Union’s COJUR, which had already been described in previous reports and to which he adverted in paragraphs 80 to 94. That had been only one source of inspiration among several, because the CAHDI mechanism could not be universalized, for the various reasons listed in paragraph 93. As explained in paragraph 94, the CAHDI mechanism, which combined technical rigour with political realism, suggested that a cooperation mechanism that did not culminate in a binding or even formal decision might produce satisfactory and effective results. In the light of those findings, he proposed that the Commission recommend the establishment of a reservations and objections to reservations assistance mechanism which, broadly speaking, would have the following characteristics: first, it would be flexible and completely optional; secondly, it would have the dual functions of providing technical advice on matters of reservations and reactions thereto and of assisting in the resolution of differences of opinion on reservations; thirdly, it would be small, consisting of a small number of government experts, not necessarily the same at all times; and fourthly, in fulfilling those dual functions, it would take due account of the Vienna Convention rules and, of course, of the Guide to Practice. He did not think that the Commission could or should offer a blueprint of the mechanism, but he was firmly convinced that the idea should be floated to see how it would be received by the General Assembly: as he had said earlier, several delegations and individual representatives in the Sixth Committee had highly commended the idea. He also thought that it would be premature to try to force the General Assembly’s hand by “selling” it a ready-made product. That explained the cautious wording of the recommendation he proposed in paragraph 101 and the fact that the outline of what the mechanism might be remained very general and purely tentative. He proposed that, as it had done with its recommendation on the reservations dialogue, the Commission should refer the modest text to the Working Group on reservations to treaties, on the understanding that the idea of adding an annex II to the Guide to Practice was in any case open to debate.

55. Whereas the reservations and objections to reservations assistance mechanism was basically an extension of the reservations dialogue, Part Three of the seventeenth report harked back to the very beginning of the whole exercise, namely to the conclusions adopted by the Commission on the proposal he had put forward following the consideration of his first report in 1995,³⁰⁷ conclusions never subsequently challenged. They concerned the nature and form of the Guide to Practice and made it plain that it was a soft law instrument designed to guide practice without purporting to establish binding rules, since in principle the 1969 Vienna Convention, the Vienna Convention on Succession of States in respect of treaties (hereinafter “1978 Vienna Convention”) and the 1986 Vienna Convention would remain untouched.³⁰⁸ Although that approach had been constantly confirmed by the Commission and reiterated in reports and statements to

³⁰⁶ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 50–51, paras. 47–50.

³⁰⁷ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, and vol. II (Part Two), p. 108, paras. 487–488.

³⁰⁸ *Yearbook ... 1996*, vol. II (Part Two), pp. 79–80, paras. 110–113.

the Sixth Committee, he was aware of some lingering doubts among members of the Sixth Committee, legal advisers and some Commission members. That realization had led him to prepare an "Introduction to the Guide to Practice", which he was intending to insert at the beginning of that instrument and which would comprise instructions for its use.

56. The proposed introduction, the text of which was to be found in paragraph 105, first explained that the Guide to Practice consisted of 180 guidelines and the commentaries thereto, which formed an integral part of the Guide. It explained its purpose, which was to provide assistance to practitioners of international law when they were faced with problems related to reservations (definition, form and procedure, permissibility or effects), reactions to reservations and the interpretative declarations or declarations that they might elicit. The introduction also adverted to the legal nature of the Guide by explaining that, while it had no binding force in itself, it reproduced certain binding rules that derived their force, not from the Guide, but from customary law or, for the parties thereto, from the Vienna Conventions. Some of the binding rules set forth in the Guide were indeed taken from those instruments or were the necessary consequences thereof. Paragraphs 4 and 5 of the introduction made it clear that States and international organizations were always free to set aside those rules, which were purely residual and voluntary. The same was true of the Guide to Practice: States were entirely free to draft their treaties as they wished. The proposed introduction likewise explained that the Commission had not wished to depart from the three Vienna Conventions, but rather to clarify their provisions—which explained the fairly lengthy exposition in the commentaries of the *travaux préparatoires* to the Conventions—and to draw conclusions that had failed to emerge in the Conventions themselves. Lastly, the introduction was to present and, if possible, explain the reasons for the layout of the Guide to Practice, even though it seemed reasonably logical and Cartesian, to show how the various parts fitted together and to explain the numbering system, which might be somewhat baffling.

57. Once the subject had been discussed, the Commission could decide either to include the 10 introductory paragraphs at the beginning of the Guide to Practice, as contained in chapter IV of the Commission's report on the work of its sixty-third session (A/CN.4/L.783/Add.8), it being understood that the text would be examined in detail in due course by the Commission meeting in plenary session, or to refer those paragraphs to the Working Group on reservations to treaties, if some passages proved to be controversial. In other words, the Commission could take note of the draft introduction contained in paragraph 105 of his report and ask the secretariat to incorporate it directly in chapter IV of the Commission's draft report on the work of the current session, on the understanding that the text would again be submitted to the Commission, meeting in plenary session, when the report was considered. It could also refer the draft introduction to the Working Group on reservations to treaties if it deemed that filter to be necessary. He further asked the Commission to refer to the Working Group the draft annex proposed in paragraph 101 of his report, since its wording needed to be discussed and it could not be included in the Commission's annual report before such a discussion had taken place.

58. Sir Michael WOOD said that he endorsed the Special Rapporteur's first proposal to examine the draft introduction paragraph by paragraph in a plenary meeting. Because he himself was somewhat puzzled by the new reservations and objections to reservations assistance mechanism, he thought it would be helpful to discuss it briefly at the next plenary meeting.

59. Mr. MELESCANU said that he agreed with Sir Michael that the Commission should examine the draft introduction to the Guide to Practice at a plenary meeting and adopt it without delay. With regard to the reservations and objections to reservations assistance mechanism, he said that in view of time constraints, the most efficient solution would certainly be to refer it to the Working Group on reservations to treaties.

60. Mr. HASSOUNA said that the best solution would indeed be to refer the addendum to the seventeenth report, as a whole, to the Working Group on reservations to treaties.

61. Mr. PETRIČ said that he had doubts about whether the solution proposed by Mr. Melescanu and supported by Mr. Hassouna would work, since it was for the plenary Commission, and not the Working Group on reservations to treaties, to reach a final decision on the document in question. Members of the Commission who were not members of the Working Group might wish to reopen the debate in a plenary meeting, so the plenary Commission should therefore consider the document submitted by Mr. Pellet.

62. Mr. NOLTE said that time constraints were not so great as to justify a departure from the procedure normally followed by the Commission when considering reports. The Commission's members should be given sufficient time to discuss in a plenary meeting the proposals contained in document A/CN.4/647/Add.1.

63. The CHAIRPERSON suggested that the Commission consider the addendum to the seventeenth report (A/CN.4/647/Add.1) at the next plenary meeting and take a decision on whether to include the draft introduction contained in that document in its annual report.

It was so decided.

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

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.783 and Add.1–8)

64. The CHAIRPERSON invited the members of the Commission to resume their consideration, paragraph by paragraph, of document A/CN.4/L.783/Add.3.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)

(b) *Text of the guidelines and the commentaries thereto (continued) (A/CN.4/L.783/Add.3)*

1.1.5 *Reservations formulated jointly*

Guideline 1.1.5 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

65. Following a discussion in which Sir Michael WOOD, Mr. VASCIANNIE, Mr. PELLET (Special Rapporteur) and Mr. NOLTE participated, the CHAIRPERSON suggested that in the first sentence of the English text, the word “current” should be deleted.

It was so decided.

Paragraph (2) was adopted with that amendment to the English text.

Paragraph (3)

66. Sir Michael WOOD said that the concept of a “joint” reservation should be developed further through the following addition at the end of the first sentence: “in the sense that it is formulated by one or more States or international organizations in a single instrument”. In addition, the words “formulation of” should be inserted at the beginning of paragraph 3 (a) and (b).

Those proposals were adopted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

The commentary to guideline 1.1.5, as amended, was adopted.

1.1.6 *Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of the treaty*

Guideline 1.1.6 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

67. Mr. NOLTE proposed that, in the English text, the word “samples” be replaced with “examples”.

It was so decided.

Paragraph (2), as amended in the English text, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

68. Sir Michael WOOD proposed that the words “In the Commission’s view” should be deleted.

69. Mr. PELLET (Special Rapporteur) proposed that at the end of the paragraph, the word “or” should be replaced by “nor”.

Those proposals were adopted.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (18)

Paragraphs (5) to (18) were adopted.

The commentary to guideline 1.1.6, as amended, was adopted.

1.2 *Definition of interpretative declarations*

Guideline 1.2 was adopted.

Commentary

Paragraph (1)

70. Mr. PELLET (Special Rapporteur) said that the word “apparent” in the first sentence should be deleted, since the silence to which it referred was a very real one.

Paragraph (1), as amended, was adopted.

Paragraph (2)

71. Mr. PERERA said that the first sentence was extremely long and difficult to understand, whereas the same idea was expressed in paragraph (34) much more clearly. Perhaps the wording of paragraph (34) could be reproduced in paragraph (2).

72. Mr. PELLET (Special Rapporteur) said that paragraphs (2) and (34) did not serve the same purpose: the first outlined the problem, while the second indicated that guideline 1.2 had resolved it. In order to respond to the concerns expressed by Mr. Perera, however, he proposed that the phrase “often on the occasion of the expression of consent by its authors to be bound” be deleted: that would simplify the sentence somewhat.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

73. Mr. NOLTE said that the word “hesitant”, in the first subparagraph, sounded strange in English.

74. Mr. PELLET (Special Rapporteur) suggested the use of the word “*incertaine*” and its English equivalent (“uncertain”).

75. Sir Michael WOOD said that in English, the word “inconsistent” was preferable.

76. Mr. McRAE said that the English reader might wonder what the adjective “inconsistent” modified. He therefore proposed the wording “is not used consistently”.

77. Mr. PELLET (Special Rapporteur) said that in that case, the French text should read “*n’est pas constante*”.

Paragraph (4) was adopted, as amended by Mr. McRae in English and Mr. Pellet in French.

Paragraph (5)

78. Mr. NOLTE said that in the English text, the beginning of the second sentence was not clear.

79. Sir Michael WOOD pointed out that the French text, in contrast, was perfectly clear.

80. Mr. McRAE proposed that in order to clarify the English text, the words “to focus instead” should be replaced with “and focuses instead”.

It was so decided.

81. Mr. NOLTE said that at the start of the final sentence, the words “obviously” and “unquestionably genuine” were redundant.

82. Mr. PELLET (Special Rapporteur) said he saw that part of the text as simply a statement, but that in order to accommodate Mr. Nolte, he would have no objection to the deletion of the word “obviously”.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraph (6)

83. Mr. NOLTE said that the phrase “cover a range of legal realities”, before footnote marker 115, was not clear. He proposed that it should be replaced with “cover a range of legal meanings”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

84. Mr. NOLTE drew attention to a mistranslation in the English text of the final sentence: the words “will set out to describe” should be replaced by “described”.

Paragraph (11) was adopted with that amendment to the English text.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

Paragraph (15)

85. Mr. PELLET (Special Rapporteur) said that footnote 131 should refer to guideline 1.3.2, not 1.3.1.

With that amendment, paragraph (15) was adopted.

Paragraphs (16) to (23)

Paragraphs (16) to (23) were adopted.

Paragraphs (24) and (25)

86. Mr. PELLET (Special Rapporteur) said that in the French text, the footnotes to these paragraphs had been left blank: they should be filled in with a translation of the corresponding footnotes in the English text.

It was so decided.

Paragraphs (24) and (25), subject to this amendment, were adopted.

Paragraphs (26) to (29)

Paragraphs (26) to (29) were adopted.

Paragraph (30)

87. Mr. NOLTE proposed that in the final sentence, the word “anarchical” should be replaced with “undesirable”.

Paragraph (30), as amended, was adopted.

Paragraph (31)

88. Sir Michael WOOD proposed that in the second bullet point after the *chapeau*, the words “such laxity” should be replaced with “this”, since the term “laxity” was rarely used in English. In the third bullet point, the English text should be aligned on the French by replacing the phrase “that an estoppel has not been raised against them” with “have created an estoppel in their favour”.

89. Mr. PELLET (Special Rapporteur) said that the problem with Sir Michael’s first proposal was that it stripped away some of the substance in the commentary, but he would not oppose it.

It was so decided.

90. Mr. NOLTE proposed that in the second bullet point, the word “reality” should be replaced with “existence”.

It was so decided.

91. Mr. NOLTE questioned the use of the word “invoked” in the third bullet point: the declarations in question could in fact be “invoked”, even if they had been expressly accepted.

92. Mr. PELLET (Special Rapporteur) said that the problem was essentially one of translation and could be resolved by replacing the word “invoked” with “formulated”. However, the text would be even clearer in French if it read: “*être formulées à tout moment et modifiées seulement*” ...

It was so decided.

Paragraph (31), as amended, was adopted.

Paragraph (32)

93. Sir Michael WOOD said that the reference in paragraph (32) should be to Part 2, not chapter II, of the Guide to Practice, and that in general, the Guide would be easier to read if the various parts were referred to by name.

94. Mr. PELLET (Special Rapporteur) said that Sir Michael's remark was entirely justified and that the parts could be referred to by name throughout the Guide.

Paragraph (32), as amended, was adopted.

Paragraphs (33) and (34)

Paragraphs (33) and (34) were adopted.

The commentary to guideline 1.2, as amended, was adopted.

The meeting rose at 1.05 p.m.

3105th MEETING

Thursday, 14 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Adoke, Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/638, sect. D, A/CN.4/643, A/ CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur's handling of the sensitive questions of who could offer assistance in the event of a disaster and the legal nature of that offer, on the one hand, and, on the other, the role of the affected State in seeking, accepting and providing assistance, suggested a means of reconciling both facets of assistance by safeguarding the balance between the sovereignty of the affected State and the protection of fundamental human rights. That was the right approach, since only by preserving that balance could the Commission help to solve a problem which, as recent events such as those in Japan had shown, had to be addressed by the international community as a matter of urgency.

2. In the fourth report on the protection of persons in the event of disasters, the Special Rapporteur attempted to

provide a rigorous and exhaustive analysis of the various international instruments pertaining to the topic, yet he had sometimes drawn conclusions that were not entirely justified. First, he had inferred from some of the instruments that there were some indisputable rights and duties relating to the offer or acceptance of assistance in the event of disasters. However, some of the instruments deserved a more thorough examination in view of the fact that work in that area of international law tended more towards progressive development than codification. Secondly, the terms "responsibility", "obligation" and "right" needed clarification and their usage ought to be harmonized. Thirdly, she agreed with the Special Rapporteur's approach to the relationship between the State receiving assistance and other States or institutions that were, or wished to be, part of the relief effort. The references in the report to international cooperation and respect for human rights as the cornerstone of assistance were correct and formed a sound basis for the Commission's work.

3. The Special Rapporteur had been wise not to include the responsibility to protect among the grounds for assistance. The discussion of the theoretical aspects had been instructive, but the issue was becoming increasingly politicized. The Commission should refrain from becoming immersed in that or related debates (for example, concerning the right or duty to intervene), since that would only hamper its work on the subject.

4. Commenting on the draft articles presented in the fourth report, she said that she agreed with the underlying idea of draft article 10. While the phrase "has the duty" might generate debate about a possible adverse impact on the affected State's sovereignty, in reality the risk was non-existent, especially in view of the safeguards contained in draft articles 6 and 9 and the recognition, implicit in draft article 11 and explicit throughout the report, of the central importance of the affected State's consent to assistance. In addition, in the context of disaster relief, sovereignty entailed the duty of the State to adopt the requisite measures to protect persons in its territory and to guarantee their enjoyment of their basic human rights. The use of the term "seek" rather than "request" was appropriate and constituted a further guarantee of the affected State's sovereignty. However, for the Spanish text, consideration should be given to whether to use the term "*recabar*" or "*buscar*", since the two words had very different implications.

5. For draft article 11, she agreed that it might be better to replace the term "arbitrarily" with "unreasonably" and, instead of speaking of an affected State that was "unable or unwilling" to provide the assistance required by the population, to employ a neutral phrase such as "does not" provide assistance. Draft article 11 simply set forth a principle without specifying either the consequences of failure to abide by it or the mechanisms and procedures for effectively delivering assistance in the event of arbitrary or unreasonable refusal. That whole issue needed to be dealt with in the draft articles, however.

6. She endorsed the comments made by Mr. Hmoud and others concerning the reference to NGOs in draft article 12. While they did play a very important role in supplying humanitarian assistance, the textual

reference to them should be amended. She had serious doubts that the phrase “right to offer assistance” was the most apposite way to describe the basis on which States, international organizations and NGOs could offer assistance. The underlying idea was of an act not prohibited by international law and which could not be regarded under any circumstances as hostile or internationally wrongful. Describing that as a right could have substantial implications for the relationship between the receiving and donor States. The term should be examined thoroughly in the Drafting Committee.

7. In conclusion, she said she was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

8. Mr. WISNUMURTI said that the fourth report on the topic showed that the Special Rapporteur had made consistent progress in the discharge of his mandate. With regard to the responsibility of the affected State to seek assistance where its national response capacity was exceeded, he said that the key question was how to construe the “responsibility” of the affected State. In giving substance to that notion, the Commission should bear in mind the need for a proper balance between the core principles mentioned in paragraph 31 of the report, namely sovereignty and non-intervention and the requirement of the affected State’s consent, and the protection of disaster victims. It might prove counterproductive if the Commission tried to lay down strict legal obligations with respect to international cooperation. Noting that Mr. Vasciannie’s statement had offered a perspective that differed from that of the Special Rapporteur, he said that the product of the Commission’s work must reflect a consensus among members from different backgrounds and legal systems in order to ensure that the final text was acceptable to States Members of the United Nations. His own views on the fourth report, like those of Mr. Murase, would inevitably be influenced by his country’s experience in coping with major disasters.

9. Despite the Special Rapporteur’s serious efforts, the three new draft articles failed to achieve the balance just mentioned between core principles and protection of disaster victims, and the way in which the responsibility of the affected State was fleshed out was difficult to accept.

10. With regard to draft article 10, he failed to see the difference between “duty” and “obligation”. The phrase “The affected State has the duty to seek assistance” meant that it was under an obligation to seek assistance. That obligation went against the principles of sovereignty, non-intervention and the requirement of the affected State’s consent. It was also inconsistent with the right of the affected State not to consent to external assistance. The Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the IFRC,³⁰⁹ to which reference was made in paragraph 42 of the report, placed no obligation on the affected State to seek assistance: they indicated that the affected State “should” seek international and/or regional

assistance.³¹⁰ Similarly, the revised Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines) provided that “[i]f international assistance is necessary, it should be requested or consented to by the Affected State”.³¹¹ The language used by the IFRC would better convey the notion that an affected State had a responsibility to seek assistance when it was needed. Imposing an obligation to seek assistance on an affected State would undermine its legitimate right to decide for itself whether it needed such assistance and to keep all options open. It might also expose the affected State to external pressure motivated by considerations unrelated to humanitarian relief.

11. When drafting provisions on the responsibility of the affected State, the Commission should not rely too heavily on isolated instances of refusals of assistance, but should rather use instances when affected States, in coping with major disasters, had been ready to work with the international community. For those reasons, the title of draft article 10 should be amended to read, “The need of the affected State to seek assistance” and the draft article should begin with the phrase “The affected State should seek assistance, as appropriate”. In addition, there was a potential problem of interpretation of the phrase “if the disaster exceeds its national response capacity” in that it was unclear who would determine that the disaster had exceeded the affected State’s national response capacity. It was essential to stress that it was the affected State’s prerogative to decide when that point had been reached.

12. He had no difficulty with the way draft article 11, paragraph 1, was formulated, provided that it was understood that the affected State was under no obligation to seek external assistance: the draft article simply set parameters for its discretionary right to give or withhold consent. The prohibition of the arbitrary withholding of consent to external assistance was necessary in order to prevent undue delay in giving consent from jeopardizing the safety and well-being of persons in need of protection. He agreed with the statement in paragraph 71 of the report that the determination of when a State’s conduct amounted to that State being unable or unwilling to provide assistance was to be arrived at in the light of the specific circumstances of each case. He also concurred with the statement in paragraph 72 that whether a decision not to accept assistance was arbitrary should be determined on a case-by-case basis.

13. He wondered whether draft article 12, on the right to offer assistance, was actually needed. Any non-affected State could provide assistance to an affected State, subject to its consent, at any time it deemed appropriate. Similarly, intergovernmental organizations such as the Office of the United Nations High Commissioner for Refugees and *bona fide* humanitarian organizations such as the ICRC could provide assistance to an affected State in accordance with their statutory mandate and subject to the State’s consent. Establishing a right to offer assistance was therefore unnecessary. If, however, the Commission felt that some

³¹⁰ *Ibid.*, p. 12 (guideline 3, para. 2).

³¹¹ Office for the Coordination of Humanitarian Affairs, Oslo Guidelines, Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007, p. 19, para. 58 (available from <http://www.unocha.org/publication/oslo-guidelines-use-foreign-military-and-civil-defence-assets-disaster-relief>).

³⁰⁹ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2008, p. 8 (available from www.ifrc.org/PageFiles/41203/introduction-guidelines-en.pdf).

kind of enabling clause was required, then draft article 12 could be split into two paragraphs. The first paragraph would provide that, subject to the consent of the affected State, non-affected States and the relevant intergovernmental organizations, in accordance with their statutory mandate, might offer assistance to the affected State. The second paragraph would provide that intergovernmental organizations and *bona fide* NGOs could offer assistance to the affected State, subject to the latter's consent.

14. He had refrained from referring to the responsibility to protect, because it lay outside the scope of the topic under discussion.

15. Mr. NIEHAUS said that the problems caused by the increasing frequency and severity of natural disasters in recent years made tackling the legal dilemmas posed by disaster relief a matter of urgency. Such disasters, many of which could be attributed to climate change, affected a great many countries. Hence the timeliness of the Commission's consideration of the topic, which would certainly be facilitated by the excellent reports produced by the Special Rapporteur.

16. The three draft articles in the fourth report covered three central concerns. Their content, read together with draft articles 6, 7, 8 and 9, was clearly aimed at reinforcing humanitarian law and respect for fundamental rights and human dignity. In addition, the new draft articles acknowledged the tension between the affected State's urgent need for assistance, on which many human lives very often depended, and the potential for abuse of such assistance, resulting in a breach of State sovereignty. A preliminary analysis of that "clash" should point to the need to lay down appropriate international legal rules which, while upholding State sovereignty, effectively facilitated the delivery of assistance. In the majority of cases, such assistance was offered out of a spirit of international solidarity and a desire to provide support and comfort to human beings, leaving aside any disagreements or geographical divisions. Such assistance was usually heartily welcomed. Cases where a foreign State tried to take advantage of a disaster situation to achieve political ends were the exception rather than the rule.

17. He had therefore been surprised by the fact that several members had dwelt on the "danger" that such assistance could represent for State sovereignty. Reference had been made to the well-known cases of Ethiopia and Myanmar, where dictatorships had refused outside assistance, not necessarily in order to defend their sovereignty, but to burnish their own image on the domestic front and preserve a totalitarian regime. The main reasons for rejecting international assistance had lain in lack of confidence in the solidity of their dictatorships, not in threats to State sovereignty.

18. While draft article 10 rightly enjoined the affected State to seek and accept international assistance, it underemphasized the international community's duty to act out of a sense of solidarity and mutual support which, to him, was axiomatic. It was curious that the Commission was proposing to create a rule on the duty to accept, but was silent about its logical counterpart, the duty to provide—the very essence of effective international solidarity.

19. In article 12 of the Spanish version, the phrase "*tendrán derecho*" ("shall have the right to") should be replaced with "*deberán en la medida de sus posibilidades*" ("should, to the extent of their abilities"), wording that was more logical in relation to an offer of assistance.

20. The impact of a natural disaster was so enormous that the international community was generally quick to mobilize relief efforts. That was as it should be. However, the silent suffering and death of millions of children every year from famine and malnutrition—the third type of disaster mentioned by Mr. Huang—also called for immediate action. It could be reasonably argued that the Commission was a legal forum, whereas famine and malnutrition were sociopolitical problems. However, in the face of such a grave humanitarian crisis, drawing the international community's attention to its obligation to provide assistance to persons in the event of disasters should be considered an important aspect of the Commission's mandate.

21. With those comments, he agreed that the draft articles should be referred to the Drafting Committee.

22. Mr. CAFLISCH said that, as the Permanent Court of International Justice had ruled in its advisory opinion of 1923 on *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, sovereignty, in legal terms, was an essentially "relative question" (p. 24) which depended upon the development of international relations, and in particular treaty law. In its advisory opinion of the same year on the case of the *SS "Wimbledon"*, the Court had observed that the conclusion of treaties restricting the exercise of the sovereign rights of the State was not an abandonment of State sovereignty, but an attribute thereof (p. 25).

23. An important aspect of the development of contemporary international law was the growth in protection of individuals. The consideration of the current topic should therefore not be confined to relations between States providing and receiving assistance, or to the dichotomy between sovereignty and non-interference: individuals should be the main focus. Simple codification was also not the proper approach: as had been suggested earlier, a large component of *lex ferenda* was involved, and the Special Rapporteur had rightly addressed the topic from that angle.

24. As he understood the basic thrust of draft articles 10 to 12, three types of actors were involved: the affected State; the State offering assistance; and individuals in need of assistance. An affected State that was unable to cope with a disaster must seek assistance. Another State or international organization could offer assistance, but had no legal obligation to do so. However, an affected State was legally bound to accept an offer of assistance, unless there was a valid reason for refusing it, because it had to protect the individuals on its territory.

25. The opposite solution, whereby third parties were obliged to provide any assistance requested but the affected State was entitled to refuse it, made no sense from the standpoint of better protection of human rights. The solution proposed by the Special Rapporteur made perfect sense and he had no hesitation in recommending that draft articles 10 to 12 should be referred to the Drafting Committee.

26. Nonetheless, he wished to ask the Special Rapporteur four questions. First, what was to be understood by “relevant non-governmental organizations”, and who would assess their relevance? It was a matter of some significance, given the number and diversity of NGOs. Secondly, who would be called upon to establish that the disaster exceeded the response capacity of the affected State? That was also significant, since the affected State, by being empowered to conclude that it was unable to cope, a conclusion that would impose upon it the duty to seek assistance for its population, was by the very same token being given the opportunity to divest itself of any duty to seek assistance. Some kind of monitoring mechanism would therefore seem to be necessary.

27. Thirdly, what were the criteria for determining whether the affected State was withholding its consent to assistance “arbitrarily”, as draft article 11, paragraph 1, put it? It might well be that, in order to block assistance, the State might claim, falsely, that it had the situation under control. Hence, again, the need for a monitoring mechanism. Another situation in which consent to assistance might be deemed to be withheld “arbitrarily” was where one State refused the assistance of another State in the same region on the grounds that, in the past, the latter had sent hostile forces to infiltrate the former’s territory. Under such circumstances, could refusing assistance be, not arbitrary, but justified? Perhaps so. Such matters should be covered in the commentary to draft article 11.

28. Fourthly, the obligation to accept assistance included assistance from NGOs. However, such organizations were not at all, or not entirely, subjects of international law, and he therefore questioned whether States could be obliged to accept assistance from them.

29. In conclusion, he commended the Special Rapporteur on a very balanced fourth report. Work on the topic was now well under way.

30. Mr. HASSOUNA thanked the Special Rapporteur for his valuable fourth report. As the end of the current quinquennium drew near and new members would be joining the Commission, it would be useful to know what the road map was for the future consideration of a topic that had assumed increasing importance at the global and regional levels. Noting that a number of regional agreements on disaster management were mentioned in the report, he pointed out that under an agreement concluded between the members of the League of Arab States, a centre for protection against the dangers of earthquakes and other natural disasters had been established in 2004;³¹² a protocol establishing a mechanism for coordination and the urgent supply of experts and materials in disaster situations had been concluded in 2008.³¹³

31. He shared the view that the legal framework presented by the Special Rapporteur in his fourth report was lacking in references to State practice. It would have been useful

³¹² See League of Arab States, “The Arab Strategy for Disaster Risk Reduction 2020”, adopted by the Council of Arab Ministers Responsible for the Environment, at its 22nd session, 19–20 December 2010, p. 9 (available from www.unisdr.org/files/18903_17934asdrrfina_lenglishjanuary20111.pdf).

³¹³ *Ibid.*, p. 8.

to include information on recent major disasters, how the affected States and the international community had reacted to them and the role of the Security Council in determining whether a given situation was a threat to international peace and security. That raised the issue of whether, under Chapter VII of the Charter of the United Nations, the Security Council might participate in creating international legal obligations for States to accept or provide aid.

32. Turning to the three draft articles contained in the fourth report, he said that he endorsed the Special Rapporteur’s general approach of striking a balance between State sovereignty and human rights protection; the rights and obligations of the parties; and the different interests at stake and actors involved. He also agreed with the expedient of not dealing explicitly with the notion of humanitarian intervention and the duty to protect, while drawing on elements of that notion implicitly. The notion had been advanced fairly recently, by Bernard Kouchner, former French Minister for Foreign Affairs, and was still controversial. There was broad agreement in the Commission not to embrace it; however, it might be appropriate to refer to it and its implications in the commentary to the draft articles.

33. The three draft articles focused mainly on the affected State and its rights and obligations, but their scope should be extended to include neighbouring States affected by the disaster as well as international organizations whose functions conferred on them responsibilities similar to those of States. The draft articles were interrelated, yet they formulated separate legal rules and, as such, should remain separate instead of being combined.

34. The duty of the affected State to seek assistance, laid down in draft article 10, should be interpreted in a flexible way. It should give the affected State a wide margin of discretion to determine its national response capacity and choose among the parties offering assistance. Such steps should be taken proactively and in good faith.

35. In draft article 11, the term “arbitrarily” was the key element and warranted explanation in the commentary. Consent could be withheld for a variety of reasons, but those reasons should always be stated. The inability or unwillingness of the affected State to provide the required assistance to its population must be determined on a case-by-case basis. That raised the question of who should make that determination—the benefactor State, the affected State or the Security Council—and what criteria should be used to do so.

36. In accordance with draft article 11, paragraph 2, the affected State was obliged to notify all concerned of its decision concerning an external offer of assistance. That placed a heavy burden on the affected State and was impracticable in disaster situations. A better solution would be to require the State to announce publicly its reasons for accepting or declining an offer of assistance. In today’s world of instant communication, such an announcement could replace formal notification. Another issue warranting consideration was, when a State gave its consent to assistance and then withdrew it, what rule would apply to the withdrawal of consent or the termination of the provision of assistance by some other means.

37. Concerning draft article 12, he said that the right to offer assistance was to be viewed as a manifestation of international solidarity, cooperation and humanity. Although most international instruments referred to a “right”, he saw it more in terms of a moral duty that might develop into a legal duty over time.

38. He shared the view that an offer of assistance to the affected State should always be provided on a *bona fide* basis by all legal persons, in accordance with the principles laid down in the draft articles, including the principle of non-discrimination. He also agreed that NGOs should not be placed on the same footing as States, the United Nations and intergovernmental organizations, since a State that did not respond to an offer from an NGO could not be deemed to incur international responsibility. The role that NGOs and volunteers could play in assisting disaster victims should not be underestimated: they often worked faster and more efficiently than Governments that were constrained by bureaucracy; at the same time, however, many NGOs were not subject to the requirements of transparency and accountability. A solution might be for the United Nations to keep a roster of legitimate and credible NGOs whose offers of assistance might be accepted by States.

39. One last issue he wished to raise was whether, when one State was either in the best position to provide immediate or appropriate aid or was the sole owner of essential technology or medications, that State then had a responsibility to provide such aid. Furthermore, was there a corollary responsibility on the part of the affected State to accept the aid? Those were some of the practical issues that the Special Rapporteur might wish to consider in his future reports.

40. In conclusion, he said that he supported the idea of referring all three draft articles to the Drafting Committee.

41. Mr. VÁZQUEZ-BERMÚDEZ said that in the Special Rapporteur’s fourth report, he had achieved a balanced approach to the responsibility of the affected State when its disaster response capacity was exceeded; consent to external assistance; and offers of assistance within the international community.

42. His own position with regard to the responsibility to protect was that it was not applicable in the context of disasters. That view had also been taken by Heads of State and Government in the 2005 World Summit Outcome resolution,³¹⁴ which described the responsibility to protect as applying solely to four specific categories of crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. It was accordingly not for the Commission to extend it to cover disasters.

43. The Commission’s work would be useful to States if the final product was more than recommendations or guidelines, of which there were already many useful examples, including the Oslo Guidelines of the Office for the Coordination of Humanitarian Affairs and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery

Assistance of the IFRC. It was clear that some aspects of the drafting work would be *de lege ferenda*, but the Commission should not be deterred from proposing any texts it considered appropriate out of the fear that the obligations they set out might remain unfulfilled. To ensure that the work was heading in the right direction, the opinions and comments of States needed to be taken into account. In that respect, the comments cited in the introduction to the fourth report were encouraging.

44. Turning to the draft articles, he noted that they built on principles already approved by the Commission. For example, draft article 10 on the duty of the affected State to seek assistance from the international community followed from the principle contained in draft article 9 that the affected State had the duty to ensure the protection of persons and the provision of disaster relief and assistance. Draft article 10 was based, *inter alia*, on the guiding principles annexed to General Assembly resolution 46/182, paragraph 5 of which referred to the need for international cooperation when the magnitude and duration of an emergency was beyond the response capacity of the affected State. Draft article 10 spoke of a duty to “seek” assistance which, as the Special Rapporteur pointed out in paragraph 44 of his report, implied a broader approach than a duty to “request” assistance. Although he supported draft article 10, he agreed with Mr. Nolte and Sir Michael that the words “as appropriate”, qualifying the phrase “seek assistance”, should be deleted. It was his view that it should also be deleted from draft article 5, where it applied to the obligation of States to cooperate among themselves.

45. He agreed with the reasoning underpinning draft article 11. The guiding principles annexed to General Assembly resolution 46/182 stated that, in the context of disaster response, “[t]he sovereignty, territorial integrity and national unity of States must be fully respected” (para. 3). The importance attached by States to those principles was illustrated by the so-called “Quito Declaration” on solidarity with Haiti, adopted by the Heads of State and Government of the Union of South American Nations on 9 February 2010,³¹⁵ in which they decided, *inter alia*, to contribute to ensuring that international cooperation reaching Haiti meets the country’s demands, needs and priorities, in the framework of absolute respect for its national sovereignty and the principle of non-intervention in domestic affairs.

46. The corollary was the need for the State to consent to the provision of international relief assistance. Consent could be refused if offers of assistance were not in accordance with the principles of humanity, neutrality, impartiality and non-discrimination. It could be withdrawn if the strictly humanitarian character of an international assistance operation was compromised and the operation constituted interference in the domestic affairs of a State or affected its national security.

47. However, where the affected State was not in a position to protect its population and to provide relief and assistance in the event of a disaster, it could not arbitrarily reject offers of external assistance made in good faith and in accordance with humanitarian principles, since

³¹⁴ General Assembly resolution 60/1 of 16 September 2005.

³¹⁵ Quito Declaration (available from www.comunidadandina.org/unasur/dec_unasur_haiti.pdf).

that would violate its duty to protect persons in need in its territory. In that connection, he cited the preamble to General Assembly resolutions 43/131 and 45/100, which stated that “the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity”.

48. As had been suggested earlier, the commentary to draft article 11 should lay out in detail the scope of the concept of arbitrariness, since that would determine when a State could be considered to have incurred international responsibility. He was in favour of the deletion of the reference to the affected State being “unwilling” to provide the assistance required, since that would be tantamount to accepting the possibility that the affected State might not fulfil its duty to protect its population. Furthermore, the current wording of draft article 11 implied that if the affected State was unwilling to provide assistance, it could withhold its consent to external assistance, as long as it did not do so arbitrarily.

49. With respect to draft article 11, paragraph 2, he agreed with those who had indicated that the duty of the affected State to notify all concerned of its decision regarding an offer of assistance should not extend to offers from NGOs: that would only give the affected State additional tasks to perform under difficult circumstances.

50. As to draft article 12, he said that the importance of the principles of humanity, neutrality and impartiality that should come into play in any humanitarian response effort should be re-emphasized. The right of non-affected States, competent international organizations and humanitarian NGOs to offer assistance to affected States in the event of disasters should be recognized, and such offers should not be regarded as an unfriendly act or interference in a State’s internal affairs. They should be viewed as acts of solidarity and friendship, and in most instances they were. He cited General Assembly resolution 65/264, the sixteenth preambular paragraph of which spoke of the generous assistance provided by Member States to countries and peoples stricken by natural disasters, while paragraph 8 welcomed the effective cooperation between affected States and the international community in the delivery of emergency relief.

51. In conclusion, he expressed his support for the referral of the three draft articles to the Drafting Committee.

52. Mr. DUGARD congratulated the Special Rapporteur on his report, which struck the right balance between respect for State sovereignty and the need for humanitarian assistance for victims of disasters.

53. Referring to the criticism voiced by some members with respect to the reference to “relevant non-governmental organizations” in draft articles 10 and 12, he said it was true that NGOs were not always transparent and accountable—but the same could be said of many States. The use of the qualifying phrase “as appropriate” in draft article 10 meant that the affected State was justified in refusing assistance from a hostile State and also from a hostile NGO. In his view, the phrase “relevant non-governmental organizations” could not be improved

upon, but it was a matter that could be considered in the Drafting Committee.

54. He was not particularly happy with the phrase “shall have the right to offer assistance” in draft article 12. Mr. Vasciannie was correct in pointing out that it could be interpreted as giving States a right to intervene. It might therefore be wiser simply to say that States “may offer assistance”.

55. With regard to the responsibility to protect, he strongly disputed Mr. Hassouna’s contention that the Commission had taken a firm stand against that principle. That was patently untrue: the Commission had simply decided that it was not appropriate to invoke it in the context of disasters,³¹⁶ since it had evolved with specific reference to genocide, war crimes and crimes against humanity.

56. The events in Ethiopia and Myanmar had dominated the Commission’s discussion, although different members appeared to recall the facts quite differently. It would be helpful if the Special Rapporteur could provide detailed information on those events in his next report.

57. He supported the referral of the proposed draft articles 10, 11 and 12 to the Drafting Committee.

58. Mr. SINGH pointed out that, according to paragraph 27 of the fourth report, some 373 natural disasters had killed nearly 300,000 people and affected nearly 208 million more in the year 2010 alone. Those figures threw into sharp relief the relevance of the topic under consideration. On the basis of the pertinent General Assembly resolutions, the Special Rapporteur highlighted a number of principles, including that humanitarian assistance should be provided with the consent of and based on an appeal from the affected country and that the affected State had a duty to seek international assistance where its national capacity was overwhelmed.

59. Turning to the draft articles under consideration, he said it was his view that they should be retained as three separate articles rather than being combined into one, as had been proposed. As to draft article 10, he agreed with the Special Rapporteur that the phrase “the duty to seek assistance” was more appropriate than “the duty to request assistance”. It was the affected State itself that was in the best position to determine whether it had the capacity to respond to a disaster situation. That principle had been recognized in the guiding principles annexed to General Assembly resolution 46/182, which stated that “humanitarian assistance should be provided with the consent of the affected country”. The affected State must make a realistic assessment in good faith of its own capacity to respond and, where it decided to seek international assistance, it could also decide on the States or organizations from which it would accept such assistance.

60. Draft article 11 sought to strike a balance between the concept of sovereignty and the obligation of the

³¹⁶ See *Yearbook ... 2008*, vol. II (Part Two), pp. 133–134, paras. 247–250; and *Yearbook ... 2009*, vol. II (Part Two), p. 135, para. 153, and p. 137, para. 164. See also *Yearbook ... 2008*, vol. I, 2978th to 2982nd meetings, pp. 129–184, *passim*.

affected State towards its own nationals. However, it should also reflect the well-established principle that international assistance might be provided only upon the request or with the consent of the affected State. The events in Ethiopia and Myanmar had been the subject of much discussion, but in his view they were not pertinent to the Commission's consideration of the draft articles. The principles of humanity, neutrality and impartiality must be duly taken into account by all those involved in providing humanitarian assistance, including States, international organizations and NGOs.

61. With respect to draft article 12, he agreed that it should refer to the "duty", rather than the "right", to provide assistance. That would be consistent with the commentary to draft article 5, which stated that the duty to cooperate was reciprocal.

62. He expressed his support for the referral of the three draft articles to the Drafting Committee.

63. Mr. ADOKE thanked the members of the Commission for their vote of confidence in having chosen him to complete Mr. Ojo's term in office and said he looked forward to benefiting from their wealth of experience.

64. The Special Rapporteur's fourth report was comprehensive, balanced and well-reasoned. He agreed with the Special Rapporteur that, where the national capacity of an affected State to provide assistance was exceeded, the act of seeking international assistance might be a step towards fulfilling its primary responsibilities under international human rights instruments and customary international law. The question at issue was whether it should be mandatory for the affected State to seek assistance or merely a matter to be left to its discretion. Given the devastating effects of disasters on the living conditions of the affected population, it would be unreasonable for States to refuse assistance where it was obvious that they lacked the capacity to deal with a disaster. Sovereignty and non-interference were undoubtedly important factors in governmental decision-making, and not without reason. However, it was necessary to strike a balance between the need to provide assistance and the assertion of sovereign rights.

65. Obtaining the affected State's consent to offers of assistance was of paramount importance, yet affected States should not unreasonably withhold consent to external assistance when it was obvious that it was necessary. They should be given the latitude to evaluate the disaster and decide whether to seek assistance on the basis of their particular circumstances and the nature of the disaster. When assistance was offered, they should be able to decide what type of assistance was required and facilitate its reception. Accordingly, draft article 10 should be reformulated so as to reduce the element of compulsion in its wording.

66. Draft article 11, paragraph 1, could also benefit from further review, specifically with a view to replacing the mandatory "shall" with "should", thereby allowing affected States greater control in deciding whether to grant consent.

67. Draft article 12, besides acknowledging the right of relevant international organizations to offer assistance

in responding to disasters, should also reiterate the key humanitarian principles applicable to the provision of such assistance. That would certainly reassure affected States that might be hesitant to accept an offer of assistance, particularly from an NGO or other organization whose motives they might not regard as entirely altruistic.

68. He was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

69. Mr. VARGAS CARREÑO said that the Special Rapporteur's rigorous approach to a complex topic had produced draft articles that were balanced, consistent with current practice and conducive to achieving general international acceptance.

70. Nonetheless, there was still room for improvement. Rather than comment on the three proposed draft articles, he wished to address the subject of the Commission's future work on the topic. In paragraph 80 of his report, the Special Rapporteur had written that the protection of persons in the event of disasters was the cornerstone of the legal structure framed by the principles of humanity, neutrality, impartiality and non-discrimination and underpinned by solidarity. While he himself agreed entirely, he believed that the draft articles should also establish rules relating to the responsibility of the international community and of non-affected States towards States affected by a disaster: otherwise, the valuable work already done by the Special Rapporteur would be incomplete. The obligation immediately to assist a State that had suffered a disaster appeared to emerge very clearly from existing international law, and he hoped that through the progressive development of the law, such an obligation would become binding on non-affected States. The Commission must study the ways in which such States, as members of the international community, were currently responding to disasters.

71. Another area of concern was prevention. The terrible earthquakes that had struck Chile in 2010 and Japan in 2011 had generated tsunamis in other parts of the world, the effects of which had fortunately been predicted. That had not been the case 50 years ago, following the 1960 earthquake in Valdivia, Chile—the most powerful earthquake ever recorded—where aftershocks had wreaked havoc in Japan the next day. There were also many other types of disasters besides tsunamis where efforts at prevention could prove crucial. In his view, the set of draft articles would be improved by the addition of rules relating to the way in which non-affected States should respond to disasters, including measures of prevention.

72. He was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

73. The CHAIRPERSON, speaking as a member of the Commission, commended the Special Rapporteur for the elegant way in which, in his fourth report, he had reconciled the need for an affected State to ensure the protection of persons in the event of a disaster and its right under domestic law to direct, control and supervise humanitarian assistance within its territory. The Commission's agreement that it would refrain from invoking the responsibility of the State to protect its population proclaimed in the 2005 World Summit Outcome had proved to be wise.

74. The debate on the Special Rapporteur's fourth report took place against the backdrop of the Commission's earlier decisions to refer, in draft article 6, to the principles of humanity, neutrality and impartiality and to non-discrimination; to stipulate, in draft article 8, that the human rights of disaster victims must be respected; and to make it clear, in the commentary to draft article 2, that the word "rights" was used with reference both to human rights and, *inter alia*, to rights acquired under domestic law. Thus, to speak of respect for human rights in the event of a disaster was not, as had been suggested, "empty talk".

75. Another issue facing the Commission was whether the draft articles should cover situations of armed conflict. The commentary to draft article 4 nicely resolved the problem by explaining that the whole set of draft articles could apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, did not apply. It might be useful for the Commission to contemplate approaches used in international humanitarian law, particularly for complex emergencies in which a disaster occurred in an area where there was an armed conflict.

76. The idea that the victims of a disaster had the right to receive humanitarian assistance and that States had a duty to assist people placed under their authority or to authorize humanitarian agencies to do so were not new ideas created by the Commission. Rather, they stemmed from other sources, one of which was Resolution 4 of the 26th International Conference of the Red Cross and Red Crescent, held in 1995.³¹⁷

77. Although the Special Rapporteur's fourth report did not contain abundant examples of State practice in relation to the protection of persons in the event of disasters, for better or for worse, such practice did exist. The fact that it was difficult in some cases to determine whether it reflected *opinio juris* should not be an impediment to the Commission's work on the topic, especially since there was a trend towards the development of national laws and regulations aimed at facilitating disaster relief. For example, the 2009 progress report on the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance³¹⁸ showed that States and intergovernmental organizations were working to issue or amend laws and regulations with a view to overcoming obstacles to disaster relief.

78. It was against that background that Ms. Jacobsson wished to comment on the proposed draft articles.

79. With regard to draft article 10, she agreed that the affected State had the duty to seek assistance if the disaster exceeded its national response capacity. However, she was in favour of deleting the term "as appropriate", which was misleading because it suggested that the affected State could refrain from seeking assistance, even in situations where the disaster exceeded its national response capacity. Despite the

fact that the word "seek" implied a proactive response from the affected State, the Commission should emphasize that point in the commentary. It was of less practical importance for the draft article to specify the sources from which the affected State should seek assistance, provided that it attempted to meet its responsibility to ensure the protection of persons in its territory.

80. She agreed that draft article 12 should precede draft article 11. Perhaps, as had been pointed out, draft article 12 stated the obvious: that competent intergovernmental organizations, relevant NGOs, and even, she would add, private individuals, had the right to offer assistance. The real issue was whether the Commission should specify the duty of non-affected States to offer assistance. Personally, she would not be against doing so. A rule to that effect would not be unprecedented: examples could even be found in the statutes of international organizations. She endorsed the first paragraph of Mr. Nolte's proposal, made at the Commission's 3103rd meeting, to combine draft articles 10 to 12 to read: "In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations have the right to offer humanitarian assistance to the affected State, and are encouraged to do so in the spirit of the principles of cooperation, international solidarity and human rights." She would prefer, however, to replace the phrase "in the spirit of" with "in accordance with".

81. In answer to the question of what legal implications should follow from an offer of assistance, she said that it was clear that the affected State had the right to reject assistance, provided that it was able to meet the needs of persons affected by the disaster. However, it was also clear, as stated by the Special Rapporteur in paragraph 52 of his report, that the right to refuse an offer of assistance was not unlimited.

82. With regard to draft article 11, she said that the idea contained in paragraph 1 should be stated very clearly, and she was not entirely happy with the use of the word "arbitrarily", nor was she certain that there was anything to be gained by Sir Michael's proposal to replace the word "arbitrarily" with "unreasonably". Irrespective of the word ultimately chosen, it was necessary to spell out in the commentary exactly which situations the Commission had in mind.

83. If it was assumed that sovereignty entailed the duty of the affected State to protect persons in its territory, then it followed that a State that was unable to ensure such protection and unwilling to accept an offer of assistance had an obligation not only to notify those concerned of its decision but also to provide them with the reasons for its decision. However, it was true that in some cases, assistance was not offered *bona fide*. In order to make it clear that the draft article applied only to the opposite case, namely to assistance offered in accordance with the principles of humanity, neutrality and impartiality and on the basis of non-discrimination, she proposed that the first paragraph of draft article 11 be amended to read: "Consent to external assistance offered in accordance with article 6 shall not be withheld [arbitrarily] if the affected State is unable or unwilling to provide the assistance required."

³¹⁷ *International Review of the Red Cross*, vol. 36 (January–February 1996), No. 310, p. 69.

³¹⁸ IFRC, "The right aid at the right time", Geneva, November 2009 (available from www.ifrc.org/PageFiles/41203/IDRL-Progress-Report_en.pdf).

84. On the other hand, if an affected State rejected or failed to consider an offer of assistance from an NGO, the requirement for it to notify all NGOs of its decision, or worse, provide them with the reasons for its decision, would place too heavy a burden on it. One of the most difficult problems encountered in disaster situations was the coordination of humanitarian aid and assistance, which was why international guidelines for such coordination had been established. Accordingly, any requirement that affected States provide reasons for the arbitrary rejection of an offer of assistance should be balanced by an effort to avoid placing unreasonable administrative obligations on them. She was not convinced that establishing a list of suitable organizations, as suggested by Mr. Hassouna and Mr. Murase, was practical, since flexibility was of crucial importance. Perhaps, indeed, it was not for the Commission to draw up such a list. Mr. Hmoud had touched on a possible solution: to exclude NGOs from the list of organizations entitled to offer assistance. The goal was simple: to prevent an affected State from circumventing its primary responsibility to ensure the protection of persons on its territory. However, it was also necessary to provide for a situation in which an affected State that was unable or unwilling to provide assistance consented to receiving assistance but subsequently withdrew its consent. Such a situation could pose considerable practical problems.

85. In conclusion, Ms. Jacobsson was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

Organization of the work of the session (*continued*)*

[Agenda item 1]

86. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the Drafting Committee on the protection of persons in the event of disasters would consist of Mr. Valencia-Ospina (Special Rapporteur), Mr. Dugard, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, with Mr. Perera (*ex officio*).

The meeting rose at 1 p.m.

3106th MEETING

Friday, 15 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Adoke, Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

1. The CHAIRPERSON invited the Commission to continue its consideration of the addendum to the seventeenth report of the Special Rapporteur on reservations to treaties (A/CN.4/647 and Add.1).

2. Sir Michael WOOD said that the draft introduction to the Guide to Practice set out in paragraph 105 of the report would be of valuable assistance to users, and he hoped that the plenary could consider and adopt it at an appropriate stage as part of the Guide. The title of the chapter on dispute settlement in the context of reservations of the seventeenth report was a little misleading, as the Special Rapporteur had indicated, and he rightly concluded that there was no reason to propose a new dispute settlement mechanism specifically for disputes concerning reservations. If two or more States or international organizations had a dispute or a difference of legal views about a reservation which one or more of them wished to resolve, they had at their disposal all the means of dispute settlement set out in Article 33 of the Charter of the United Nations. The most interesting part of the report began at paragraph 78, entitled “Advantages of a flexible assistance mechanism for the resolution of disputes concerning reservations”. The idea was not to recommend the creation of a new dispute settlement body, but rather the establishment of a small panel of government experts with a dual function: to assist in the resolution of differences of opinion on reservations, and to provide technical assistance to States that referred such questions to it. The details of how such a mechanism would function had not been worked out, which was intentional, but it seemed clear that its mandate would be broad and potentially quite sensitive. In proposing that mechanism, the Special Rapporteur referred “to existing precedents and, specifically, to the one established by ... CAHDI”, and also to COJUR. However, neither CAHDI nor COJUR had the functions proposed by the Special Rapporteur for a new panel. CAHDI was not a body that assisted in dispute settlement, it did not give technical assistance in the drafting of reservations, and while occasionally it might consider the terms of an objection, there were very different views on reservations, legal and political, among the member States of the Council of Europe, although that might pose less of a problem when the Guide to Practice was available. For now, the objective of CAHDI was not really “to present as united as possible a ‘front’ with respect to reservations formulated by other States” (para. 93), because a lot of its time was devoted to the consideration of reservations made by States represented in it, whether as member States or observers. Its main activity involved the exchange of views on those reservations and reservations made by other States. From time to time, that might lead to coordinated reactions by several participating States,

* Resumed from the 3097th meeting.

* Resumed from the 3104th meeting.

but that was not the principal aim. Often, views or explanations were sought from a reserving State, and, where appropriate, that State might be encouraged to withdraw or modify its reservation. Thus, he saw CAHDI as an important example of the reservations dialogue, but not as a dispute settlement mechanism. It should further be remembered that CAHDI was an intergovernmental body. Its members exchanged views on reservations, rather efficiently for 30 minutes or so, as part of its twice-yearly meetings.

3. Within the European Union, the role of COJUR in relation to reservations was similar. It was a smaller group and met four times a year, which gave it certain advantages. In addition to examining new reservations that had been made over the past year or so, CAHDI sometimes considered reservations in a specific field, especially with regard to terrorism conventions. It could also focus on a particular convention. For example, he had recently attended a conference on reservations and interpretative statements under the Convention on the Rights of Persons with Disabilities.

4. In paragraph 94, the Special Rapporteur drew a number of general conclusions on CAHDI and then proposed something rather different, namely that the Commission recommend the establishment of a new panel, but he did not say who would create it or how it would be funded. The panel would be small, composed of "government experts" serving only at need and would have "a very small secretariat". The proposal that the members of the panel be government experts was rather curious. The members of CAHDI spoke for their Governments and on instructions. Given the functions proposed, it was not clear that the members of the panel would do the same or what kind of body it would be. The Special Rapporteur seemed to think that all those questions would be decided by the General Assembly, but he personally doubted whether the General Assembly would want to set up a new body for that purpose. One of the reasons given by the Special Rapporteur for his proposal was the need to compensate for the lack of resources and competence that handicapped some Member States, but in his own view, lack of competence was not the problem, because no particular State or group had a monopoly of competence, whereas all countries lacked sufficient resources to perform the task by themselves. The real advantage of the CAHDI process was that it forced States to focus on reservations and assisted them through a collective discussion. Even if only one or two States had found time to study a particular reservation, all participating States would benefit through the division of labour, whereas that would not be the case under the mechanism proposed by the Special Rapporteur, which would not involve such collective discussion.

5. He did not see why the CAHDI and COJUR experience could not be followed elsewhere. Other regional organizations, such as AALCO, the Inter-American Juridical Committee (IAJC) or ASEAN, could conduct a similar exercise if they so wished. Specialized agencies could do likewise for treaties adopted under their auspices, and the Sixth Committee could perhaps set up a subcommittee or working group to meet for a day once or twice a year, like CAHDI did.

6. He hoped that the Commission would consider and adopt the proposed introduction in plenary as part of the Guide to Practice, but he was not in favour of it recommending the establishment of a panel as suggested by the Special Rapporteur. Quite apart from the budgetary implications, which could not be ignored, he questioned the usefulness of the proposed mechanism. The Commission should perhaps decide to draw some ideas to the attention of the General Assembly and through it to States, regional organizations and specialized agencies, such as engaging, in the context of regular meetings, in some form of collective consideration of reservations, as was done in CAHDI.

7. Mr. NOLTE said that he was no more convinced than Sir Michael by the Special Rapporteur's proposal that the Commission recommend, as part of the Guide to Practice, the establishment of a mechanism to assist in the area of reservations and objections to reservations. As a general consideration, he was concerned that any dispute settlement mechanism which the Commission might recommend as part of the Guide to Practice might undermine the Guide's authority if the recommendation was not acted upon. That was because users might consider that the Guide to Practice presupposed the existence of such a mechanism, regardless of any protestations to the contrary by the Commission, and States might conclude that if the dispute settlement mechanism was not implemented or did not work as envisaged, then the Guide itself did not have to be taken too seriously. That was why the Commission should not propose a specific mechanism, but should limit itself to making a general recommendation pursuant to which States should consider establishing a mechanism for the assessment of reservations and related declarations, bearing in mind the experience at the regional level, such as that of CAHDI. Such a recommendation might trigger a reflection process among States on how to improve the treatment of reservations, a process that should take place after States had had a chance to digest the Guide to Practice as a whole and to assess its significance. It was not until after the significance of the Guide to Practice, and in particular some of its key elements, had become clear that the time might be ripe for elaborating a tailor-made mechanism. Perhaps States would then refer the matter back to the Commission and ask it to make more specific suggestions.

8. The Special Rapporteur described his proposal for a mechanism as being flexible and he emphasized its quality as an instrument for providing technical assistance to smaller or less developed States, although the proposal was not so limited or technical. Of course, as an international lawyer, he personally supported and welcomed in general the establishment of third-party mechanisms; otherwise, opposing subjective assessments might lead to differences of opinion in international relations. However, the situation at issue was more complicated. The stated purpose of the mechanism was to resolve the question of whether a reservation was invalid because it was incompatible with the object and purpose of the treaty. Often that was more than a mere technical question and could involve very difficult assessments based on value judgments and political considerations. Who would make such an assessment? The Special Rapporteur suggested that a committee of 10 government experts would do so. That raised a number of difficulties. Would those government experts

come from States that had signed the treaty concerned or that were at least entitled to become parties to the treaty? After all, why should a government official of a State that had nothing to do with a treaty be qualified to assess its object and purpose? Should such a body take decisions in the form of recommendations, and, if so, on the basis of what procedure? Would it take decisions by a majority vote, and, if so, by what majority? Would all 10 members discuss a reservation with the reservation's author? Would the membership of such a body be determined by an election in the General Assembly, or elsewhere? Would membership be *ad personam*, or would membership be held by a particular State? A larger question, above and beyond those of a practical nature, was whether the CAHDI model lent support to the proposal to establish an assistance mechanism at the universal level. The comments by Sir Michael, who knew CAHDI well, confirmed his own doubts in that regard. The question of what the CAHDI model meant and whether it was transferable to the universal plane required more discussion, for which the Commission did not have time at the current session. Thus, the Commission should not make specific suggestions, but should merely recommend that States should start an exchange of views on the possible establishment of a mechanism for the assessment of reservations and related declarations, bearing in mind the experience in that respect at the regional level. He was open to discussing in the Working Group whether the Commission should formulate a general recommendation along those lines, but he was not in favour of referring the proposed mechanism to the Working Group on the assumption that the Working Group would confine itself to making drafting changes.

9. Turning to the proposed introduction to the Guide to Practice (para. 105 of the report), the text of which had been considered by the Working Group, he noted, in the second sentence of paragraph 1, that the Special Rapporteur was of the view that the commentaries had the same force and authority as the guidelines themselves. While it was true that, as was usually the case, the Commission would adopt every part of the commentary, it had spent infinitely more time on the elaboration of the guidelines themselves than on the formulation of the commentaries, and thus the input of members was much more significant in the former case than in the latter. It was a general understanding that commentaries did not carry the same weight as the provisions themselves; otherwise, there would be no point in differentiating between the two. He therefore suggested inserting a new phrase at the beginning of the second sentence of paragraph 1, which would then read: "Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide to Practice and an indispensable supplement to the guidelines, which they expand and explain."

10. With regard to paragraph 9 of the proposed introduction, which stated that "reading the commentaries will be useful only where the answer to a question is not provided in the text of the guidelines", he did not think that the paragraph should be adopted as it stood, because as a lawyer, he had often had the experience that a provision which seemed to be clear at first sight turned out not to be so clear on further reflection or upon consultation of the commentary. As a matter of technique of interpretation, *acte clair* theories, which suggested that

there was no further need to explain what appeared to be clear at first glance, had also been abandoned. More generally, although he agreed with the substance of the proposed text, except for the two points just made, he found its tone unnecessarily defensive. The same thing could be said in shorter form and more confidently, for example in paragraph 1, the third sentence of which did not appear to be necessary. He hoped that the Commission would have the possibility of revising the provisions of the introduction and would take his comments into account.

11. Mr. DUGARD said that on past occasions, he had opposed dispute settlement mechanisms, notably following the adoption of the draft articles on State responsibility for internationally wrongful acts,³¹⁹ and the Commission had generally taken the view that it was not necessary to include dispute settlement provisions in "orthodox" draft articles. However, it must be acknowledged that the Guide to Practice contained innovative provisions, and thus an innovative dispute settlement mechanism was needed. If the Commission did not recommend such a mechanism, who would? Since the Sixth Committee did not usually innovate, it was up to the Commission to do so. On the merits of the issue, the Special Rapporteur had pointed out that the Vienna Conventions were silent on the subject, yet there was a need for a dispute settlement mechanism. The second preambular paragraph of the draft recommendation (para. 101) rightly stated that the Commission was "[a]ware of the difficulties faced by States and international organizations in the interpretation, assessment of the permissibility, and implementation of reservations and objections thereto". Some special informal mechanism was required in order to deal with the problems that States encountered in respect of reservations to treaties. Surely everyone would agree that the ICJ was not the appropriate body for the kind of work that the Special Rapporteur contemplated. The Court had considered the question of reservations in a number of cases, but that had been very expensive for the parties, and it would be preferable if such disputes could be settled quietly and amicably, rather than sending them to the Court or an arbitral tribunal.

12. He agreed with the Special Rapporteur that any mechanism that was established should not be compulsory, unless the parties so agreed. Perhaps the most innovative feature of the proposal related to the granting of technical assistance to States, of which there was clearly a need, especially for developing States. For that reason, he approved paragraph 4 of the annex. An examination of the reservations made to many multilateral treaties, particularly by developing States, gave the impression that the authors of those reservations were not really aware of the general legal context in which the reservations had been made. For example, Mauritius had recently made a reservation to the Convention on the Rights of Persons with Disabilities which provided that it would not fulfil its obligations in the case of a natural disaster.³²⁰ Was Mauritius aware of the work of the Commission on the subject? Thus, a

³¹⁹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

³²⁰ *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. IV.15.

body was needed to advise States on the general legal framework relating to reservations. One of the problems which the Commission had faced in elaborating the guidelines concerned the monitoring of the application of human rights treaties. There had been a major dispute and debate over the power of monitoring bodies such as the Human Rights Committee to decide whether a reservation was permissible or not. Such problems could be avoided if a mechanism was established of the kind proposed by the Special Rapporteur, which would make it unnecessary to resort to treaty bodies for that purpose.

13. With regard to the composition of the proposed mechanism, he was not quite sure whether the Special Rapporteur envisaged that the 10 experts would sit together or that they would operate in panels of 3 or 5 members. Like Sir Michael, he did not think it necessary to call on government experts. Referring to a comment by Mr. Nolte, he did not believe that the members of the panel should necessarily be officials of one of the States involved. The idea was to establish a small group of experts who would assist States in the preparation of reservations and would settle disputes between States relating to reservations. Of course, the annex did not deal with all the details of the mechanism, but in the normal course of events, that would be done by the institution itself when it adopted its rules of procedure. In sum, he endorsed the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, and he congratulated the Special Rapporteur on his innovative proposal.

14. Mr. NOLTE said that he had been speaking on the assumption that the proposed mechanism would be a panel of government experts, as indicated by the Special Rapporteur, in which case the question of whether a State was or was not party to a treaty would be relevant, whereas if the mechanism was composed of independent experts, of course it would not be. That said, Mr. Dugard's proposal seemed to go even further than the Special Rapporteur's.

15. Mr. McRAE said he was pleased that the draft introduction would be included in the Guide to Practice and would be sent to the plenary for final approval. With respect to dispute settlement, he wished to make several comments on the proposed mechanism. In principle, he thought it useful to establish a group of experts to provide advice on reservations and objections or to give assistance to countries that wished to have help in the formulation of reservations and objections, because he saw it as a logical progression in the process identified in the Guide to Practice. However, a consideration of the practical reality of what was proposed revealed a number of gaps and problems. Essentially, the mechanism proposed by the Special Rapporteur was nothing more than what had been said: it was the establishment of a group of experts and the possibility of States empowering them to do certain things. As pointed out by Sir Michael and Mr. Nolte, it was not clear how the group of experts would operate, what terms of reference it would have, who it would report to and so forth. Nor was it apparent to what extent CAHDI and COJUR provided any guidance, because even after reading the Special Rapporteur's report, he still was not sure what CAHDI and COJUR did in relation to reservations—but perhaps members who were familiar with those bodies

had a better understanding in that regard. Thus, for the moment, it seemed that all the Commission had was an idea, not a mechanism, but if all that was being suggested was an idea, he was not sure that it needed the trappings of a formal resolution or an acronym. Equally, if the Commission had to make a recommendation to the General Assembly or States, it should be done as a proposal within its report on the work of its sixty-third session, and not as a special resolution.

16. What, then, should the Commission do? As he saw it, there was some value in suggesting to States that they could set up a group of experts to assist countries in assessing the validity of reservations and objections and in formulating their own reservations and objections, but the idea needed to be developed, and the resulting mechanism could be included in an annex dealing with the reservations dialogue or another annex to the Guide to Practice. The Commission should produce a sort of model mechanism that might be adopted by States parties to a particular treaty regime or by States to operate a cross-treaty regime. That said, it would be necessary to go beyond the idea proposed in the Special Rapporteur's report before the Commission obtained a result that could be included in an annex to the Guide to Practice.

17. In short, he was in favour of referring the question to the Working Group, which could elaborate on the idea of a model mechanism to assist in resolving disputes over reservations through a group of experts and could then submit a more detailed proposal for consideration in plenary.

18. Mr. PETRIČ said that he fully agreed with the changes proposed by Mr. Nolte concerning the draft introduction to the Guide to Practice. With regard to the proposed mechanism, it was not yet sufficiently elaborated for the Commission to be able to adopt it, but that did not mean that it should be rejected, and he would strongly oppose any decision along those lines, since such a mechanism would promote respect for the principle of the rule of law. The Commission should therefore consider how to follow up the project, and the proposal which Mr. McRae had just made seemed very reasonable. For the smallest States and their Ministries of Foreign Affairs, disputes concerning reservations were always a source of great difficulty. Such States needed assistance, whether in formulating or withdrawing their reservations or in objecting to the reservations of others. Although many points still had to be clarified, the idea of a mechanism that provided technical assistance to States must not be abandoned.

19. Mr. VASCIANNIE said he hoped that the Commission would adopt the draft recommendation proposed by the Special Rapporteur on technical assistance and assistance in the settlement of disputes on reservations. The general idea was sound. The mechanism must be advisory; in other words, the parties to disputes on reservations must be free to address it, and its decisions must not be binding. In the 1990s, reservations to the International Covenant on Civil and Political Rights had been made by States of the Caribbean region,³²¹ which had prompted strong objections by a number of European countries and had ultimately led to considera-

³²¹ *Ibid.*, chap. IV.4.

tion by the Human Rights Committee of the issue of reservations,³²² which had simply informed those States that their reservations had been wrong.³²³ With the proposed mechanism, matters would not go all the way to the Human Rights Committee. That was an additional illustration of the need for technical assistance in the area of reservations. Such assistance could encompass the drafting and interpretation of reservations, the preparation of objections and responses to objections.

20. Sir Michael had rightly said that small States did not lack competence. However, such States did not have the capacity to address the entire range of issues of international law that might arise at any time. If the proposed mechanism allowed for small States to obtain assistance on a case-by-case basis, it would be of practical use. Moreover, it would be less expensive than referral to the ICJ. The fact that the details of the functioning of the mechanism had not yet been specified was not a problem: such questions would be addressed in due course by the General Assembly or a body instructed by it to do so.

21. In his view, experts from a State not party to a particular international convention should be allowed to express a judgment on reservations to that convention. Members of the Commission frequently evoked treaties to which their countries of origin were not parties, but that had not posed a problem. With regard to the composition of the mechanism, he thought that experts did not have to be representatives of their State, but that point could also be addressed when the time came. The funding of the mechanism was a matter for the General Assembly to decide. He was not opposed to taking regional bodies such as CAHDI as a model, although apparently it was not clear how CAHDI functioned with regard to reservations. The Commission might also follow the example of AALCO. However, those regional bodies, apart from CAHDI and IAJC, had not set up a mechanism for technical assistance or for the settlement of disputes concerning reservations, perhaps for financial reasons or because of the technical nature of the questions. That was all the more reason for the Commission to recommend the establishment of such a body in a draft resolution to be submitted to the General Assembly.

22. Mr. SABOIA said that initially he had been sceptical about the idea of filling all the gaps in the Vienna Conventions, since such gaps had been left open because of diplomatic ambiguities or to allow countries some political leeway. However, he had now changed his mind and realized the great usefulness of the Guide to Practice as well as of the proposed mechanism, which would provide technical assistance to all States, large and small. That said, the details needed to be specified, but such questions could be addressed by the Working Group.

23. Mr. HMOUD said that the mechanism proposed by the Special Rapporteur was all the more useful because it was a well-known fact that there was no really satisfactory dispute settlement mechanism in the area of reservations.

The mechanism would be very valuable in dealing with objections with “super-maximum” effect, a problem which only a body of that type could really help to address, apart from the Guide to Practice itself. It would be preferable for such a mechanism to be composed of independent experts rather than government experts. Referrals to the mechanism should be optional, and its decisions should be non-binding. There should be a strict separation of its two functions, namely technical assistance and dispute settlement, because a mechanism helping a State to formulate a reservation or an objection should not have to consider that same reservation or objection if it was subsequently disputed before it by another State party. The lack of details on how the mechanism would function was not problematic: the provisions of a number of international agreements and treaties setting out a dispute settlement mechanism were very brief and left it to the mechanism itself to decide its rules of procedure.

24. Mr. NOLTE said that, in their statements, the members of the Commission were proceeding on the assumption that the mechanism was designed to help States formulate reservations, whereas the report spoke of presenting a “front” with respect to reservations, which seemed to imply that the aim of the mechanism was to reduce the scope of reservations in order to preserve the integrity of treaties. He sought clarification on that point from the Special Rapporteur.

25. Mr. PELLET (Special Rapporteur) said that the very interesting mini-debate had suggested to him new proposals which he would present when the Chairperson allowed him. Replying to Mr. Nolte, he drew his attention to paragraph 93 of the report, in which it was stressed that, “whereas the objective of the European Observatory of Reservations to International Treaties was to present as united as possible a ‘front’ with respect to reservations formulated by other States, this would obviously not be the function of the assistance mechanism envisaged here”. As pointed out in that paragraph, “its purpose would be rather to provide technical assistance to States that wished to receive it; to help States (and international organizations) with differing views concerning reservations to resolve their differences by finding common ground; and to provide those countries or international organizations with specific information on the applicable legal rules”. The Commission could recommend that regional bodies other than European ones should attempt to establish a mechanism of the kind set up by CAHDI, but the CAHDI mechanism should not be imitated, despite its merits, because it could not be universalized. For his part, Mr. Hmoud had rightly stressed that the proposed mechanism had a dual function, technical assistance to countries and assistance in dispute settlement. He urged the members of the Commission to put forward ideas that might be endorsed by the General Assembly, while not losing sight of the ones he had just advanced.

26. Sir Michael WOOD noted that there were many ways in which technical assistance with regard to reservations could be provided to States. He doubted that it would be possible to appoint experts who were familiar with all areas of international law, and he wondered whether it might not be preferable to rely on the secretariats established by various international instruments or even on the Secretariat of the United Nations, which had an

³²² See, *inter alia*, General Comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant and the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

³²³ See, *inter alia*, *Kennedy v. Trinidad and Tobago*.

excellent Treaty Section. He asked the Special Rapporteur whether he had considered that possibility.

27. Mr. PELLET (Special Rapporteur) said that the 10 experts referred to in the draft proposal—and they could be less numerous—would be experts in the law of treaties and the regime of reservations. They did not need to be specialists in all areas of international law to provide technical assistance to States.

28. Mr. GALICKI welcomed the Special Rapporteur's important work on reservations to treaties and endorsed the very useful introduction to the Guide to Practice proposed in the seventeenth report. He also firmly supported the draft recommendation on technical assistance and assistance in the settlement of disputes, which provided an excellent framework for the application of the Guide to Practice.

29. Mr. KEMICHA also found the novel idea of a mechanism such as the one proposed by the Special Rapporteur to be very attractive, but like Mr. Hmoud, he thought that the functions of technical assistance and dispute settlement should be kept separate; it would be unwise for a single body or mechanism to have both. As for the modalities, it was likely to be very difficult for the Commission to take a final decision on the details of either technical assistance or dispute settlement or to formulate a recommendation without considering in depth the implementation of those two functions.

30. Mr. FOMBA said that the introduction proposed by the Special Rapporteur did not pose any problem for him. It should be considered as being part of chapter IV of the report of the Commission and should constitute the introduction to the Guide to Practice.

31. With regard to the proposed mechanism, he shared the view expressed by a number of members, and in particular Mr. Dugard, Mr. McRae, Mr. Petrič and Mr. Vasciannie, that the draft recommendation proposed by the Special Rapporteur should be referred to the Working Group, which should attempt to define its scope and modalities. Consideration should also be given to the point raised by Mr. Hmoud and supported by Mr. Kemicha.

32. Ms. ESCOBAR HERNÁNDEZ subscribed to the idea of creating a mechanism like the one proposed by the Special Rapporteur to help States resolve problems that they might encounter in the area of reservations. The proposed mechanism could not be compared to either CAHDI or COJUR, because although those two bodies were concerned with reservations, their functions were different and related primarily to the exchange of information and cooperation between the member States of the Council of Europe in the case of CAHDI and between the member States of the European Union in the case of COJUR. The mechanism as contemplated by the Special Rapporteur should be composed of experts in the international law of treaties and reservations. The Commission should reflect on the comments by Mr. Hmoud and Mr. Kemicha concerning the need to keep the functions of technical assistance and dispute settlement separate. She had no objection to the Special Rapporteur's draft recommendation being referred to the Working Group, but it was up to the General Assembly to

take a final decision, and the Commission should leave it to the General Assembly to decide on the details of the proposed mechanism's composition and functions.

33. Mr. PELLET (Special Rapporteur), summarizing the debate, said that general agreement seemed to be emerging with regard to his proposed introduction, namely that it should be regarded as forming part of chapter IV of the report of the Commission and as constituting the introduction to the Guide to Practice, with the incorporation of the proposals by Mr. Nolte, without it being necessary to refer it to the Working Group.

34. As to the proposed mechanism, the Commission could not and should not try to "sell" the General Assembly such a body in a completed form; the point was merely to launch the idea. The recommendation addressed to the General Assembly should be even less detailed than the one contained in paragraph 101 of the report and should include alternatives. It should simply retain the idea of technical assistance and dispute settlement assistance. The point was not to create a jurisdictional body but rather a mechanism which provided assistance in the settlement of disputes concerning reservations. Unlike the three members of the Commission who had spoken on that question, he thought that it might perhaps be preferable for the same persons to discharge both functions. He proposed that the questions envisaged in the draft recommendation be referred to the Working Group, which would not be bound by it. He would submit a revised draft recommendation, bearing in mind the comments made in the debate that had just taken place. Perhaps the draft recommendation could propose, along the lines envisaged by Sir Michael, that regional non-European bodies be encouraged to concern themselves with the problem of reservations, and it could also evoke the possibility that the Sixth Committee reflect on a system similar to CAHDI. Lastly, the Working Group should decide on the form that the recommendation should take: a recommendation addressed to the General Assembly; or conclusions of the Commission, as with the reservations dialogue, although personally he was not in favour of the latter choice for the proposed mechanism.

35. The CHAIRPERSON said that, if she heard no objection, she would take it that the Commission decided that the introduction proposed by the Special Rapporteur in paragraph 105 of the report under consideration would constitute the introduction to the Guide to Practice and would be adopted in plenary as part of chapter IV of the report of the Commission, and that the recommendation contained in paragraph 101 would be referred to the Drafting Committee.

It was so decided.

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

CHAPTER IV. Reservations to treaties (continued)* (A/CN.4/L.783 and Add.1-8)

36. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of its draft report.

* Resumed from the 3104th meeting.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)*

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)*

(b) *Text of the guidelines and the commentaries thereto* (continued)* (A/CN.4/L.783/Add.3)

1.2.1 *Interpretative declarations formulated jointly*

Guideline 1.2.1 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 1.2.1 was adopted.

1.3 *Distinction between reservations and interpretative declarations*

Guideline 1.3 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

37. Mr. NOLTE said that the word “declarant” in the English text seemed unusual.

38. Sir Michael WOOD said that he agreed with Mr. Nolte and suggested replacing the word “declarant” by “author” both in paragraph (5) and throughout the Guide to Practice.

It was so decided.

Paragraph (5), as amended, was adopted.

The commentary to guideline 1.3, as amended, was adopted.

1.3.1 *Method of determining the distinction between reservations and interpretative declarations*

Guideline 1.3.1 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

39. Mr. NOLTE said that, in the third sentence, the phrase “only an analysis of the potential—and objective—effects of the statement can determine the purpose sought” should be replaced by “only an objective analysis of the potential effects of the statement can determine the purpose sought”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

40. Sir Michael WOOD, referring to the second sentence, suggested replacing the phrase “the normal rules of interpretation in international law” by “the applicable rules of interpretation”.

41. Mr. PELLET (Special Rapporteur) said that he was not very enthusiastic about that suggestion. The text intended to make the point that it was necessary to rely on the “general rule of interpretation” within the meaning of article 31 of the Vienna Convention. Merely to speak of “applicable rules” would be too vague.

42. Sir Michael WOOD suggested at least deleting the word “normal”.

43. Mr. KEMICHA proposed replacing the words “normal rules” by “usual rules”.

44. Mr. SABOIA said that he was opposed to the deletion of the words “in international law” as proposed by Sir Michael.

45. Mr. NOLTE suggested using the phrase “general rules of interpretation”.

46. Sir Michael WOOD said that he had no objection to retaining the words “in international law”, provided that the word “normal” was deleted.

47. Mr. VALENCIA-OSPINA said that it would be preferable to speak of “ordinary rules of interpretation”, as in the last sentence in paragraph (4).

48. Mr. PELLET (Special Rapporteur) proposed that the second sentence should simply read: “The problem is therefore a conventional one of interpretation.”

Paragraph (4), as amended by the Special Rapporteur, was adopted.

Paragraph (5)

49. Mr. NOLTE said that the part of the sentence following the first footnote marker should be deleted, since the Guide to Practice would state that reservations were in fact dissociable from the treaty to which they applied.

50. Mr. PELLET (Special Rapporteur) said that he had no objection to deleting that part of the sentence, but he disagreed with the reason given by Mr. Nolte. Regardless of whether it was valid, a reservation was not dissociable from the treaty.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

51. Mr. PELLET (Special Rapporteur) said that, at the end of the first sentence, the words “unilateral declarations” should be replaced by “interpretative declarations”.

Paragraph (7), as amended, was adopted.

* Resumed from the 3104th meeting.

Paragraph (8)

52. Mr. NOLTE said that he was in favour of deleting the second paragraph of the quotation from advisory opinion OC-3/83 of the Inter-American Court of Human Rights on *Restrictions to the Death Penalty*. The paragraph suggested that the interpretation must be guided by the primacy of the text and that other means of interpretation were merely supplementary. That was not what the Vienna Convention said.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (14)

Paragraphs (9) to (14) were adopted.

The commentary to guideline 1.3.1, as amended, was adopted.

1.3.2 *Phrasing and name*

Guideline 1.3.2 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

53. Mr. PELLET (Special Rapporteur) said that, in the first sentence, the numbering “1.3.2” should be replaced by “1.3.1”.

54. Sir Michael WOOD said that, in the first bullet, the words “or scope” should be inserted after “the meaning”.

55. Mr. NOLTE said that, in the second bullet of the English text, the word “non-relevance” should be replaced by “irrelevance”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

56. Mr. PELLET (Special Rapporteur) said that the words “the analysis of” in the first footnote to the paragraph should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

57. Mr. NOLTE said that, in the English text, the word “nullifying” should be replaced by “decisive”.

Paragraph (4), as amended in the English text, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

58. Mr. PELLET (Special Rapporteur) said that he would replace all references to the *Mer d'Iroise (English*

Channel) case, in paragraph (6) and elsewhere, by the official title.

59. Sir Michael WOOD said that the words “Franco-British dispute” should also be replaced by the official title of the case.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

60. Mr. PELLET (Special Rapporteur) suggested deleting, at the end of the sentence, the words “as the last phrase of guideline 1.3.2 emphasizes”.

Paragraph (11), as amended, was adopted.

The commentary to guideline 1.3.2, as amended, was adopted.

1.3.3 *Formulation of a unilateral statement when a reservation is prohibited*

Guideline 1.3.3 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

61. Sir Michael WOOD said that he did not understand the last sentence.

62. Mr. PELLET (Special Rapporteur) suggested replacing the words “Its sole aim is to draw” at the beginning of the last sentence by “This guideline draws”.

Paragraph (4), as amended, was adopted.

The commentary to guideline 1.3.3, as amended, was adopted.

1.4 *Conditional interpretative declarations*

Guideline 1.4 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

63. Mr. PELLET (Special Rapporteur) said that, at the beginning of the sentence, the words “The members of the Commission have unanimously recognized the existence” should be replaced by “The Commission has recognized the existence”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

64. Mr. VARGAS CARREÑO said that the example cited in the paragraph of the interpretative declaration which France had attached to its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”) called for some clarification. Reviewing in detail the context of that declaration, he recalled that it had contained the following passage: “The French Government interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter of the United Nations.”³²⁴

65. France had reiterated that declaration when it had signed Protocol I in 1979.³²⁵

66. The declaration by France had caused deep concern among the Latin American States parties to the Treaty, which had made it known to the Government of France. Their concern had stemmed above all from the fact that the right of self-defence did not emanate from a treaty instrument such as the Charter of the United Nations, which spoke of an “inherent” right, but had existed before it. The exercise of that right was subject to the principles of necessity and proportionality, which had a particular dimension in the case of nuclear weapons.

67. The representatives of the Latin American States had requested an audience at the French Ministry of Foreign Affairs with a view to urging France to withdraw its reservation. France had not acceded to that request, but it should be noted that the attitude of the Government of France had changed considerably over the years and, although it had not withdrawn its reservation, it considered itself to be firmly bound by the two Protocols. To take that reality better into account, he proposed either to delete the reference to the interpretative declaration by France or to add the following text: “However, the Latin American States, through the intermediary of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, have requested the Government of France to withdraw the part of the interpretative declaration of France referring to the possibility of the use of nuclear weapons in the case of armed attack. In the view of these States, such an interpretation does not fulfil the requirements of necessity and proportionality which are attached to the exercise of the right of self-defence under international law. France has not yet withdrawn this part of its interpretative declaration; however, it has repeatedly expressed its intention to remain a party to the Additional Protocols to the Treaty of Tlatelolco.”

68. Mr. SABOIA endorsed Mr. Vargas Carreño’s statement and his suggestion to delete the reference to the interpretative declaration of France.

69. Mr. PELLET (Special Rapporteur) said that he was firmly opposed to the idea of deleting that example and it would be shocking if he should be forced to do so, because that would amount to censorship. He failed to see why something that France had said should be censored. On the other hand, Mr. Vargas Carreño’s comments on the reaction of the Latin American States was very interesting, and he was in complete agreement that the proposed text should be inserted, although not in the body of the report itself, where it would be out of place, but in a footnote.

70. The CHAIRPERSON said that, if she heard no objection, she would take it that the members of the Commission wished to adopt Mr. Pellet’s proposal.

It was so decided.

Paragraph (3), as amended, was adopted.

The meeting rose at 1 p.m.

3107th MEETING

Monday, 18 July 2011, at 3 p.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Mr. Kemicha, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Francisco Villagrán Kramer, former member of the Commission

1. The CHAIRPERSON said that she had received the sad news that Mr. Francisco Villagrán Kramer, a member of the Commission from 1992 to 1996, had passed away on 12 July 2011. He would be remembered for his rich and exemplary career in the international legal field and his indefatigable support for human rights, justice, democracy and peace.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

2. Mr. VARGAS CARREÑO said that he had had the privilege of counting Francisco Villagrán Kramer as a friend and serving with him as a member of the Commission from 1992 to 1996. Francisco Villagrán Kramer had been devoted to justice, peace and human rights. He had made outstanding contributions in the field of law as a university professor, the author of important publications and the representative of Guatemala at international conferences. At a time of great violence in Guatemala, he had agreed

³²⁴ United Nations, *Treaty Series*, vol. 936, p. 419.

³²⁵ *Journal officiel de la République française*, n° 243 du 18 octobre 1992, “Décret n° 92-1152 du 14 octobre 1992 portant publication du protocole additionnel I au traité du 14 février 1967 visant l’interdiction des armes nucléaires en Amérique latine, dit Traité de Tlatelolco, signé par la France le 2 mars 1979” (available from www.legifrance.gouv.fr).

to serve as Vice-President under General Romeo Lucas García, whose Government was known for its human rights violations. Some of his friends had found it very hard to understand that decision, but Francisco had believed that in doing so he would be able to improve the situation in Guatemala. Unfortunately, he had been mistaken, and he had subsequently decided to leave the Government and go into exile in the United States, where he had continued to work for the cause of human rights and peace in Central America. Following a change in the political situation, he had returned to Guatemala and served as a member of Parliament. He had also been a member of the Inter-American Juridical Committee.

3. As a member of the Commission, he had contributed actively and effectively to its work on such topics as succession of States, State responsibility and the draft code of crimes against the peace and security of mankind.³²⁶ He had been a good-natured man, a distinguished jurist and a prominent member of the Commission.

Protection of persons in the event of disasters (continued)* (A/CN.4/638, sect. D, A/CN.4/643, A/CN.4/L.794)

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)*

4. Mr. VALENCIA-OSPINA (Special Rapporteur), summing up the debate on his fourth report, thanked all those who had taken part for their rich and substantive contributions to the debate and their encouraging response to the matters dealt with in the report. During the course of the lively discussions, 23 members had expressly supported the referral of draft articles 10 to 12 to the Drafting Committee, while another member had agreed expressly to the referral of draft article 12 and implicitly to the referral of the other two draft articles. The remaining member had not spoken either for or against referral.

5. It was clear from the plenary debate that the Commission had embraced the Special Rapporteur's approach to the topic, which had consisted in seeking balanced solutions that could facilitate consensus. Members' comments should be assessed against that yardstick. The Commission had been able to adopt by consensus and based on the proposals contained in the Special Rapporteur's second³²⁷ and third³²⁸ reports, nine draft articles.³²⁹ That had been no mean feat in the short space of two years, given the entrenched opinions expressed by members on opposing sides of the Commission's lively debates on the topic.

6. It was in the context of its mandate to promote the progressive development of international law and its codification that the Commission had undertaken work on the protection of persons in the event of disasters.

The topic had been included in the Commission's long-term programme of work in 2006³³⁰ on the grounds that it reflected new developments in international law and pressing concerns of the international community as a whole. As had been rightly pointed out during the debate, the Commission's task was not to address the operational aspects of disaster relief, but rather to enhance the normative framework for the protection of persons in the event of disasters, to move beyond a statement of broad principles in order to define the rights and obligations of the different actors involved. It should not be deterred from proposing any articles it considered appropriate by the fact that States might disregard their obligations.

7. Article 15 of the Commission's statute drew a distinction between the codification and progressive development of international law.³³¹ However, as the Commission had concluded in 1996, that distinction was difficult if not impossible to draw in practice.³³² The Commission had accordingly proceeded on the basis of a composite idea of codification and progressive development in formulating its drafts.

8. The words "progressive development" had been chosen by the drafters of Article 13, paragraph 1 (a), of the Charter of the United Nations because when juxtaposed with the term "codification", they implied modifications of and additions to existing rules, thus establishing a balance between stability and change. As defined in article 15 of the Commission's statute, progressive development referred to subjects that had not yet been regulated by international law or in regard to which the law had not yet been sufficiently developed in the practice of States. For those who had framed the statute, "practice" meant practice reflected in law which was insufficiently developed on a given subject. However, the debate on the fourth report of the Special Rapporteur had left the impression that some members of the Commission were using the term "practice" in a much broader, almost colloquial sense, citing specific instances of "bad" or "good" practice. On the basis of such an extended meaning, some members had called for a more detailed treatment in future reports by the Special Rapporteur of events amounting to disasters. Looking at things from that perspective, he could not but endorse the position of one member who had maintained that a more elaborate recounting of the specific practice of States and other actors in that sphere would not have yielded different conclusions.

9. On the other hand, the debate had also demonstrated that several members used the term "practice" in the narrower, technical sense given to it by article 15 of the statute of the International Law Commission, as exemplified by references to *opinio juris*. One member had endorsed the need to pay careful attention to texts adopted by States and by organizations such as the IFRC, which were a distillation of practice by entities that had huge experience in the field. Another member had emphasized

³²⁶ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

* Resumed from the 3105th meeting.

³²⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

³²⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

³²⁹ *Ibid.*, vol. II (Part Two), paras. 330–331 (for draft articles 1 to 5 and the commentary thereto). For the adoption of draft articles 6 to 9, see the 3102nd meeting above, p. 172.

³³⁰ *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257, and p. 206, annex III.

³³¹ Available from the Commission's website.

³³² *Yearbook ... 1996*, vol. II (Part Two), p. 84, para. 147 (a), and pp. 86–87, paras. 156–159.

the significant development of national legislation to facilitate disaster relief, which revealed an important trend in the thinking of States. In that connection, he recalled that, at his suggestion, the Commission had included the practice of States on the protection of persons in the event of disasters in its report to the General Assembly on the work of its sixtieth session (2008) as a specific issue on which it would welcome observations.³³³ Only three States had responded to the Commission's appeal, and it might therefore wish to reiterate that call in its report on the work of the current session.

10. He welcomed the information received from States and his colleagues to date. In his four reports to the Commission, he had reflected—and in most cases reproduced—various provisions from the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and other relevant international instruments.

11. Although his use of binding and non-binding international instruments in support of his proposals had been acknowledged, the pertinence of using instruments adopted by or under the auspices of the General Assembly, the ICRC, the Institute of International Law and other such bodies as evidence of practice had been questioned on methodological grounds. In response, he wished to reiterate that such texts were a distillation of practice in themselves. Practice in the area of protecting persons in the event of disasters was particularly scarce. Apart from a handful of multilateral—mainly regional—agreements and a larger number of bilateral treaties on mutual assistance, the bulk of the material available on the “law of disaster relief” was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. The very notion of disaster relief law was an emerging one, consolidation of which would depend in great measure on the work of progressive development being carried out by the Commission in the context of the topic under consideration. How could the Commission fail to give due importance to resolutions of the General Assembly, such as resolution 46/182, which established the basic framework within which contemporary disaster relief activities were undertaken, or to the private codification efforts of the Institute of International Law on the subject of humanitarian assistance, when similar efforts had been invoked time and again as authoritative pronouncements of the law in relation to other, truly “traditional” topics dealt with by the Commission?

12. In his preliminary report,³³⁴ he had singled out three immediate legal sources of present-day international disaster protection and assistance—international humanitarian law, international human rights law and international law on refugees and internally displaced persons—to which he had systematically reverted in each of his three subsequent reports. In the context of international humanitarian law, some members had questioned the methodological pertinence of invoking principles and rules applicable to humanitarian assistance in armed conflict. In reply, he referred to the debate on

his third report, when the view had been expressed that a principle that by definition was envisaged in general and abstract terms could be applied to areas of the law other than those with which it originated and was traditionally associated.³³⁵ On that assumption, the Commission had been able to adopt draft article 6 on humanitarian principles in disaster response. As distinguished jurist Juan Antonio Carrillo Salcedo had written in 1997,³³⁶ humanitarian law was not limited to international humanitarian law applicable to armed conflict. One could not ignore the existence of causes of extreme suffering that were alien to the hypotheses envisaged by the Geneva Conventions for the protection of war victims, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). The result was that humanitarian law was applicable in many circumstances, one of which was armed conflict. Although international humanitarian law applicable in a situation of armed conflict, international or otherwise, was the most developed branch of humanitarian law, the part must not be confused with the whole. The development and technical perfection of international humanitarian law applicable to armed conflict made it a model to be adapted—rather than a system to be applied—in other circumstances of humanitarian urgency.

13. A third methodological reproach had been that he had not made the concept of the responsibility to protect the cornerstone of the Commission's work on the topic. In that connection, he recalled that in his preliminary report he had drawn attention to the Secretariat's observations, in its proposal for the topic, that the protection of persons might be “located within contemporary reflection on an emerging principle entailing the responsibility to protect”.³³⁷ However, his personal opinion, expressed in the same report, was that the appropriateness of extending the concept of responsibility to protect and its relevance to the present topic both required careful consideration. Even if the responsibility to protect was recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear. He had thus anticipated the position taken the following year by the Secretary-General in his report on implementing the responsibility to protect.³³⁸ In his second report, he had quoted with approval paragraph 10 (b) of the Secretary-General's report, explaining that the responsibility to protect applied, until Member States decided otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity.³³⁹ To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept

³³⁵ *Yearbook ... 2010*, vol. II (Part Two), p. 184, para. 325.

³³⁶ See J. A. Carrillo Salcedo, “Reflections on the existence of a hierarchy of norms in international law”, *European Journal of International Law*, vol. 8 (1997), pp. 583–595, at p. 591.

³³⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 154, para. 55. See also *Yearbook ... 2006*, vol. II (Part Two), annex III, p. 207, para. 9.

³³⁸ A/63/677.

³³⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 14 (c).

³³³ *Yearbook ... 2008*, vol. II (Part Two), p. 16, paras. 31–33.

³³⁴ *Ibid.*, vol. II (Part One), document A/CN.4/598.

beyond recognition or operational utility. As the debate on his fourth report had confirmed beyond any doubt, the Commission had endorsed the Secretary-General's stand, which he, as Special Rapporteur, had made his own.

14. Some of the comments made during the debate had been intended to draw attention to the need for a corresponding explanation in the commentary to a particular draft article. To the extent that those comments remained relevant once the Commission had adopted the respective draft articles, they should be included in the commentaries.

15. The debate had focused to a large extent on drafting. Many suggestions had been made for amendments to the form and content of draft articles 10 to 12, which the Drafting Committee would have to discuss in detail. A specific objection had been raised to draft article 10 on the grounds that it dealt with States unwilling to provide assistance to affected persons in their territory. It had been argued that if an affected State did not wish to use its own resources, it should not seek assistance. To facilitate comprehension in that regard, he explained that, while the positioning of the words "as appropriate" in the draft article might mislead the reader into believing that they qualified the preceding phrase, "the duty to seek assistance", the real intention had been to stress the discretionary power of the affected State to choose from among the potential donors listed. Furthermore, the term "unwilling" did not appear in draft article 10 but in draft article 11, which dealt not with the duty to seek assistance, but rather with the duty of the affected State not to withhold arbitrarily its consent to external assistance offered. In that connection, he recalled that the Drafting Committee had not yet considered paragraph 2 of former draft article 8, which he had proposed in his third report³⁴⁰ and which reaffirmed in unequivocal terms that an affected State was required to give its consent to any offer of external assistance before that assistance could be provided. It had been suggested that paragraph 2 of former draft article 8 should be inserted as paragraph 1 of draft article 11.

16. In conclusion, and in accordance with the express will of all members, with the exception of one who had abstained, he requested that draft articles 10 to 12 be referred to the Drafting Committee, together with all suggestions concerning the text thereof and possible commentaries, in the hope that improved draft articles would result.

17. The CHAIRPERSON said she took it that the Commission wished to refer draft articles 10 to 12 to the Drafting Committee.

It was so decided.

³⁴⁰ Draft article 8 read as follows:

"Primary responsibility of the affected State

"1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.

"2. External assistance may be provided only with the consent of the affected State."

Yearbook ... 2010, vol. II (Part One), document A/CN.4/629. See also *ibid.*, vol. II (Part Two), pp. 183–184, paras. 316–324, and footnote 1339.

Organization of the work of the session (concluded)*

[Agenda item 1]

18. Mr. MELESCANU (Chairperson of the Drafting Committee) announced that Mr. Candiotti and Ms. Escobar Hernández would be joining the Drafting Committee.

The meeting rose at 3.45 p.m.

3108th MEETING

Wednesday, 20 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candiotti, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (continued)**

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Ms. Hyacinth Lindsay, of the Inter-American Juridical Committee, and invited her to address the Commission.

2. Ms. LINDSAY (Inter-American Juridical Committee) said that it was an honour for her to present the 2010 annual report on the activities of the Inter-American Juridical Committee, which consisted of three chapters. The first discussed the origin, legal bases and structure of the IAJC. The second chapter considered the issues discussed at the Committee's two regular sessions held in 2010 and also contained the texts of the resolutions adopted at the two regular sessions and related documents. The third chapter concerned the other activities of the IAJC and other resolutions adopted by it. Budgetary matters were also discussed in the report.

3. With respect to innovative forms of access to justice in the Americas, the rapporteur for that topic had presented a document entitled "Access to justice: preliminary considerations". As the IAJC had decided that the most important issue was to approach access to justice in innovative ways and to expand the channels of access to justice, it intended to approve general guidelines on the topic. A report entitled "Comprehensive training of

* Resumed from the 3105th meeting.

** Resumed from the 3101st meeting.

judges: a need in the administration of justice” had been prepared on the basis of guiding principles presented at the previous session and the ensuing discussions. The report placed emphasis on the need for greater rigour in the training of judges, the importance of the independence and modernization of the judiciary, and accessibility to all communities with equality and timeliness. It also emphasized the training of workers in the justice system and the resources required to simplify judicial proceedings.

4. With respect to the International Criminal Court, the IAJC had adopted a resolution entitled “Promotion of the International Criminal Court” to be forwarded by the General Secretariat of the OAS to the Permanent Council for submission to the General Assembly at its thirty-sixth regular session. A request had also been made via the Secretariat to member States which had not yet replied to the Committee’s questionnaire to do so. States parties to the Rome Statute of the International Criminal Court that had adopted laws and applied Parts IX and X of the Statute had been requested to report any other measures implemented to facilitate cooperation with the Court. The IAJC had decided to keep the topic of the promotion of the International Criminal Court under consideration and requested the rapporteur concerned to submit an updated report at the next regular session.

5. As to the topic entitled “Considerations on an inter-American jurisdiction of justice”, it had been decided at the seventy-sixth regular session to postpone the study of the topic. With regard to the promotion and strengthening of democracy, the rapporteur for the topic had presented a report highlighting shortcomings in the preventive actions available to the Permanent Council for remedying threatened breakdowns in the democratic order and the relationship between democracy and development and the scant usage made of the provisions of the Charter of the Organization of American States in promoting economic and social development. A working group comprising five members of the IAJC had been established to review the draft resolution on the topic. A revised version, entitled “Essential and fundamental elements of representative democracy and their relationship with collective action under the Inter-American Democratic Charter”, had been approved. The Committee had decided to prepare a briefer text for distribution to the press and publication on the OAS web page.

6. As to the issue of international humanitarian law in the OAS member States, the IAJC had adopted a report on war crimes in international humanitarian law and another on international criminal tribunals. The IAJC had received a visit from Mr. Anton Camen of the ICRC, who had referred to the work of the IAJC, in conjunction with other organizations, in drafting model laws on anti-personnel mines, the use of biological weapons and the implementation of the Geneva Conventions for the protection of war victims. Mr. Camen had given a summary of the progress made in the implementation of international humanitarian law treaties by OAS member States and made recommendations for juridical measures by States in relation to international humanitarian law.

7. On the issue of cultural diversity in the development of international law, it had been recommended that diversity

be recognized as a cultural heritage, different cultural expressions be promoted, cultural goods be considered as spiritual assets and not merely as merchandise, educational spaces be developed to consolidate collective awareness about cultural diversity, and public and private initiatives be promoted to reflect on problems caused by the recognition of diversity and its impact in the field of international law.

8. Migratory topics included migrants’ rights, the rights of refugees and the right of asylum. The annual report highlighted the causes of migration, which were multiple, complex and heterogeneous, while focusing on the economic factor, differences in development between the country of origin and the country of destination, the divergence between work markets, and the natural aspiration to overcome poverty and inequality. The report also examined the positive and negative consequences of migration, including the illicit traffic of migrants, actions taken to facilitate illegal entry, and trafficking in people for the purpose of exploiting forced labour. The IAJC had unanimously adopted the resolution entitled “Protection of the rights of migrants”, and two other documents entitled “Refugees” and “Refugees [asylum]” had been included in the report.

9. The OAS General Assembly had requested the IAJC to conduct a study on the importance of guaranteeing the right of freedom of thought and expression, in the light of the fact that free and independent media carried out their activities guided by ethical standards, which could in no case be imposed by the State, consistent with applicable principles of international law. The IAJC had recognized the difference between freedom of expression and freedom of thought and noted the fact that those rights were not absolute. In that connection, both the American Convention on Human Rights: “Pact of San José, Costa Rica” and the International Covenant on Civil and Political Rights regulated the conditions whereby the exercise of freedom of expression might be restricted. Reference had also been made to a series of recommendations by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights regarding the duty of States to uphold the utmost impartiality and due process in all administrative and judicial procedures for enforcing the law. The study had concluded that the initiation of proceedings and the imposition of sanctions must be the task of impartial and independent agencies, be regulated by legal provisions and abide by the terms of the conventions, and that in no instance could the editorial line of a media outlet be a factor of relevance in pursuing sanctions in that area.

10. With regard to topics on private international law, the report recounted the actions taken since the adoption of the relevant resolution of the OAS General Assembly. The IAJC had approved a proposal for inclusion of alternative dispute-solving methods on its agenda with a view to the forthcoming Inter-American Specialized Conference on Private International Law. At the fortieth regular session of the OAS General Assembly in June 2010, the member States had failed to reach consensus on the proposals related to the seventh Inter-American Specialized Conference on Private International Law. The IAJC had not discussed the proposals at its seventy-seventh regular session in August 2010.

11. In respect of new topics, the IAJC had been asked to conduct a legal study into the mechanisms for participatory democracy and citizen participation provided for in the laws of some of the region's countries and a comparative analysis of the principal legal instruments of the inter-American system related to peace, security and cooperation. The Committee had agreed that the subject should be addressed using a restrictive interpretation and separately from the topic of strengthening democracy, and that the aim should not be to discuss participatory democracy but rather to identify citizen participation mechanisms for making representative democracy more effective. The Chairperson of the IAJC had asked the secretariat to prepare a note for the delegations of the OAS member States requesting the information necessary to progress with the topic.

12. Within the framework of new topics, the IAJC had also studied the issue of peace, security and cooperation. At the fortieth regular session of the OAS General Assembly, the IAJC had been asked to conduct a comparative analysis of the principal legal instruments of the inter-American system related to peace, security and cooperation. Members had indicated, *inter alia*, that new concepts of security had emerged which were not solely restricted to the use of weapons or war-related activities, but also covered topics related to human security and poverty. They had also noted that it was necessary to start with an analysis of the treaties in force within the OAS regulatory framework and that consideration should be given to the concept of democratic security, including multidimensional security as set out in the 2003 Declaration on security in the Americas adopted by the Special Conference on Security held in Mexico City on 27 and 28 October 2003.³⁴¹ It had also been stressed that security was no longer seen as a merely legal or territorial issue but that the concept had been expanded to include human security and multidimensional security. A decision had been taken to return to the topic at a later date.

13. With respect to simplified stock companies, a document entitled "Draft model law on simplified stock companies" had been presented by a group of Colombian lawyers, who had explained the rationale behind it for analysis by the IAJC. Since the topic was one of private international law, some members had requested that it be included under that heading.

14. As to concluded topics, during the period covered by the report the IAJC had approved two documents entitled "Strengthening the consultative function of the Inter-American Juridical Committee" and "Comments on the draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance".

15. The CHAIRPERSON invited members of the Commission to put questions and make comments.

16. Mr. MURASE, recalling that the United Nations General Assembly was due to consider the draft articles on the law of transboundary aquifers at its 2011 session,³⁴²

³⁴¹ OAS, "Declaration on security in the Americas" (OEA/Ser.K/XXXVIII CES/DEC.1/03 rev. 1) (available from the website of the OAS, at www.oas.org).

³⁴² General Assembly resolution 63/124 of 11 December 2008, para. 6. For the draft articles adopted by the Commission and the commentary thereto, see *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

asked what the members of the IAJC thought that the Sixth Committee should do in that regard, in particular whether the General Assembly should adopt a resolution with a view to the possible adoption of a framework convention on the topic. In that context, it was to be welcomed that four Latin American countries had already concluded an agreement on the basis of the draft articles.³⁴³

17. With respect to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on the basis of draft articles prepared by the Commission,³⁴⁴ only 11 States had ratified the Convention and a further 19 ratifications were still necessary for the instrument to enter into force. As Mexico and Paraguay were the only countries in Latin America to have ratified the text, the IAJC should encourage its members to do so.

18. Mr. NOLTE asked whether the IAJC, like CAHDI in Europe, might consider playing a role in respect of reservations to treaties, for instance in the context of deciding whether reservations were compatible with the object and purpose of the treaty or giving opinions to States on how to formulate reservations or react to reservations.

19. Noting that the Council of Europe's European Commission for Democracy through Law (Venice Commission), an institution dealing mainly with constitutional law but also with international law, also had members from the Americas, including Brazil, Chile, Mexico and Peru, he wondered whether the IAJC had considered the relationship between its work and that of the Venice Commission.

20. Mr. VARGAS CARREÑO highlighted the importance of activities for coordination between universal forums, such as the Commission, and regional forums like the IAJC. Endorsing the comments made by Mr. Murase and Mr. Nolte, he said that contacts should be strengthened so that the results of the Commission's work were better disseminated at the regional level. Noting that some items on the Committee's agenda had been codified at the global level, he emphasized that duplication should be avoided.

21. Mr. VASCIANNIE, noting that the IAJC was undertaking work on migration, asked what its goal was and whether, for example, the Committee was intending to prepare a draft convention or an information document on the topic.

22. Noting also that several topics on the Committee's agenda would need contributions from member States of the IAJC, he asked what measures the IAJC took to obtain information from its member States and what their general reaction was.

23. Ms. LINDSAY (Inter-American Juridical Committee) said that she would report the comments by members of the Commission to the IAJC at its upcoming August 2011 session.

³⁴³ Guarani Aquifer Agreement, signed at San Juan (Argentina) on 2 August 2010, between Argentina, Brazil, Paraguay and Uruguay (available from the website of the Food and Agriculture Organization of the United Nations, at <http://faolex.fao.org/docs/pdf/mul-143888English.pdf>).

³⁴⁴ *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 28.

24. With respect to the topic of migration, the IAJC had taken up the issue because the State of Arizona in the United States of America had adopted a law on immigration. Fears had been expressed that the law was discriminatory, but after considering the matter the IAJC had concluded that all immigrants were treated in the same way, that no particular group was targeted and that, therefore, the text did not involve any discrimination.

25. Mr. CANDIOTI said he agreed with Mr. Vargas Carreño that coordination between the IAJC and the Commission should be improved and, to that end, it would be useful for a member of the Commission to be able to inform the IAJC annually of the work it had undertaken. Noting that the Working Group on the long-term programme of work, which he chaired, had the task of recommending new topics for inclusion in the long-term programme of work of the Commission, he said he would like to know the Committee's opinion in that regard and which topics it thought that the Commission should consider for codification or progressive development. He also looked forward to hearing the Committee's reaction to the Guide to Practice on Reservations to Treaties, which the Commission would forward to it after the Guide had been adopted at the current session.

26. Mr. VÁZQUEZ-BERMÚDEZ, noting that the IAJC was undertaking work on cultural diversity in the development of international law, recalled that in 2005 UNESCO had adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Although the Convention had been adopted only recently, it was a clear success, since 117 States had already ratified it. He wondered what contribution the IAJC intended to make in that regard, for example, whether it was planning to promote accession to the Convention or to help States to enact appropriate legislation for its implementation.

27. Ms. LINDSAY (Inter-American Juridical Committee) said that the topic of cultural diversity in the development of international law was being considered in depth by the IAJC and that, as work was still ongoing, the Committee had not yet identified the ultimate objectives.

The meeting rose at 10.55 a.m.

3109th MEETING

Thursday, 21 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. *Reservations to treaties* (*continued*)* (A/CN.4/L.783 and Add.1–8)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.783/Add.3.

F. *Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session* (*continued*)*

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (*continued*)*

(b) *Text of the guidelines and the commentaries thereto* (*continued*)* (A/CN.4/L.783/Add.3)

1.4 *Conditional interpretative declarations* (*concluded*)*

Commentary (*concluded*)*

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

2. Mr. NOLTE said that, in the first sentence, the word “so” should be deleted because it did not apply to paragraph (7), as it seemed to indicate, but rather to paragraph (6).

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

3. Mr. PELLET (Special Rapporteur) proposed that, in the final sentence, the phrase “application of the” [*l'application des*] should be inserted between “legal effect on the” and “provisions of the treaty”.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (14)

Paragraphs (11) to (14) were adopted.

The commentary to guideline 1.4, as amended, was adopted.

1.5 *Unilateral statements other than reservations and interpretative declarations*

Guideline 1.5 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

* Resumed from the 3106th meeting.

Paragraph (3)

4. Mr. NOLTE proposed that, in the second sentence, the word “definition” be replaced with “assessment” since the user did not define the statements concerned but rather assessed them.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (12)

Paragraphs (4) to (12) were adopted.

Paragraph (13)

5. The CHAIRPERSON said, in response to a question from Mr. Candiotti concerning mistakes in the paragraph numbering in the French and Spanish texts, that the secretariat would ensure the consistency of paragraph numbering between the various language versions of the Guide to Practice and of the corresponding cross references to paragraphs of the commentary. She suggested that the Commission continue its consideration of the paragraphs to the commentary based on the correct numbering used in the English text.

It was so decided.

Paragraph (13) was adopted.

Paragraphs (14) to (18)

Paragraphs (14) to (18) were adopted.

Paragraph (19)

6. Mr. NOLTE proposed that, in the first sentence, the word “pretext” should be replaced with a more appropriate expression to signify that the authors of the declarations in question used the treaty in an opportunistic fashion.

Paragraph (19) was adopted, subject to the requisite editorial amendments.

The commentary to guideline 1.5, as amended, was adopted.

1.5.1 *Statements of non-recognition*

Guideline 1.5.1 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

7. Mr. NOLTE pointed out that, in the first and third sentences, the words “the Federal Republic of” should be inserted before each of the two references to “Germany”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

8. Mr. McRAE proposed that the reference to the adverb “[sic]” in the citation be deleted, unless it was part of the original, given that the text that preceded it was not erroneous.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (13)

Paragraphs (7) to (13) were adopted.

The commentary to guideline 1.5.1, as amended, was adopted.

1.5.2 *Statements concerning modalities of implementation of a treaty at the internal level*

Guideline 1.5.2 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

9. Mr. McRAE proposed that, in the final sentence, the word “true” be replaced with “simple”, because the text that followed that word defined the declaration in question as a declaration “explaining how Sweden understands the treaty”, which corresponded to a simple declaration. Moreover, if the word “true” was retained, it would not be clear whether what was meant was a “simple” or a “conditional” interpretative declaration.

Paragraph (6), as amended, was adopted.

Paragraph (7)

10. Mr. NOLTE proposed that, in the first sentence, the words “cannot and” before “do not purport to have any international effects” be deleted. Informative declarations—although they did not purport to produce any international effect—could nonetheless produce an effect indirectly. It was therefore incorrect to assert that they could not have an effect.

11. Mr. PELLET (Special Rapporteur) said that the text of the footnote to the first sentence should read: “Paragraphs (2) to (4)”.

Paragraph (7), as amended by Mr. Nolte and Mr. Pellet, was adopted.

Paragraphs (8) to (12)

Paragraphs (8) to (12) were adopted.

The commentary to guideline 1.5.2, as amended, was adopted.

1.5.3 *Unilateral statements made under a clause providing for options*

Guideline 1.5.3 was adopted.

Commentary

Paragraphs (1) to (19)

Paragraphs (1) to (19) were adopted.

Paragraph (20)

12. Mr. PELLET (Special Rapporteur) proposed inserting a footnote at the end of the second sentence in order to illustrate the text in parentheses immediately preceding it. The new footnote would read: “See guidelines 2.3.4 (Widening of the scope of a reservation), 2.5.10 (Partial withdrawal of a reservation) and 2.5.11 (Effect of a partial withdrawal of a reservation) and commentaries.”

Paragraph (20), as amended and supplemented, was adopted.

Paragraph (21)

Paragraph (21) was adopted.

The commentary to guideline 1.5.3, as amended, was adopted.

1.6 *Unilateral statements in respect of bilateral treaties**Commentary*

Paragraphs (1) and (2)

13. Mr. NOLTE proposed that, in the second sentence of paragraph (1) and in the first sentence of paragraph (2), the word “individual” before “definitions” be replaced with “different”.

14. Sir Michael WOOD said that the French phrase “*des éléments de définitions*” to which Mr. Nolte’s proposal had referred could be rendered in English as simply “definitions” and did not require any adjective. He therefore proposed to delete the word “individual” in both paragraphs.

Paragraphs (1) and (2), as amended by Sir Michael, were adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to section 1.6, as amended, was adopted.

1.6.1 *“Reservations” to bilateral treaties**Commentary*

Paragraphs (1) to (19)

Paragraphs (1) to (19) were adopted.

Paragraph (20)

15. Mr. PELLET (Special Rapporteur) proposed that, in the first sentence, the phrase “most of the members of” [*la plupart des membres de*] be deleted. The sentence would then begin: “Although the Commission considers ...” [*Bien que la Commission considère ...*].

16. Mr. McRAE proposed that the phrase “within the scope of the treaty” be replaced by “within the scope of the Guide to Practice”.

Paragraph (20), as amended, was adopted.

The commentary to guideline 1.6.1, as amended, was adopted.

1.6.2 *Interpretative declarations in respect of bilateral treaties**Guideline 1.6.2 was adopted.**Commentary*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

17. Mr. NOLTE proposed that, in the first sentence, the phrase “where principles are concerned” be replaced by “of principle”.

18. Mr. PELLET (Special Rapporteur) pointed out that, in the first footnote to the last sentence, the paragraph number to which reference was made should be paragraph (9), not paragraph (7).

Paragraph (2), as amended by Mr. Nolte and Mr. Pellet, was adopted.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were adopted.

The commentary to guideline 1.6.2, as amended, was adopted.

1.6.3 *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party**Guideline 1.6.3 was adopted.**Commentary*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

19. Mr. NOLTE proposed that in the first sentence the phrase “becomes an integral part of the treaty and” be deleted, thereby limiting the Commission to what was a safer assertion, namely, that when an interpretative declaration made in respect of a bilateral treaty was accepted by the other party, it constituted the authentic interpretation thereof. In addition, in the fifth sentence the phrase “which forms part of its context” should be deleted.

20. Sir Michael WOOD proposed that, in the fifth sentence, the phrase “paragraph 2 and 3 (a)” be amended to read “paragraph 2 or 3 (a)”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to guideline 1.6.3, as amended, was adopted.

1.7 *Alternatives to reservations and interpretative declarations*

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to section 1.7 was adopted.

1.7.1 *Alternatives to reservations*

Guideline 1.7.1 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

21. Mr. McRAE questioned the need for the adjective “worrisome” in the phrase “at the cost of worrisome terminological confusion” in the last footnote and proposed its deletion.

Paragraph (2) was adopted with that amendment.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

22. Mr. McRAE said that the last three words of the paragraph, “from one another”, seemed unnecessary and proposed their deletion.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

23. Mr. PELLET (Special Rapporteur), referring to the third footnote, said that in the first sentence of the French version the words “*qu’elle rencontre*” should be replaced by “*qu’ils rencontrent*”.

24. Mr. McRAE proposed that in the fourth sentence of the same footnote, the words “regulated but not abolished by” should be replaced by “expanded on in”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

25. Mr. PELLET (Special Rapporteur) said that the first sentence, which stated that it did not seem useful to mention other alternative procedures, was not in line with the text of the guideline as amended by the Working Group on reservations to treaties, which did, in fact, mention several alternative procedures. He therefore proposed that the sentence be redrafted to read: “There are other alternative procedures that are even further removed from the reservations procedure” [*D’autres procédés alternatifs s’éloignent plus encore du procédé des réserves*].

Paragraph (10), as amended, was adopted.

Paragraph (11)

26. Mr. PELLET (Special Rapporteur) said that, for similar reasons, the last sentence should be redrafted to read: “There is therefore no likelihood of serious confusion between such notifications and reservations” [*Il n’existe dès lors aucun risque de confusion sérieux entre ces notifications, d’une part, et les réserves, d’autre part*].

Paragraph (11), as amended, was adopted.

Paragraph (12)

27. Mr. PELLET (Special Rapporteur) said that, as a consequence of the amendment to paragraph (11), the first sentence of paragraph (12) would need to be redrafted to begin: “Two other procedures that may also be considered alternatives to reservations purport (or may purport) to modify the effects of a treaty” [*Deux autres procédés, que l’on peut également considérer comme des alternatives aux réserves visent (ou peuvent viser) à moduler les effets d’un traité*].

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

28. Mr. PELLET (Special Rapporteur) said that, for the sake of accuracy, the first sentence of the penultimate footnote should refer to a similarity, not a difference, and should read: “Pierre-Henri Imbert gives two examples that highlight this fundamental similarity, by comparing” [*Imbert donne deux exemples qui font bien ressortir cette similitude essentielle, en comparant*].

Paragraph (14) was adopted with that amendment.

Paragraph (15)

29. Mr. McRAE said that he questioned the accuracy of the phrase in the second sentence “yet authors, including the most distinguished among them, have caused an unwarranted degree of confusion”. The footnote that followed made no reference to such confusion in the literature but instead to a dissenting opinion by Judge Zoričić in the *Ambatielos* case, cited by Sir Gerald Fitzmaurice.³⁴⁵ He therefore proposed that the phrase in

³⁴⁵ See G. G. Fitzmaurice, “The law and procedure of the International Court of Justice, 1951–4: Treaty interpretation and other treaty points”, *BYBIL 1957*, vol. 33, pp. 203–293, at pp. 272–273.

question should read “yet there is still an unwarranted degree of confusion”.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (20)

Paragraphs (16) to (20) were adopted.

Paragraph (21)

30. Mr. NOLTE queried the appropriateness of referring by name to the author of the explanatory report (C. N. Fragistas) in the body of the document.

31. Mr. PELLET (Special Rapporteur) said it was important to refer to the name of the author somewhere in the document, since he was the sole author of the explanatory report in question. He proposed that the name of the author be moved from paragraph (21) to the related footnote.

Paragraph (21), as amended, was adopted.

Paragraphs (22) to (24)

Paragraphs (22) to (24) were adopted.

The commentary to guideline 1.7.1, as amended, was adopted.

1.7.2 *Alternatives to interpretative declarations*

Guideline 1.7.2 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

32. Mr. PELLET (Special Rapporteur) proposed that, in the last footnote to paragraph (4), reference should be made to paragraph (21) as well as paragraph (20) of the commentary to guideline 1.7.1.

Paragraph (4) was adopted with that amendment.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 1.7.2, as amended, was adopted.

1.8 *Scope of definitions*

Guideline 1.8 was adopted.

Commentary

Paragraph (1)

33. Mr. NOLTE said that it did not seem necessary to provide the somewhat old-fashioned explanation of the term “definition”. He therefore proposed deleting the opening phrase of the second sentence: “As ‘a precise statement of the essential nature of a thing’”.

34. Mr. FOMBA pointed out that the related footnote would then also need to be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

The commentary to guideline 1.8, as amended, was adopted.

35. The CHAIRPERSON invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.783/Add.4.

2. *Procedure* (A/CN.4/L.783/Add.4)

2.1 *Form and notification of reservations*

2.1.1 *Form of reservations*

Guideline 2.1.1 was adopted.

Commentary

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to guideline 2.1.1 was adopted.

2.1.2 *Statement of reasons for reservations*

Guideline 2.1.2 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

36. Mr. NOLTE proposed that in the first part of the second sentence the phrase “making it a legal obligation” should be replaced by “recognizing it as a legal obligation”, since the Commission could not in any case make it a legal obligation to give reasons for reservations but could have recognized it as such. The second half of the sentence would then become superfluous and could be deleted.

37. Mr. McRAE said that the Commission could do rather more than recognize something as a legal obligation. He therefore proposed using the term “expressing” so that the sentence would read: “It was for this reason that the Commission deemed it useful to encourage giving reasons without expressing it as a legal obligation to do so.”

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

38. Mr. PELLET (Special Rapporteur) said that in the last sentence the word “indispensable” was too strong and

should be replaced by “central”. The sentence would thus read: “It is a central element of the reservations dialogue” [*Elle est un élément central au dialogue réservataire*].

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

The commentary to guideline 2.1.2, as amended, was adopted.

2.1.3 *Representation for the purpose of formulating a reservation at the international level*

Guideline 2.1.3 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

39. Mr. PELLET (Special Rapporteur) said that, as currently worded, the first sentence of the paragraph made little sense. He proposed that it read “The two Vienna Conventions of 1969 and 1986 contain no particular explanation of persons or organs authorized to formulate reservations at the international level” [*Les deux Conventions de Vienne de 1969 et de 1986 ne comportent aucune précision particulière en ce qui concerne les personnes ou organes habilités à formuler une réserve au plan international*].

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (11)

Paragraphs (3) to (11) were adopted.

Paragraph (12)

40. Mr. McRAE proposed the deletion of the adjective “recent” before the mention of the *Aerial Incident of 10 August 1999* case in the related footnote, since the case was no longer recent.

Paragraph (12) was adopted with that amendment.

Paragraphs (13) to (18)

Paragraphs (13) to (18) were adopted.

The commentary to guideline 2.1.3, as amended, was adopted.

2.1.4 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

Guideline 2.1.4 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

41. Mr. McRAE, referring to the adverb “regrettably” in the second sentence of the first footnote to the paragraph, questioned the need to express regret that the European Community had not replied to the Commission’s questionnaire. Surely a statement of fact would suffice.

42. Mr. PELLET (Special Rapporteur) said that, in his view, it had been necessary to express regret; however, the statement was no longer accurate because one European body—the Council of the European Community—had replied. He therefore proposed that the sentence should be reworded: “As far as the European Community was concerned, only the Council replied to the Commission’s questionnaire” [*En ce qui concerne la Communauté européenne, seul le Conseil a répondu au questionnaire de la Commission*].

Paragraph (6) was adopted with that amendment.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

43. Mr. NOLTE said that the last sentence was overly categorical when it stated that the internal rules on competence for formulating reservations were not laid down in constitutions. He therefore suggested that the word “usually” be inserted before the phrase “not the case”. He also took issue with the phrase “which derives from practice”, because most constitutional lawyers in Germany and probably those in many other countries would not accept that the rules laying down who was competent to formulate reservations on behalf of the State derived only from practice. In fact, in most cases, they stemmed from constitutional principles regarding the separation of powers in combination with practice. He therefore suggested that the phrase read “which mostly derives from general constitutional principles and practice” and end with a full stop, and that what followed should be a new sentence to read: “Such rules are not necessarily in line with those expressing consent to be bound.”

44. Sir Michael WOOD said that in the United Kingdom it was not even true to say that the internal rules on competence to conclude treaties were laid down in the constitution.

45. Mr. McRAE, responding to Sir Michael’s concern, said that the word “often” could be inserted before the phrase “laid down in the constitution”.

46. Mr. PELLET (Special Rapporteur) said that the commentary could not state that the rules concerning the formulation of reservations derived from general constitutional principles and practice, since in France they derived only from practice.

47. Mr. PETRIČ and Mr. SABOIA endorsed Mr. Nolte’s viewpoint, since in their countries the rules governing the approval of treaties and the formulation of reservations thereto did derive from general constitutional principles.

48. Mr. FOMBA agreed with Mr. Pellet, since in many French-speaking African countries practice was the only source of the rules in question. For that reason, he suggested that the phrase in question should read “which mostly derives from general constitutional principles or practice”.

49. Mr. KEMICHA said that the words “which mostly derives from” would make it possible to take account of the constitutional particularities of many different countries. That phrase allowed for the fact that, in some jurisdictions, constitutional provisions could require that another organ must examine whether reservations formulated by the executive were consistent with the constitution.

50. Mr. PETRIČ and Mr. NOLTE agreed with the wording proposed by Mr. Fomba.

51. The CHAIRPERSON said she took it that the Commission wished to divide the last sentence of paragraph (10) into two, reading as follows: “Whereas the internal rules on competence to conclude treaties are often laid down in the constitution, at least in broad outline, that is usually not the case for the formulation of reservations, which mostly derives from general constitutional principles or practice. Such rules are not necessarily in line with those expressing consent to be bound.”

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

The commentary to guideline 2.1.4, as amended, was adopted.

2.1.5 Communication of reservations

Guideline 2.1.5 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

Paragraph (8) was adopted with a minor drafting change.

Paragraph (9)

52. Mr. NOLTE said that, for the sake of consistency, the names of individual members of State delegations should not be mentioned and that the beginning of the paragraph should therefore read: “At the United Nations Conference on the Law of Treaties, Canada pointed out that ...”.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted with minor drafting changes.

Paragraphs (11) to (27)

Paragraphs (11) to (27) were adopted.

Paragraph (28)

53. Mr. NOLTE said that the fourth sentence, “The Commission does not intend to take a position on the matter and decided not to devote a specific guideline to it”, should be deleted in order to make it clear the Commission considered that the same rule should apply in a situation to which it did not devote a specific guideline.

54. Mr. PELLET (Special Rapporteur) said that deleting that sentence would not be wise. Unfortunately, the Commission had not wished to adopt a guideline on the situation in which certain treaties, especially in the field of disarmament or environmental protection, created deliberative bodies with a secretariat which was sometimes denied the status of an international organization. The sentence that followed the one that Mr. Nolte wished to delete was not incompatible with that point, since it concerned a different matter, namely reservations to treaties creating oversight bodies.

55. Mr. NOLTE said that the idea behind the latter part of the paragraph needed to be expressed more clearly. He therefore suggested that consideration of that paragraph should be deferred in order to give the Special Rapporteur time to reformulate it.

56. The CHAIRPERSON suggested that the Commission should defer its consideration of paragraph (28).

It was so decided.

Paragraph (29)

Paragraph (29) was adopted.

Paragraph (30)

57. Mr. PELLET (Special Rapporteur) said that the second clause in the second sentence, “the Commission proposes to decide on the matter after it undertakes an in-depth study of whether or not it is possible to object to a reservation that is expressly provided for in a treaty”, no longer applied and should be deleted; instead, a footnote should be added which would read: “See guideline 2.8.12 and commentary”.

Paragraph (30), as amended and supplemented with a footnote, was adopted.

Paragraphs (31) and (32)

Paragraphs (31) and (32) were adopted.

2.1.6 Procedure for communication of reservations

Guideline 2.1.6 was adopted.

Commentary

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

Paragraph (12)

58. Mr. PELLET (Special Rapporteur) said that the expression “could rely on” [*pourrait se reposer sur*], should be replaced with “might leave it up to” [*pourrait se décharger sur*].

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (25)

Paragraphs (13) to (25) were adopted.

The commentary to guideline 2.1.6, as amended, was adopted.

2.1.7 *Functions of depositaries*

Guideline 2.1.7 was adopted.

Commentary

Paragraph (1)

59. Mr. NOLTE said that the meaning of the final sentence was unclear. He proposed replacing the phrase “performs this transition” with “makes this clear”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (14)

Paragraphs (2) to (14) were adopted.

The commentary to guideline 2.1.7, as amended, was adopted.

2.2 *Confirmation of reservations*

2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

Guideline 2.2.1 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

60. Mr. PELLET (Special Rapporteur) said that the second footnote to the paragraph should indicate that the publication entitled *Multilateral Treaties Deposited with the Secretary-General* was available online.

Paragraph (8), with that amendment, was adopted.

Paragraphs (9) to (15)

Paragraphs (9) to (15) were adopted.

The commentary to guideline 2.2.1, as amended, was adopted.

2.2.2 *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

Guideline 2.2.2 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 2.2.2 was adopted.

2.2.3 *Reservations formulated upon signature when a treaty expressly so provides*

Guideline 2.2.3 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.2.3 was adopted.

2.2.4 *Form of formal confirmation of reservations*

Guideline 2.2.4 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.2.4 was adopted.

2.3 *Late formulation of reservations*

Guideline 2.3 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted with minor drafting changes.

Paragraph (4)

61. Mr. PELLET (Special Rapporteur) said that, in the last footnote to the paragraph, which referred to the Convention on Mutual Administrative Assistance in Tax Matters, the phrase “it seems that no State party has exercised the option envisaged in this provision” was inaccurate and should be deleted.

Paragraph (4), with that amendment, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor drafting change.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

62. Mr. NOLTE expressed concern that the combination of paragraph (10) and the footnote added in brackets to the

quote by F. Horn seemed to imply that it was possible to denounce a treaty and reaccede to it in order to formulate a reservation even if the treaty had no withdrawal clause.

63. Mr. PELLET (Special Rapporteur) said that he was simply noting what had happened in practice, as indicated, for example, in paragraph (14), which was the correct reference in the above-mentioned footnote, not paragraph (13).

64. Mr. NOLTE said that the Special Rapporteur seemed, on the basis of a single precedent, to be casting doubt on the general rule contained in the Vienna Conventions that a treaty that had no denunciation clause could not be denounced.

65. Mr. PELLET (Special Rapporteur) said that the portion of the quotation in paragraph (10) that stated “A party remains always at liberty to accede anew to the same treaty”³⁴⁶ was nuanced by the footnote added in brackets, which explained that the quotation referred to a particular treaty; the footnote went on to refer the reader to paragraph (14), which provided a somewhat different example.

66. Sir Michael WOOD said that Mr. Nolte had drawn attention to a disturbing paragraph. Perhaps the problem lay with the opening words of paragraph (10), which were ambiguous. The apparent impact of the paragraph could be limited if the first sentence were amended so as to make it clear that the possibility in question was the unanimous acceptance of a late reservation.

67. Mr. PELLET (Special Rapporteur) said that the paragraph reflected views expressed in the literature with which he agreed, namely, that the parties could always modify a treaty by unanimous consent.

68. Mr. NOLTE said that the problem lay not with the views reproduced in the paragraph but rather with the Special Rapporteur’s point made in the footnote indicating that treaties that contained no withdrawal clause could be denounced.

69. The CHAIRPERSON suggested that the adoption of paragraph (10) should be deferred until an alternative text had been drafted.

It was so decided.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraphs (13) and (14)

70. Mr. NOLTE said that paragraphs (13) and (14) were related to paragraph (10). He therefore proposed that the Commission should defer their consideration.

It was so decided.

Paragraphs (15) and (16)

Paragraphs (15) and (16) were adopted.

Paragraph (17)

71. Mr. NOLTE proposed replacing the phrase “A pamphlet published by the Council of Europe” with “A publication by the Council of Europe”, which was a more appropriate description of the document in question.

Paragraph (17), as amended, was adopted.

Paragraphs (18) and (19)

Paragraphs (18) and (19) were adopted.

Paragraph (20)

72. Mr. NOLTE asked the Special Rapporteur to clarify the meaning of the phrase “unless a single opposition renders the reservation impossible” in the third sentence.

73. Mr. PELLET (Special Rapporteur) said that it meant that it rendered the formulation of the reservation impossible. He proposed amending the wording accordingly.

Paragraph (20), as amended, was adopted.

Paragraph (21)

Paragraph (21) was adopted.

Paragraph (22)

74. Mr. NOLTE proposed that, for the sake of clarity, the word “not” in the phrase “should not have a choice” should be replaced with “only”.

Paragraph (22), as amended, was adopted.

Paragraphs (23) and (24)

Paragraphs (23) and (24) were adopted.

2.3.1 Acceptance of the late formulation of a reservation

Guideline 2.3.1 was adopted.

Commentary

Paragraphs (1) to (12)

Paragraphs (1) to (12) were adopted.

The commentary to guideline 2.3.1 was adopted.

2.3.2 Time period for formulating an objection to a reservation that is formulated late

Guideline 2.3.2 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.3.2 was adopted.

³⁴⁶ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 43.

2.3.3 *Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations*

Guideline 2.3.3 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

75. Mr. NOLTE proposed that, in the third sentence, the words “of Human Rights” should be inserted after the words “the European Commission” so as to avoid any misunderstanding.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

76. Mr. NOLTE said that, although he understood that the other decisions mentioned in the commentary supported the point being made, he did not understand the relevance of the *Loizidou* judgment in that regard. He therefore proposed deleting paragraph (6). He also proposed amending paragraph (7) to include a reference to the European Commission of Human Rights.

77. The CHAIRPERSON suggested that the Commission might wish to defer consideration of those paragraphs.

It was so decided.

The meeting rose at 1 p.m.

3110th MEETING

Friday, 22 July 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Later: Mr. Bernd H. NIEHAUS (Vice-Chairperson)

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.783 and Add.1–8)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of its draft report contained in document A/CN.4/L.783/Add.4.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)

(b) *Text of the guidelines and the commentaries thereto* (continued)
(A/CN.4/L.783/Add.4)

2.3.3 *Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations* (continued)

Commentary (continued)

Paragraph (7) (concluded)

2. Mr. NOLTE recalled that at the previous meeting, he had suggested deleting paragraph (6), which would mean that the reference in paragraph (7) to the European Court of Human Rights would have to be deleted.

3. The CHAIRPERSON said that paragraph (6), which was the subject of another proposal, would be examined, like paragraph (7), at the same time as the other paragraphs still pending.

Paragraph (8)

Paragraph (8) was adopted.

2.3.4 *Widening of the scope of a reservation*

Guideline 2.3.4 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

4. Mr. NOLTE proposed replacing the words “extensive changes” by “extensions”.

5. Sir Michael WOOD said that it would be preferable to replace the phrase “extensive changes to the scope” by “changes that widen the scope”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

6. Sir Michael WOOD suggested deleting the phrase “in other words, to modify in its favour the legal effect of the provisions of the treaty to which the reservation refers”, because paragraph (13) of the commentary contained a more complete definition of the phrase “widening the scope of a reservation”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

7. Mr. FOMBA said that, in the French text, the word “*une*” in the third line should be replaced by “*un*”, and the word “*elles*” in the penultimate line should be replaced by “*eux*”, since “*opposé*” was masculine.

Paragraph (8) was adopted with that minor drafting amendment to the French text.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

8. Mr. NOLTE suggested the deletion of the last sentence, which was unnecessary.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

The commentary to guideline 2.3.4, as amended, was adopted.

2.4 Procedure for interpretative declarations

Commentary

9. Mr. NOLTE wondered whether it was really appropriate to say that there was a scarcity of interpretative declarations, and he therefore proposed the deletion of “scarcity or”.

The general commentary to section 2.4, as amended, was adopted.

2.4.1 Form of interpretative declarations

Guideline 2.4.1 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

10. Mr. NOLTE suggested the deletion of the words “at the present stage” in the first line.

11. Mr. PELLET (Special Rapporteur) said that he had no objection to that deletion, but the footnote to that phrase should be retained, and the corresponding footnote number should then be placed after the words “treaty in question”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

12. Mr. PELLET (Special Rapporteur) said that the words “online” should be inserted in the fourth line after “publishes them”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to guideline 2.4.1, as amended, was adopted.

2.4.2 Representation for the purpose of formulating interpretative declarations

Guideline 2.4.2 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to guideline 2.4.2 was adopted.

2.4.3 Absence of consequences at the international level of the violation of internal rules regarding the formulation of interpretative declarations

Guideline 2.4.3 was adopted.

Commentary

Paragraph (1)

13. Mr. PELLET (Special Rapporteur) said that in the French text, and presumably also in the Spanish version, the words “*ce cas*” before the penultimate footnote to the paragraph should be replaced by “*un cas*”.

Paragraph (1), as amended in the French text, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The commentary to guideline 2.4.3, as amended, was adopted.

2.4.4 Time at which an interpretative declaration may be formulated

Guideline 2.4.4 was adopted.

Commentary

Paragraph (1)

14. Sir Michael WOOD said that the English version needed to be brought into line with the French original by starting the paragraph with the words “It results from guideline 1.2”; the words “*a contrario*” in the French text should be deleted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

15. Sir Michael WOOD said that the words “contracting parties” should be replaced by “contracting States or organizations” both in the second sentence and throughout the Guide to Practice.

16. Mr. PELLET (Special Rapporteur) said that the Commission had already taken a decision to that effect.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

17. Sir Michael WOOD suggested the deletion of paragraph (6), which did not add anything to paragraph (5); indeed, it duplicated paragraph (5).

Paragraph (6) was deleted.

Paragraph (7)

18. Sir Michael WOOD said that, contrary to what was said in paragraph (7), it was quite common for interpretative declarations to be made before the final adoption of the treaty. They might for example be formulated in the Sixth Committee or when a particular provision of a treaty was adopted before the adoption of the treaty as a whole. Paragraph (7) was also inconsistent with the guideline itself, according to which an interpretative declaration could be formulated “at any time”.

19. Mr. PELLET (Special Rapporteur) said that he was not at all convinced by Sir Michael’s line of reasoning; he failed to see how an interpretative declaration could be formulated with regard to a treaty that did not exist. However, even if Sir Michael were right, the paragraph could not simply be deleted.

20. Sir Michael WOOD proposed that the phrase “only after the text of the treaty has been finally adopted” at the end of the sentence be replaced by “only after the text of the provisions of the treaty concerned has been adopted”.

It was so decided.

Paragraph (7), as amended, was adopted.

21. Coming back to paragraph (3), Sir Michael WOOD proposed that, in its footnote, the words “exceptional and” be deleted and that, in the English version, the word “derogative” be replaced by “residual”.

It was so decided.

The commentary to guideline 2.4.4, as amended, was adopted.

2.4.5 *Communication of interpretative declarations*

Guideline 2.4.5 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.4.5 was adopted.

2.4.6 *Non-requirement of confirmation of interpretative declarations formulated when signing a treaty*

Guideline 2.4.6 was adopted.

Commentary

Paragraph (1)

22. Sir Michael WOOD suggested that the word “final” in the last line should be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

The commentary to guideline 2.4.6, as amended, was adopted.

2.4.7 *Late formulation of an interpretative declaration*

Guideline 2.4.7 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

23. Sir Michael WOOD said that, as had been done in paragraph (7) of guideline 2.4.4, the words “of the provisions of the treaty concerned” should be inserted after “text” in the second line.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The commentary to guideline 2.4.7, as amended, was adopted.

2.4.8 *Modification of an interpretative declaration*

Guideline 2.4.8 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

24. Mr. PELLET (Special Rapporteur) said that the words “the declaration” in the second line should read “its declaration”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

25. Sir Michael WOOD said that the words “*a fortiori*” in the second line should be deleted.

Paragraph (5), as amended, was adopted.

The commentary to guideline 2.4.8, as amended, was adopted.

2.5 *Withdrawal and modification of reservations and interpretative declarations*

2.5.1 *Withdrawal of reservations*

Guideline 2.5.1 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

26. Mr. NOLTE suggested replacing the word “recently” in the second sentence of the English text by “late”.

Paragraph (2), as amended in the English version, was adopted.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were adopted.

Paragraph (10)

27. Mr. PELLET (Special Rapporteur) said that the words “and the commentary thereto” should be inserted at the end of the second footnote to the paragraph.

Paragraph (10) was adopted with that amendment.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

The commentary to guideline 2.5.1, as amended, was adopted.

2.5.2 *Form of withdrawal*

Guideline 2.5.2 was adopted.

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

28. Mr. NOLTE suggested that the words “juridical event constituted by the” should be deleted; the phrase would then read “the consequence of the lapse of a fixed period of time”.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

29. Sir Michael WOOD said that, to make the English text clearer, the word “it” in the third line should be replaced by “the reservation”.

It was so decided.

30. Mr. NOLTE, likewise referring to the English text, said that the word “chaos” in the sixth line should be replaced by “uncertainty”.

Paragraph (11), as amended in the English text, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

The commentary to guideline 2.5.2, as amended, was adopted.

2.5.3 *Periodic review of the usefulness of reservations*

Guideline 2.5.3 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 2.5.3 was adopted.

2.5.4 *Representation for the purpose of withdrawing a reservation at the international level*

Guideline 2.5.4 was adopted.

Commentary

Paragraphs (1) to (17)

Paragraphs (1) to (17) were adopted.

The commentary to guideline 2.5.4 was adopted.

2.5.5 *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

Guideline 2.5.5 was adopted.

Commentary

Paragraph (1)

31. Mr. PELLET (Special Rapporteur) said that, given that the reader would have the Guide to Practice, there was no reason to reproduce the text of the guidelines in a footnote when they were referred to. The same comment also applied to the last footnote to paragraph (4) of the commentary to guideline 2.5.6.

Paragraph (1) was adopted with the deletion of the corresponding footnote.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

32. Sir Michael WOOD said that the words “the withdrawal of” should be inserted before “a reservation is not valid”, since that was the subject of the draft guideline.

33. Mr. PELLET (Special Rapporteur) said that he could go along with the proposal by Sir Michael, but he was not convinced that only the rules of internal law relating to the withdrawal of a reservation were concerned.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to guideline 2.5.5, as amended, was adopted.

2.5.6 *Communication of withdrawal of a reservation*

Guideline 2.5.6 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 2.5.6 was adopted.

2.5.7 *Effects of withdrawal of a reservation*

Guideline 2.5.7 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

34. Mr. PELLET (Special Rapporteur) said that the original text of the quotation should be placed in the body of the text, in accordance with the usual practice, and not in the footnote. That question should be resolved once and for all and should be made a general rule.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

35. Mr. PELLET (Special Rapporteur) said that the words “because of the reservation in question” should be inserted after “author of the reservation”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

The commentary to guideline 2.5.7, as amended, was adopted.

2.5.8 *Effective date of withdrawal of a reservation*

Guideline 2.5.8 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

36. Mr. PELLET (Special Rapporteur) said that, in the second sentence, the word “formula” should be replaced by “formulation”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

37. Mr. NOLTE proposed replacing the word “code” in the third line by “guide”.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

Paragraph (13)

38. Mr. PELLET (Special Rapporteur) said that, in the third sentence, the first “certainly” should be deleted.

Paragraph (13), as amended, was adopted.

The commentary to guideline 2.5.8, as amended, was adopted.

2.5.9 *Cases in which the author of a reservation may set the effective date of withdrawal of the reservation*

Guideline 2.5.9 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 2.5.9 was adopted.

2.5.10 *Partial withdrawal of a reservation*

Guideline 2.5.10 was adopted.

Commentary

Paragraphs (1) to (12)

Paragraphs (1) to (12) were adopted.

Paragraph (13)

39. Mr. PELLET (Special Rapporteur) said that, in the footnote added in brackets in Horn’s quote,³⁴⁷ the words “will be studied *in fine* and” should be deleted, and the words “will be the subject” should be amended to read “are the subject”.

Paragraph (13), as amended, was adopted.

Paragraphs (14) to (20)

Paragraphs (14) to (20) were adopted.

The commentary to guideline 2.5.10, as amended, was adopted.

2.5.11 *Effect of a partial withdrawal of a reservation*

Guideline 2.5.11 was adopted.

Commentary

³⁴⁷ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 43.

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 2.5.11 was adopted.

2.5.12 *Withdrawal of interpretative declarations*

Guideline 2.5.12 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.5.12 was adopted.

2.6 *Formulation of objections*

2.6.1 *Definition of objections to reservations*

Guideline 2.6.1 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

40. Sir Michael WOOD said that paragraph (2) would be clearer if it began with the words “The definition of reservations contains five elements”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

41. Sir Michael WOOD suggested the deletion, in the last sentence, of the words “very sensitive”.

42. Mr. PELLET (Special Rapporteur) said that he had no objection to that suggestion, although he continued to believe that the question was in fact very sensitive.

Paragraph (6), as amended, was adopted.

Paragraph (7)

43. Mr. NOLTE proposed the deletion of the words “At the present stage”.

44. Mr. PELLET (Special Rapporteur) said that he was not really in agreement with that proposal, but could go along with it, provided that a footnote was added explaining why the Commission would include the detail in question at a later stage.

Paragraph (7) was adopted.

Paragraph (8)

45. Sir Michael WOOD suggested that the first footnote to the paragraph be deleted, because it was unnecessary.

46. Mr. PELLET (Special Rapporteur) said that in the French text, the footnote was very relevant. He proposed inserting the words “*en français*” after “*expression*” in the footnote.

47. Sir Michael WOOD endorsed this suggestion on the condition that, in the English version, the word “*expression*” be italicized.

48. Mr. NOLTE proposed that the words “the intentions of States” should be replaced by “the expressed intentions of States”.

49. Mr. PELLET (Special Rapporteur) said that he was not convinced by Mr. Nolte’s proposal. It was precisely when the intention was not expressed that the problem arose.

50. Sir Michael WOOD agreed with Mr. Nolte and suggested replacing the words “the law of treaties” in the first line by “the law on reservations to treaties”; that would solve the problem.

Paragraph (8), as amended, was adopted.

Paragraph (9)

51. Mr. NOLTE proposed that the second sentence and its footnote be deleted.

52. Mr. PELLET (Special Rapporteur) endorsed Mr. Nolte’s proposal and suggested that the following sentence begin with the words “According to the *Dictionnaire de droit international public*, the word ‘objection’ means ...”³⁴⁸.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraphs (12) to (14)

53. Mr. CAFLISCH said that in the English text, the verb “arbitrate” should be replaced by the adjective “arbitral”.

Paragraphs (12) to (14) were adopted with that drafting amendment to the English text.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

54. Mr. PELLET (Special Rapporteur) said that in the French text, the words “*il pouvait s’agir aussi*” should be replaced by “*il peut s’agir aussi*”.

55. Mr. NOLTE, supported by Sir Michael WOOD, proposed that the phrase “for the most part European States” in parentheses in the second sentence be deleted.

Paragraph (16), as amended, was adopted.

³⁴⁸ J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 763.

Paragraph (17)

56. Mr. PELLET (Special Rapporteur) said that in the French text, the words “*mais au statut juridique et aux effets incertains*” should be replaced by “*mais dont le statut juridique et les effets sont incertains*”.

Paragraph (17) was adopted with that minor drafting amendment to the French text.

Paragraph (18)

Paragraph (18) was adopted.

Paragraph (19)

57. Mr. PELLET (Special Rapporteur) said that, in the last sentence, the words “description of reactions to a reservation” should be replaced by “description of a reaction to a reservation”.

Paragraph (19), as amended, was adopted.

Paragraph (20)

58. Sir Michael WOOD suggested the deletion of the words “In the view of the Commission”: everything that was said in the document reflected the view of the Commission.

Paragraph (20), as amended, was adopted.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were adopted.

Paragraphs (23) and (24)

59. Mr. NOLTE said that, given that paragraphs (23) to (25) concerned “minimum”, “maximum” and “intermediate” effects of objections, footnotes should be added referring to the relevant draft guidelines, namely draft guideline 4.3.7 in paragraph (23) and draft guideline 4.5.3 in paragraph (24).

Paragraphs (23) and (24) were adopted, subject to an amendment to be made later by the Secretariat.

Paragraph (25)

60. Mr. NOLTE proposed replacing the word “validity” in the first line by “effect”.

It was so decided.

Paragraph (25), as amended, was adopted.

Paragraph (26)

Paragraph (26) was adopted.

Paragraph (27)

61. Mr. PELLET (Special Rapporteur) proposed the deletion of the last footnote to the paragraph.

It was so decided.

Paragraph (27), as amended, was adopted.

Paragraph (28)

62. Sir Michael WOOD suggested the deletion of the words “third clause of the proposed” in the first sentence.

63. Mr. PELLET (Special Rapporteur) said that, in the last sentence of the French text, the word “*produisait*” should be in the present tense.

Paragraph (28), as amended, was adopted.

Mr. Niehaus (Vice-Chairperson) took the Chair.

Paragraphs (29) to (34)

Paragraphs (29) to (34) were adopted.

The commentary to guideline 2.6.1, as amended, was adopted.

2.6.2 *Right to formulate objections*

Guideline 2.6.2 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

Paragraph (10)

64. Mr. PELLET (Special Rapporteur) said that, in the third sentence of the French text, the words “*cette faculté*” should be replaced by “*ce droit*”.

Paragraph (10), as amended, was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

The commentary to guideline 2.6.2, as amended, was adopted.

2.6.3 *Author of an objection*

Guideline 2.6.3 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

Paragraph (10)

65. Sir Michael WOOD said that, at the end of the third sentence of the English text, the words “an executive agreement” should be replaced by “a treaty in simplified form”.

Paragraph (10), as amended in the English text, was adopted.

The commentary to guideline 2.6.3, as amended in the English text, was adopted.

2.6.4 *Objections formulated jointly*

Guideline 2.6.4 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.6.4 was adopted.

2.6.5 *Form of objections*

Guideline 2.6.5 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.6.5 was adopted.

2.6.6 *Right to oppose the entry into force of the treaty vis-à-vis the author of the reservation*

Guideline 2.6.6 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

66. Mr. PELLET (Special Rapporteur) said that the words “italics added” should be inserted in the last footnote to the paragraph.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

The commentary to guideline 2.6.6, as amended, was adopted.

2.6.7 *Expression of intention to preclude the entry into force of the treaty*

Guideline 2.6.7 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

67. Mr. PELLET (Special Rapporteur) said that the text of the footnote should be replaced by a reference to the second footnote to paragraph (7) of the commentary to guideline 2.6.6.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to guideline 2.6.7, as amended, was adopted.

2.6.8 *Procedure for the formulation of objections*

Guideline 2.6.8 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

68. Mr. PELLET (Special Rapporteur) said that, in the penultimate line of the French text, the word “projets” should be replaced by “directives”.

Paragraph (7), as amended in the French text, was adopted.

The commentary to guideline 2.6.8, as amended in the French text, was adopted.

2.6.9 *Statement of reasons for objections*

Guideline 2.6.9 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

69. Mr. PELLET (Special Rapporteur) said that, in the third line, the word “permissibility” should be replaced by “non-permissibility”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to guideline 2.6.9, as amended, was adopted.

2.6.10 *Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation*

Guideline 2.6.10 was adopted.

Commentary

Paragraph (1)

70. Mr. PELLET (Special Rapporteur) proposed that a footnote be inserted at the end of the paragraph that would read: “On the non-requirement of confirmation of an express acceptance formulated prior to formal confirmation of a reservation, see guideline 2.8.6”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

The commentary to guideline 2.6.10, as amended, was adopted.

2.6.11 *Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty*

71. Mr. PELLET (Special Rapporteur) said that, for the sake of consistency with the body of the text, the words “by a non-signatory State” should be inserted in the title, which would then read: “Requirement of confirmation of an objection formulated by a non-signatory State prior to the expression of consent to be bound by a treaty”.

72. Sir Michael WOOD said that that gave the impression that the draft guideline only concerned non-signatory States, which was not the case. To solve that problem, he suggested the deletion of the words “Requirement of” in the title.

73. Mr. VÁZQUEZ-BERMÚDEZ pointed out that, if the Special Rapporteur’s proposal was retained, the insertion would have to read: “by a non-signatory State or international organization”.

74. Mr. PELLET (Special Rapporteur) endorsed Sir Michael’s proposal.

Guideline 2.6.11, as amended, was adopted.

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

The commentary to guideline 2.6.11 was adopted.

2.6.12 *Time period for formulating objections*

Guideline 2.6.12 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

75. Mr. PELLET (Special Rapporteur) said that, for the sake of consistency with the guidelines already adopted, the words “late reservations” should be replaced by “reservations formulated late” in the third sentence from the end and in the fourth footnote to the paragraph, in which he also proposed the insertion of the words “See guideline 2.3.1 and the commentary thereto”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

The commentary to guideline 2.6.12, as amended, was adopted.

2.6.13 *Objections formulated late*

Guideline 2.6.13 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

76. Mr. PELLET (Special Rapporteur) said that the words “late objections” in the sixth footnote to the paragraph should be replaced by “objections formulated late”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (8)

Paragraphs (3) to (8) were adopted.

The commentary to guideline 2.6.13, as amended, was adopted.

2.7 *Withdrawal and modification of objections to reservations*

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The general commentary to section 2.7 was adopted.

2.7.1 *Withdrawal of objections to reservations*

Guideline 2.7.1 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to guideline 2.7.1 was adopted.

2.7.2 *Form of withdrawal of objections to reservations*

Guideline 2.7.2 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.7.2 was adopted.

2.7.3 *Formulation and communication of the withdrawal of objections to reservations*

Guideline 2.7.3 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to guideline 2.7.3 was adopted.

2.7.4 *Effect on reservation of withdrawal of an objection*

Guideline 2.7.4 was adopted.

Commentary

Paragraph (1)

77. Mr. PELLET (Special Rapporteur) said that, in the footnote to the paragraph, the reference to the title of

guideline 2.5.7 should be corrected to read “Effects of withdrawal of a reservation”.

Paragraph (1), as corrected, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

78. Mr. PELLET (Special Rapporteur) said that the words “which are the subject of guidelines 4.2.1 to 4.2.4” should be inserted at the end of the penultimate sentence.

Paragraph (4), as amended, was adopted.

The commentary to guideline 2.7.4, as amended, was adopted.

2.7.5 *Effective date of withdrawal of an objection*

Guideline 2.7.5 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

79. Mr. PELLET (Special Rapporteur) said that, in the third sentence of the French text, the words “*celui ou celle qui avait objecté à la réserve*” should be replaced by “*l’auteur de l’objection*”.

Paragraph (2), as amended in the French text, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to guideline 2.7.5, as amended, was adopted.

2.7.6 *Cases in which the author of an objection may set the effective date of withdrawal of the objection*

Guideline 2.7.6 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.7.6 was adopted.

2.7.7 *Partial withdrawal of an objection*

Guideline 2.7.7 was adopted, subject to minor drafting amendments to be made later to the English text.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 2.7.7 was adopted.

2.7.8 *Effect of a partial withdrawal of an objection*

Guideline 2.7.8 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

80. Mr. NOLTE said that the word “weakened” in the last sentence of the English text should be replaced by “limited”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to guideline 2.7.8, as amended in the English text, was adopted.

2.7.9 *Widening of the scope of an objection to a reservation*

Guideline 2.7.9 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

81. Mr. PELLET (Special Rapporteur) said that the last footnote to the paragraph should be amended to refer to paragraph (3) of the commentary to guideline 2.6.13.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to guideline 2.7.9, as amended, was adopted.

2.8 *Formulation of acceptances of reservations*

2.8.1 *Forms of acceptance of reservations*

Guideline 2.8.1 was adopted.

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

82. Mr. PELLET (Special Rapporteur) said that a footnote should be added at the end of the paragraph to refer to guidelines 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation) and 4.3.4 (Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required) and the commentaries thereto.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

The commentary to guideline 2.8.1, as amended, was adopted.

2.8.2 *Tacit acceptance of reservations*

Guideline 2.8.2 was adopted.

Commentary

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

Paragraph (11)

83. Mr. PELLET (Special Rapporteur) said that the last sentence should be amended to read: "The Commission nevertheless decided that it was useful to recall that the rule set out in guideline 2.8.2 applied 'unless the treaty otherwise provides' in order to adhere to the text of the Vienna Conventions."

Paragraph (11), as amended, was adopted.

The commentary to guideline 2.8.2, as amended, was adopted.

2.8.3 *Express acceptance of reservations*

Guideline 2.8.3 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

84. Mr. PELLET (Special Rapporteur) proposed that the third footnote to the paragraph be amended to read: "On the question of reciprocity of reservations, see guideline 4.2.4 (Effect of an established reservation on treaty relations); see also D. Müller (footnote ... above), pp. 901–907, paras. 30–38."

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to guideline 2.8.3, as amended, was adopted.

2.8.4 *Form of express acceptance of reservations*

Guideline 2.8.4 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.8.4 was adopted.

2.8.5 *Procedure for formulating express acceptance of reservations*

Guideline 2.8.5 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

The commentary to guideline 2.8.5 was adopted.

2.8.6 *Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation*

Guideline 2.8.6 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.8.6 was adopted.

2.8.7 *Unanimous acceptance of reservations*

Guideline 2.8.7 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 2.8.7 was adopted.

2.8.8 *Acceptance of a reservation to the constituent instrument of an international organization*

Guideline 2.8.8 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 2.8.8 was adopted.

2.8.9 *Organ competent to accept a reservation to a constituent instrument*

Guideline 2.8.9 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.8.9 was adopted.

2.8.10 *Modalities of the acceptance of a reservation to a constituent instrument*

Guideline 2.8.10 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

85. Mr. PELLET (Special Rapporteur) said that, in the last sentence, the words “As guideline 2.8.12 explains” should be replaced by “As it follows from guideline 2.8.12”.

Paragraph (7), as amended, was adopted.

The commentary to guideline 2.8.10, as amended, was adopted.

2.8.11 *Acceptance of a reservation to a constituent instrument that has not yet entered into force*

Guideline 2.8.11 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 2.8.11 was adopted.

2.8.12 *Reaction by a member of an international organization to a reservation to its constituent instrument*

Guideline 2.8.12 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 2.8.12 was adopted.

2.8.13 *Final nature of acceptance of a reservation*

Guideline 2.8.13 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.8.13 was adopted.

2.9 *Formulation of reactions to interpretative declarations*

2.9.1 *Approval of an interpretative declaration*

Guideline 2.9.1 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 2.9.1 was adopted.

2.9.2 *Opposition to an interpretative declaration*

Guideline 2.9.2 was adopted.

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

86. Mr. NOLTE said that, in the French text, the reference to “l’Allemagne” (Germany) should be replaced by “la République fédérale d’Allemagne” (the Federal Republic of Germany).

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (15)

Paragraphs (10) to (15) were adopted.

The commentary to guideline 2.9.2, as amended, was adopted.

2.9.3 *Recharacterization of an interpretative declaration*

Guideline 2.9.3 was adopted.

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

The commentary to guideline 2.9.3 was adopted.

2.9.4 *Right to formulate approval or opposition, or to recharacterize*

Guideline 2.9.4 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.9.4 was adopted.

2.9.5 *Form of approval, opposition and recharacterization*

Guideline 2.9.5 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 2.9.5 was adopted.

2.9.6 *Statement of reasons for approval, opposition and recharacterization*

Guideline 2.9.6 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 2.9.6 was adopted.

2.9.7 *Formulation and communication of approval, opposition or recharacterization*

Guideline 2.9.7 was adopted.

Commentary

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.**The commentary to guideline 2.9.7 was adopted.*2.9.8 *Non-presumption of approval or opposition**Guideline 2.9.8 was adopted.*

Commentary

Paragraphs (1) to (11)

*Paragraphs (1) to (11) were adopted.**The commentary to guideline 2.9.8 was adopted.*2.9.9 *Silence with respect to an interpretative declaration**Guideline 2.9.9 was adopted.*

Commentary

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.**The commentary to guideline 2.9.9 was adopted.**The meeting rose at 12.50 p.m.***3111th MEETING***Monday, 25 July 2011, at 3 p.m.**Chairperson:* Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/638, sect. E, A/CN.4/648)³⁴⁹

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the obligation to extradite or prosecute (A/CN.4/648).

2. Mr. GALICKI (Special Rapporteur) said that his fourth report was a further step in the process of formulating draft articles dealing with some general aspects of the

topic. After recalling the work done in 2009³⁵⁰ and 2010³⁵¹ by the Working Group on the obligation to extradite or to prosecute, he explained that in his fourth report he had decided to concentrate primarily on the sources of the obligation *aut dedere aut judicare*.

3. The general framework proposed by the Working Group in 2009³⁵² would seem to be an appropriate basis for further codification work, since it had been accepted by the members of the Sixth Committee of the General Assembly. The starting point for that work was to identify the sources of the obligation to extradite or prosecute, a task he had begun in his previous reports.³⁵³ It should be noted that, in comparison with the reaction of States to the preliminary report on the topic in 2006, criticism of the idea that there might possibly be a basis in customary law for the obligation *aut dedere aut judicare* had been to some extent relaxed in 2008. That relaxed attitude had been even more visible after the two sessions—in 2009 and 2010—when the topic had been discussed in the Working Group of the Commission.

4. The eight sections of the chapter of the fourth report on the sources of the obligation to extradite or prosecute closely followed the above-mentioned general framework. They dealt with the duty to cooperate in the fight against impunity; the obligation to extradite or prosecute in existing treaties; the principle *aut dedere aut judicare* as a rule of customary international law; the discussion of the customary character of the obligation in the Sixth Committee during the sixty-fourth session of the General Assembly (2009); the customary basis of the rights invoked before the ICJ; an identification of categories of crimes and offences which could be classified as those giving rise to the customary obligation *aut dedere aut judicare*; *jus cogens* as a source of a duty to extradite or prosecute; and a proposed draft article 4 on international custom as a source of the obligation *aut dedere aut judicare*.

5. The fourth report contained an entirely new element in the shape of a draft article on the duty to cooperate in the fight against impunity. That duty, as a *sui generis* primary source of the obligation *aut dedere aut judicare*, had headed the list of the legal bases of the obligation as proposed by the Working Group in 2009, and its prime importance had been confirmed by the Working Group in 2010.³⁵⁴ For that reason, he was proposing, in paragraph 40 of his fourth report, a draft article 2 that read:

“Article 2. Duty to cooperate

“1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international courts and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

³⁵⁰ *Yearbook ... 2009*, vol. II (Part Two), pp. 142–144, paras. 200–204.

³⁵¹ *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340.

³⁵² *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

³⁵³ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report), *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585 (second report), and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report).

³⁵⁴ *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, para. 339.

³⁴⁹ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

“2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*).”

In paragraphs 26 to 40, the Special Rapporteur provided a detailed explanation of the background to and rationale for the draft article and demonstrated the linkage between the duty to cooperate in the fight against impunity and the obligation to extradite or prosecute.

6. In his preliminary report in 2006, he had proposed an initial classification of existing treaties that established an obligation to extradite or prosecute, a classification that distinguished between substantive treaties and procedural conventions. In paragraphs 44 to 69 of his fourth report, he reviewed the best-known classifications of such treaties, namely, those done by Cherif Bassiouni and Edward M. Wise in 1995;³⁵⁵ by Amnesty International in 2001,³⁵⁶ 2009³⁵⁷ and 2010;³⁵⁸ by Claire Mitchell in 2009;³⁵⁹ and by the Secretariat of the United Nations in 2010.³⁶⁰ The growing number of international treaties that contained clauses laying down the obligation *aut dedere aut judicare* lent further support to the view that they formed the primary and most frequently applied basis of the obligation to extradite or prosecute. The treaty-based rights invoked by States before international courts in cases involving the obligation *aut dedere aut judicare* served as a useful tool for parties to a dispute.

7. As no objections had been raised in either the Commission or the Sixth Committee to the original version of draft article 3 entitled “Treaty as a source of the obligation to extradite or prosecute”, it could be retained. Bearing in mind the wide variety of treaty provisions concerning the obligation in question, it seemed advisable, however, to add a second paragraph concerned with the practical implementation of the obligation by individual States. The draft article, as presented in paragraphs 70 and 71 of the fourth report, would then read:

“Article 3. Treaty as a source of the obligation to extradite or prosecute

“1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

“2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal

³⁵⁵ C. Bassiouni and E. M. Wise, *Aut Dedere aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, Martinus Nijhoff, 1995.

³⁵⁶ Amnesty International, *Universal Jurisdiction: the Duty of States to Enact and Enforce Legislation*, London, 2001 (IOR 53/002-018/2001).

³⁵⁷ Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, London, 2009 (IOR 40/001/2009).

³⁵⁸ Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support this Essential International Justice Tool*, London, 2010 (IOR 53/015/2010).

³⁵⁹ C. Mitchell, *Aut Dedere, aut Judicare: the Extradite or Prosecute Clause in International Law*, Geneva, Graduate Institute of International and Development Studies, 2009, No. 2.

³⁶⁰ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/630 (also available from the Commission’s website).

law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law.”

8. The last section of the fourth report dealt with the various problems connected with recognition of the principle *aut dedere aut judicare* as a rule of customary international law, a matter on which opinions differed widely. Although he had adopted a fairly cautious position in that respect, support for the view that an obligation to extradite or prosecute did exist under customary international law had grown significantly in recent years. The fullest presentation of the grounds for holding that the obligation derived from customary international law had been given by Eric David³⁶¹ in the case before the ICJ concerning *Questions relating to the Obligation to Prosecute or Extradite*; David’s arguments were quoted in paragraph 82. As Special Rapporteur, he awaited with great interest the Court’s final decision in that case, as it might further strengthen the notion of a customary basis for the obligation *aut dedere aut judicare*. Since it could not yet be stated that an obligation to extradite or prosecute indubitably existed under general customary international law, a more promising approach seemed to be that of identifying the categories of crimes which might give rise to a customary obligation recognized by the international community, even though that obligation might be limited in scope and substance. In section F of the last chapter of the fourth report, the Special Rapporteur discussed several categories of such crimes.

9. In section G of the fourth report, he considered *jus cogens* as a source of a duty to extradite or prosecute. While some norms of international criminal law (such as the prohibition of torture), which were based not only on treaty provisions but also on recognition by the international community, had attained *jus cogens* status, scholars disagreed on whether that was true of an obligation *aut dedere aut judicare* deriving from, or connected with, such peremptory norms of international law.

10. He therefore proposed, in paragraph 95 of the report, draft article 4, which would read:

“Article 4. International custom as a source of the obligation *aut dedere aut judicare*

“1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation derives from a customary norm of international law.

“2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

“3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (*jus cogens*), either in the form of international treaty or international custom, criminalizing any one of the acts listed in paragraph 2.”

³⁶¹ ICJ, Public sitting held on Monday, 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, verbatim record (CR2009/8), pp. 42–44, paras. 19–23 (available from the website of the ICJ: www.icj-cij.org).

The list of crimes and offences contained in brackets in paragraph 2 was open to further consideration and discussion.

11. Lastly, he recalled that the Commission had not yet decided on an acceptable text for draft article 1 on the scope of the draft articles. The alternative versions of that article, as presented in his second and third reports, were reproduced in the footnote to paragraph 39 of the fourth report, after the title of draft article 2 (Duty to cooperate).

12. Mr. MURASE thanked the Special Rapporteur for his introduction to the fourth report on a significant but difficult topic. With respect to draft article 2, he agreed with the Special Rapporteur's emphasis on the importance of the fight against impunity for serious international crimes. However, in his view, the wording of the first paragraph was too vague, even for a provision intended to define a duty to cooperate. The phrase "the fight against impunity" sounded like a campaign slogan and was not precise enough for an operative provision in a legal text. Furthermore, the phrase "as it concerns crimes and offences of international concern" was far too ambiguous to define the type of offences to be covered by the draft articles.

13. As to the second paragraph of draft article 2, he had been surprised by the excessively broad wording of the phrase "wherever and whenever appropriate". That might be misinterpreted to mean that States were permitted to extradite or prosecute as they considered appropriate. In order to avoid such a misunderstanding, the draft article should clearly explain the relationship between the principle *aut dedere aut judicare* and the duty of States to cooperate with one another. On the whole, draft article 2 did not seem appropriate as a provision in the body of the operative text and should therefore be moved to the preamble or else deleted.

14. With regard to draft article 3, he was unsure what purpose was served by paragraph 1, as it hardly seemed necessary to remind States of their treaty obligations. In paragraph 2 it was not clear which State party was being referred to. If the State of residence of a suspected criminal was meant, he wondered what would be the consequence if its internal law was not in accordance with its treaty obligation as interpreted by other States parties. Moreover, it was not clear from the phrase "general principles of international criminal law" which principles were being referred to. If paragraph 2 was to be retained, it should be reformulated to indicate that a State's treaty obligations took precedence over its domestic law.

15. The report presented a review of several classifications of international treaties establishing the obligation *aut dedere aut judicare*, but unfortunately contained no further analysis of those classifications. There were a number of interesting areas that might usefully be explored, such as the qualifications, conditions, requirements and possible exceptions relating to extradition or prosecution provided for in those treaties. Other issues that should be addressed in relation to extradition included the political offence exception and the nationality exception.

16. Draft article 4 was the most problematic of all. The debates in the Sixth Committee had revealed that a

majority of States doubted the customary law character of the obligation *aut dedere aut judicare*. Indeed, the Special Rapporteur himself admitted in paragraph 86 of his report that it was rather difficult to prove the existence of a general international customary obligation to extradite or prosecute. He also seemed to assert that certain serious crimes such as genocide, crimes against humanity and war crimes could be considered as having a customary law basis by citing the entirely non-binding draft code of crimes against the peace and security of mankind, adopted by the Commission in 1996,³⁶² and the Rome Statute of the International Criminal Court, which was binding only as a treaty obligation. Regrettably, there was no reference to State practice and the only evidence of *opinio juris* cited concerned a presentation by counsel for Belgium in the *Questions relating to the Obligation to Prosecute or Extradite* case. Furthermore, he personally had no recollection of the Working Group having relaxed the criteria for the customary law character of the obligation in question.

17. There seemed to be two possible ways to prove the existence of a customary law obligation. It was first necessary to ask whether an obligation to extradite or prosecute existed outside specific treaties. The answer would probably be in the negative. A second question was whether it was possible to conceive of a crime based on a customary international law rule, which was, by definition, unwritten. One of the basic principles of criminal law was *nulla crimen sine lege*, which established that there was no crime without a written law. He was not aware of any country in the world where individuals could be convicted in criminal proceedings on the basis of unwritten customary law, whether internal or international.

18. He sympathized with the Special Rapporteur, who had tackled an intractable topic. In his view, the Commission should not force the Special Rapporteur to bear such a heavy burden any further and should consider suspending or terminating the project. It was his understanding that the Sixth Committee was planning to establish a working group on universal jurisdiction; it might therefore be desirable to suspend the project at least until the Commission could benefit from the working group's conclusions. It was not unprecedented for a project to be terminated: in 1992, the Commission had decided to terminate consideration of the second part of the topic "Relations between States and international organizations", on the status, privileges and immunities of international organizations and their personnel.³⁶³ He hoped that the Commission would take a clear stance on whether to continue or terminate a project which had not made any significant progress after so many years.

19. Mr. MELESCANU commended the Special Rapporteur and the Working Group on their excellent work. At the previous session, the Working Group had reaffirmed the idea that, in accordance with the Commission's practice, the general orientation of future reports should be towards the presentation of draft articles.

20. The main novelty of the Special Rapporteur's fourth report was that he had decided to focus on just two of the

³⁶² *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

³⁶³ *Yearbook ... 1992*, vol. II (Part Two), p. 53, para. 362.

sources of the obligation *aut dedere aut judicare*, namely international treaties and international custom, leaving aside, only temporarily, one hoped, the other sources identified in previous reports, such as general principles of international law, national legislation and State practice.

21. An important development in the Special Rapporteur's approach to the subject was that for the first time he had prepared a draft article on the duty of States to cooperate in the fight against impunity, in accordance with the first item on the list of issues prepared by the Working Group in 2009.³⁶⁴ He did not share the view expressed by Mr. Murase that the reference to the duty to cooperate belonged in the preamble to any final document the Commission produced on the topic. Although he was sensitive to the arguments presented by Mr. Murase, he was in favour of improving the drafting of that article rather than deleting it altogether.

22. Another important aspect of the report was the Special Rapporteur's analysis of the different classifications of international treaties establishing the obligation *aut dedere aut judicare*, including the valuable classification prepared by the secretariat.

23. The last part of the report was devoted to the presentation and analysis of different problems arising in connection with attempts to recognize the principle *aut dedere aut judicare* as a rule of customary international law. Judging from debates in the Sixth Committee and the literature on the topic, opinions were divided on the issue. The most comprehensive presentation of the customary grounds for the obligation *aut dedere aut judicare*, given by Mr. David in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, was merely an opinion and, as such, could not be used as the basis of the Commission's future work on the topic until the ICJ had rendered a decision in that case.

24. He supported the Special Rapporteur's view that it was difficult in the current state of affairs to prove the existence of a general international customary obligation to extradite or prosecute and that it was more promising to try to identify particular categories of crimes that might give rise to such a customary obligation. He also shared the doubts expressed by the Special Rapporteur as to whether the obligation *aut dedere aut judicare* could be considered a *jus cogens* norm.

25. In conclusion, while the topic remained on its agenda, the Commission should concentrate its efforts on realistic objectives. Owing to time constraints, he was of the view that the draft articles proposed by the Special Rapporteur should not be sent to the Drafting Committee. He proposed therefore to attach the draft articles to the Commission's report in whatever form members deemed appropriate.

26. Mr. DUGARD thanked the Special Rapporteur for his fourth report on a very difficult topic involving some of the most controversial issues in international law, such as extradition law, prosecutorial discretion, asylum, universal jurisdiction and the principles of

jus cogens. Before commenting on the report itself, he wished to raise a more general issue prompted by the Special Rapporteur's comments on the views of the Sixth Committee in paragraphs 18 and 19 of the report. It was, of course, customary for special rapporteurs to refer to the work of the Sixth Committee; however, it was important to consider the reasons for doing so. Was it a question of obligation, was it merely for guidance or was it perhaps because the accumulated views of the Sixth Committee constituted evidence of State practice? He would like to ask the Sixth Committee itself for answers to such questions relating to the status of its work.

27. One of the Special Rapporteur's main problems was how to distinguish between core crimes and other crimes. The Special Rapporteur referred to some examples of core crimes in draft article 4, paragraph 2. The term "core crimes" was used rather freely to refer to crimes that fell within the jurisdiction of the International Criminal Court, such as genocide, aggression, crimes against humanity and war crimes. Yet all would agree that some war crimes were of lesser significance. Thus one could not simply assert that all war crimes came under the category of core crimes. In paragraph 24 of the report, the Special Rapporteur mentioned the crime of piracy, but, personally, he would not classify it as a core crime, one to which the principle *aut dedere aut judicare* automatically applied, as was borne out by the difficulties encountered by the international community in prosecuting pirates operating off the Somali coast. It was nevertheless important to distinguish between core crimes and other crimes, because the former could be classified as violations of *jus cogens* norms or possibly as crimes subject to universal jurisdiction. In 1996, in its draft code of crimes against the peace and security of mankind, the Commission had stated that the principle *aut dedere aut judicare* applied to genocide, crimes against humanity and war crimes.³⁶⁵ Perhaps that provision had been *de lege ferenda*, but at least it suggested that the Commission should pay particular attention to such crimes. Another factor to be borne in mind was that the political offence exception did not apply in respect of genocide and crimes against humanity.

28. The situation was much more difficult in respect of other crimes, mainly crimes defined under international conventions. They could not all be classified as *jus cogens* crimes; certainly torture might, but not all forms of terrorism. In the absence of a definition of terrorism, it was difficult to classify crimes involving terrorism as *jus cogens* crimes.

29. Moreover, there was a distinction to be drawn—that between early and later conventions relating to terrorism. For example, the Convention for the suppression of unlawful seizure of aircraft of 1970 did not exclude the political offence exception. That had been done deliberately since, at the time, States had not wished to accept an obligation to extradite or prosecute that allowed for no exceptions in the case of a politically motivated aerial hijacking. However, later conventions, like the International Convention for the Suppression of the Financing of Terrorism of 1999, expressly excluded the political offence exception; thus

³⁶⁴ *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

³⁶⁵ *Yearbook ... 1996*, vol. II (Part Two), pp. 30–32, article 9, and pp. 44–56, articles 17–20.

the obligation to prosecute or extradite was firmer. His point was that the subtle differences in formulation among treaties must be borne in mind.

30. With regard to the text of the draft articles, he shared many of the misgivings expressed by Mr. Murase. Draft article 1 could be left in its current form. Draft article 2 seemed to be concerned with international crimes only, although the phrase in paragraph 1 “concerns crimes and offences of international concern” was slightly misleading and implied that non-international crimes were at issue too. He endorsed Mr. Murase’s comment that the phrase “the fight against impunity” belonged to a preambular provision and not to the text of a draft article. Furthermore, it was not clear to him why States were required to cooperate among themselves and with competent international courts and tribunals. The question principally concerned domestic courts and not international courts, in respect of which special surrender provisions applied. He also agreed with Mr. Murase that paragraph 2 was very broad in scope, although that might be necessary in view of the range of treaties involved.

31. Concerning draft article 3, he shared Mr. Murase’s view that it was not necessary to include paragraph 1, which merely reiterated the obligation to implement treaty provisions. Paragraph 2 referred to general principles of international criminal law; he would appreciate it if, at some point, the Special Rapporteur would be more specific about which principles he had in mind, whether, for example, prosecutorial discretion was one of those principles.

32. With regard to draft article 4, it was necessary to distinguish between core and other crimes, which was implied by the Special Rapporteur in paragraph 2. However, he could not agree with paragraph 3, which postulated that the basis of the obligation to extradite or prosecute was to be found in peremptory norms of general international law. That conclusion was in contradiction with paragraph 94 of the report, which expressed doubt as to whether the principle *aut dedere aut judicare* possessed characteristics of *jus cogens*. Moreover, the relevance of the citation in paragraph 93 from the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was questionable.

33. At some stage, he would like to know the Special Rapporteur’s detailed views on his plans for the future consideration of the topic. It could not be addressed with broad, sweeping provisions; the details of extradition law, general principles of prosecution, especially prosecutorial discretion, and of when the State could grant asylum to political offenders would need to be looked into. He was not in favour of abandoning the topic: it was too important and expectations had been raised that the Commission would address it properly. However, there seemed to be no point in referring the draft articles to the Drafting Committee, which would not have enough time during the current session to deal with them. He therefore recommended that the Commission should simply take note of the draft articles and leave the task of their further consideration to the new membership of the Commission in the next quinquennium.

34. Mr. VASCIANNIE thanked the Special Rapporteur for his fourth report. He felt assured that the project was now substantially under way; however, there were important caveats. First, draft article 2 begged questions and could not be supported in its current form. It called for cooperation, but did not say when such cooperation should be provided. Perhaps the provision should be reconsidered at a later stage when the implications of the duty to cooperate in that context had been more clearly defined.

35. Secondly, draft article 3 should be deleted in its entirety. Paragraph 1 was superfluous, since it set forth the well-established treaty rule *pacta sunt servanda*; restating the rule would merely cause confusion. Furthermore, paragraph 2 was too vague to make it clear exactly what was required.

36. Thirdly, draft article 4 needed further consideration by the Special Rapporteur before it could be referred to the Drafting Committee. While the terms of paragraph 1 were unobjectionable, the paragraph added little. It affirmed that States were obliged to extradite or prosecute if they were so obliged by customary law. While that must be true, it was a tautology. In other words, although the rule set forth in paragraph 1 was true, it followed not from any special rule relating to *aut dedere aut judicare*, but rather from the definition of what a customary rule happened to be. A State was required to do something if customary international law ruled that the State must do so.

37. Paragraph 2 had the potential to become an important rule, but its current formulation was too tentative to be of particular use, since the Special Rapporteur had placed square brackets around the central issues. The Special Rapporteur should undertake a more detailed study of State practice and *opinio juris* and reach his own conclusions on whether and to what extent certain offences against international humanitarian law gave rise to an obligation on the part of States either to extradite or to prosecute an alleged offender. If the Special Rapporteur believed that there was such an obligation, he should provide arguments to support it, so that the other members of the Commission could decide whether they agreed with his conclusions after a full review of the primary sources. That applied equally to genocide, crimes against humanity and war crimes, as well as possibly to other crimes.

38. The chapter of the report on sources of the obligation to extradite or prosecute represented a start but did not cover the ground fully. The Special Rapporteur should examine certain aspects of State practice more closely. As part of the analysis, he might wish to consider expressly whether the accumulation of many treaties with *aut dedere aut judicare* clauses meant that States accepted that there was a customary rule, or whether States believed that they were derogating from customary law. That determination could play an important part in the Special Rapporteur’s assessment of the weight to be given to different material sources of law in determining whether a customary rule existed. The Special Rapporteur should not await a decision of the ICJ on the subject, but should reach his own conclusion, however difficult that might be.

39. The meaning of draft article 4, paragraph 3, was not entirely clear. Did it mean that only offences that were in breach of a peremptory norm of international law could be regarded as offences giving rise to the obligation to extradite or prosecute, or that once a peremptory norm existed, any breach of that norm gave rise to such an obligation? The latter interpretation would be without prejudice to the existence of other offences that gave rise to an obligation to extradite or prosecute, whereas the former would suggest that *jus cogens* norms provided the only basis for invoking the obligation.

40. However, the challenges presented by draft article 4, paragraph 3, were not merely drafting questions that could reasonably be thrashed out by the Drafting Committee without guidance from State practice and *opinio juris*. The paragraph required extensive analysis by the Special Rapporteur, building on paragraphs 92 to 94 of his report: the place of *jus cogens* in the topic needed full and careful consideration.

41. Following an assessment of the significance of customary law and *jus cogens* norms in that area, the Special Rapporteur might then consider whether desirable rules could be drafted that would codify or supplement existing customary rules or, alternatively, set the foundation for treaty rules pertaining to the obligation to extradite or prosecute. In his subsequent reports, the Special Rapporteur might also consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction and whether that relationship had any bearing on the draft articles to be prepared. With such considerations in mind, draft article 4 would remain a viable and useful project for the Commission to pursue. If the Special Rapporteur undertook additional work and could come to less equivocal conclusions than those reflected in his fourth report, the Commission would probably be in a position to refer a substantially revised draft article 4 to the Drafting Committee during its sixty-fourth session. He did not support the referral of draft articles 2 and 3 to the Drafting Committee at the present juncture. However, overall, he believed that the project should be continued.

42. Mr. SABOIA thanked the Special Rapporteur for his fourth report which had helped the Commission to make progress on a difficult topic. Thanks were also due to the Working Group on the obligation to extradite or prosecute for its contribution. With respect to the sources of the obligation to extradite or prosecute, he observed that the duty to cooperate in the fight against impunity was well established, *inter alia*, in the Charter of the United Nations and the Rome Statute of the International Criminal Court. In addition, more recently, a positive approach to the duty to cooperate had been taken in the fourth report on the protection of persons in the event of disasters (A/CN.4/643). He did not share the concerns voiced about the use of the expression “fight against impunity” in draft article 2, paragraph 1. The expression was easy to understand and the words “fight against” were commonly used in legal texts in respect of drugs and terrorism. He did, however, have a problem with the reference to “competent international courts and tribunals”. Some redrafting would be necessary, but, on the whole, draft article 2 made a good attempt at defining the duty to cooperate.

43. With respect to section B in the last chapter, on the obligation to extradite or prosecute in existing treaties, he endorsed Mr. Dugard’s comments about the need to distinguish more clearly between core crimes and other crimes. Yet that was no easy task, as was borne out by the useful information on the Bassiouni and Wise classification³⁶⁶ provided in paragraph 44 of the report, which helped to identify the types of crimes on which the international community needed to cooperate to ensure that the perpetrators were brought to justice. He also agreed with Mr. Dugard on the need to distinguish between treaties that admitted exceptions and those that did not. Such aspects must be borne in mind during the consideration of the topic. He would therefore be in favour of drawing up a list of crimes in the corresponding draft article that was not too restrictive. Criminals were creative and the Commission needed to keep its options open too. Draft article 3 had been described as superfluous, yet he found paragraph 2 useful: in dealing with the obligation to extradite or prosecute based on a treaty, the particular conditions of national law and jurisprudence should be taken into account.

44. With respect to section C on the principle *aut dedere aut judicare* as a rule of customary international law, he acknowledged that the rule had not yet been properly defined. Nevertheless, in 1996, in its draft code of crimes against the peace and security of mankind, the Commission had stated that States parties should extradite or prosecute individuals in their territory alleged to have committed genocide, crimes against humanity or war crimes. It was therefore surprising that, 15 years later, the Commission seemed reluctant to take that provision seriously.

45. Although draft article 4 as proposed by the Special Rapporteur required some redrafting, the number of treaties establishing the obligation to extradite or prosecute and the number of States parties to them was proof in itself that there was a basis in international customary law for the obligation. However, as Mr. Vasciannie had said, a more detailed explanation of the legal basis was required.

46. He had no particular recommendation to make in respect of the future consideration of the topic. He did not support Mr. Murase’s proposal, but Mr. Melescanu’s proposal might be acceptable to him, if it garnered sufficient support among other members. Perhaps it would be preferable to defer any decision until the Commission’s sixty-fourth session.

Immunity of State officials from foreign criminal jurisdiction (*continued*)* (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

47. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646).

³⁶⁶ C. Bassiouni and E. M. Wise (see footnote 355 above).

* Resumed from the 3088th meeting.

48. Mr. KOLODKIN (Special Rapporteur) said that his third report marked the culmination of the initial phase of work on the topic, provided a thematic overview and outlined the conceptual balance that was shaping up—in his own mind, at any rate.

49. The third report focused on procedural aspects of immunity: the stage of criminal proceedings at which the question of immunity should come into play; when and by whom it could be invoked; which State bore the burden of invoking it; and by whom and how it could be waived. The report also covered the non-procedural issue of the relationship between a State's declaration that its official had immunity and the responsibility of that State for a wrongful act committed by that official.

50. The third report differed methodologically from the second,³⁶⁷ in which an analysis of the practice of States, their opinions on the scope of immunity from foreign jurisdiction, rulings of the ICJ and national courts and the literature had allowed certain conclusions to be drawn with regard to the current status and future development of international law on immunity for State officials. The situation was somewhat different with respect to the procedural aspects of such immunity, on which neither Governments nor national courts had set out their position so clearly. As to the literature, while some procedural aspects were dealt with, most were not covered.

51. Nevertheless, some relevant precedents could be adduced. Of particular importance was the judgment of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. There was also the Court's advisory opinion regarding the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the practice of States and various significant rulings from national courts. Some conclusions drawn in the report were extrapolations of logic rather than deductions from an analysis of sources of the applicable law, the approach used in the second report.

52. The issue of immunity ought to be raised at the preliminary stage of criminal proceedings, even though the State exercising criminal jurisdiction was not obliged to consider the issue of immunity at that stage. In any event, the issue of immunity should be addressed at an early stage of the judicial proceedings, and even at the pretrial stage. As the ICJ had stated in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, "questions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law" (para. 63). Failure to consider the issue of immunity at the start of criminal proceedings could be considered a violation by the forum State of the norms governing immunity.

53. The stage of criminal proceedings at which the issue of immunity should be considered should likewise be examined from the standpoint of who bore the burden of invoking immunity. If the State of the official enjoying immunity *ratione materiae* did not invoke immunity in the

initial stages of the proceedings, then the proceedings could continue, and the issue of a violation of the obligations stemming from immunity would not arise. In any event, recognition of an official's personal or functional immunity did not preclude all measures that might be taken in the exercise of criminal jurisdiction, only those which imposed an obligation on the official or were coercive.

54. A second question was who could legally raise the issue of immunity, the official or the State which the official served? Immunity belonged not to the official, but to the State which the official served or had served. The official merely "enjoyed" immunity, which belonged legally to the State. Accordingly, the rights inherent in immunity were rights of the State. It could thus be said that only when it was the State of the official which invoked or declared immunity that the invocation of immunity was legally meaningful. That did not mean that such a declaration by an official had no significance at all in the context of legal procedures carried out in relation to that person. It was unlikely that it could simply be ignored by the State that was criminally prosecuting the official. However, if it was uncorroborated by the official's State, it would seem that such a declaration lacked sufficient legal weight and significance.

55. For the State of an official to be able to declare that that official had immunity, it must be aware that criminal proceedings were being undertaken or were planned with regard to that person. Consequently, the State implementing or planning such measures must so inform the State of the official. That, naturally, could be done only when it became known or there were grounds to suppose that a foreign official was involved.

56. As to which State should raise the issue of immunity, his third report took as its starting point the position that the burden of invoking immunity fell to different parties, depending on whether the official involved was a serving member of the "threesome", or troika—Head of State, Head of Government or Minister for Foreign Affairs—or any other serving or former official.

57. In the case of officials who had merely functional as opposed to personal immunity, the burden of invoking immunity fell to the State of the official. Functional immunity was enjoyed by officials who were not high ranking and by former officials, and only with regard to actions carried out by them in an official capacity. The State exercising jurisdiction was under no obligation to know that they were foreign officials, much less former officials, nor that, in violating the law, they were acting in an official capacity. The State of the official must notify the State exercising jurisdiction of the existence of and grounds for immunity: if it failed to do so, then the State exercising jurisdiction was not obligated to consider the issue of immunity *proprio motu*, and, consequently, could proceed with the criminal prosecution.

58. Similar logic yielded the same result when applied to officials who enjoyed personal immunity but were not part of the troika—if indeed there was such a category of officials, and he believed there was. The State exercising jurisdiction was not required to be aware of the significance of the official's position, the functions the official exercised or the fact that he or she represented the State in international relations. The official's State had to notify

³⁶⁷ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

the State exercising jurisdiction that the official enjoyed immunity and had to substantiate the claim of immunity.

59. Applying the same logic to serving Heads of State, Heads of Government or Ministers for Foreign Affairs who enjoyed personal immunity gave the opposite result: the State exercising jurisdiction should raise the issue of immunity itself. All such officials were, as a rule, well known to foreign States. They enjoyed immunity in respect of actions undertaken in both their official and personal capacities. Consequently, the State of the official was under no obligation to invoke immunity before the authorities of the State exercising jurisdiction.

60. The above conclusions were confirmed, in his view, by the judgment of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.

61. With regard to the means of invoking immunity, his third report concluded that the State of an official was not obliged to invoke immunity before a foreign court, and that it sufficed to do so through diplomatic channels. The absence of an obligation on the part of the State to deal directly with a foreign court stemmed from the principle of the sovereign equality of States. The issue of immunity from foreign criminal jurisdiction often arose and was resolved at the pretrial stage.

62. Concerning waiver of immunity, he said that the right to waive an official's immunity, like the right to invoke immunity, lay with the State and not with the official, for the same reasons.

63. The means of waiving immunity varied. In the case of State officials belonging to the troika, the waiver must be express. Any possible exceptions would be largely hypothetical. On the other hand, waiver of the personal immunity of officials not included in the troika and of the functional immunity of other officials could be either express or implied. Importantly, an implied waiver could take the form of failure by the official's State to invoke immunity.

64. Thus, who must invoke immunity and who must waive it depended on who it was that enjoyed immunity—a member of the troika or another State official. In either case, members of the troika were in a privileged position.

65. His third report also examined the relationship between the invocation or waiver of an official's immunity by the State of the official and the responsibility of that State. The relationship was based on the fact that conduct presumed unlawful could be attributed to the official and the State of the official simultaneously.

66. First, a State which invoked its official's immunity on the grounds that the act with which that person was charged was of an official nature was acknowledging the fact that the act was an act of the State itself. That established significant premises for the responsibility under the international law of the State in question. The fact that the burden of invoking functional immunity lay with the official's State left that State with a choice: to declare that an official's or former official's actions were official in nature, thereby acknowledging the action as its own, with all the attendant political and legal consequences; or not to do so, thus allowing the foreign

State to prosecute the official concerned. Cases of the latter were known to have occurred.

67. Secondly, the State of an official could acknowledge that he or she had acted in an official capacity, but not invoke immunity, as in the "*Rainbow Warrior*" incident. In itself, such recognition did not relieve the official of responsibility, as attributing conduct to the State did not preclude attributing it to the official as well.

68. Thirdly, the State could opt not to declare that its official's acts were of an official nature, and thus not invoke functional immunity. It could even declare that the official had acted in his or her personal capacity and consequently did not enjoy immunity. That did not mean, however, that the State exercising jurisdiction could not deem the acts to have been carried out in an official capacity. In such a case, that State could then not only bring criminal proceedings against the foreign official, but also, if the acts were internationally wrongful, raise the question of the international responsibility of the official's State, on grounds of dual attribution.

69. In conclusion, he said that the consideration of the issues dealt with in his third report would help to strike an appropriate balance between immunity of State officials from foreign criminal jurisdiction and responsibility for crimes committed.

The meeting rose at 5.55 p.m.

3112th MEETING

Tuesday, 26 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (concluded)*

[Agenda item 13]

STATEMENT BY THE SECRETARY-GENERAL OF THE
ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed the Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Mr. Rahmat Mohamad, and invited him to take the floor.

* Resumed from the 3108th meeting.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO continued to attach great importance to its long-standing relationship with the Commission and would endeavour to further strengthen that relationship in the years to come.

3. One of the statutory obligations of AALCO was to examine the questions that were under consideration by the International Law Commission and to forward the views of its member States to the Commission.

4. The fiftieth annual session of AALCO had been held in Colombo, Sri Lanka, from 27 June to 1 July 2011. The Eminent Persons Group constituted on that occasion as an advisory body to guide the work of AALCO included four members of the International Law Commission.³⁶⁸

5. The deliberations on the work of the Commission had been held on 27 June 2011. In his introductory statement at the annual session, the Secretary-General of AALCO had given a brief overview of the work of the Commission at its sixty-second session and had emphasized that inputs from AALCO member States would be of immense significance to the Commission in formulating the future direction of its work and that the feedback and information on State practice in Asia and Africa would enable the Commission to take into consideration the views of diverse legal systems.

6. Two of the members of the Eminent Persons Group who were also members of the Commission had spoken in their personal capacity on the topics “Effects of armed conflicts on treaties” and “Immunity of State officials from foreign criminal jurisdiction”.³⁶⁹ Their complete statements were contained in the record of the debate, which would be distributed to all members of the Commission.

7. The delegations of China, Indonesia, the Islamic Republic of Iran, Japan, Kuwait, Malaysia and Saudi Arabia had expressed their views on various topics on the Commission’s agenda.

8. On the topic “Effects of armed conflicts on treaties”, one delegation had noted that draft article 2 included express reference to the applicability of the draft articles to non-international armed conflicts and that it had continued to deem such an inclusion to be inappropriate. The effects that that category of conflicts might have on treaties were governed by the provisions on circumstances precluding wrongfulness of the draft articles on international responsibility of States for internationally wrongful acts.³⁷⁰ Moreover, article 73 of the 1969 Vienna Convention, which was the basis of the Commission’s work on the subject, referred exclusively to the effects on treaties of armed conflicts between States. In the view of

another delegation, the definition of armed conflict was insufficiently restrictive and could easily be construed as allowing any use of force, which in turn could affect the stability of treaty relations.

9. With regard to the topic “Expulsion of aliens”, one delegation had underscored that expulsion must take place with due respect for the fundamental human rights of the deportees. Another delegation had been of the view that nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. A third delegation had observed that the topic should be addressed primarily from the standpoint of international human rights law, rather than from the perspective of the principles of sovereignty and non-intervention, and had emphasized that, above and beyond the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, could be afforded additional protection against expulsion and other procedural guarantees.

10. Concerning the topic “Protection of persons in the event of disasters”, one delegation had noted that it was for the affected State to determine whether receiving external assistance in the event of a disaster was appropriate. Any suggestion to penalize the affected States would be contrary to international law. Another delegation had observed that humanitarian assistance should be undertaken solely with the consent of the affected State, with strict respect for the principles of national sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. Yet another delegation had reiterated that the affected State had the principal right, and the obligation, to meet the needs of victims of disasters within its borders. The affected State had the right to decide where, when and how relief operations were to be conducted and had the power to dictate the terms of the humanitarian response.

11. In respect of the topic “Responsibility of international organizations”, one delegation had underlined the importance of the draft articles on the responsibility of international organizations adopted on second reading by the Drafting Committee during the current session of the Commission and recommended that the AALCO secretariat undertake a study on the subject and submit a comprehensive report on it to the next annual session.

12. With regard to the topic “The law of transboundary aquifers”, one delegation had recalled that, with a view to providing a legal framework for the proper management of groundwater resources, the Commission had formulated a set of 19 draft articles on the subject.³⁷¹ That delegation had suggested that the draft articles be adopted either as a universal treaty at a diplomatic conference or as a declaration by the United Nations General Assembly. Another delegation, while acknowledging the importance of the topic of transboundary aquifers, given the global water crisis, had argued that the draft articles would be more useful in the form of guidelines than in a legally binding form and that States could enter into appropriate bilateral or regional arrangements for the

³⁶⁸ For a list of the members of the Eminent Persons Group, see the Summary Report of the Fiftieth Annual Session of the Asian–African Legal Consultative Organization, 27 June–1 July 2011, Colombo, Sri Lanka, p. 27, para. 5.25.

³⁶⁹ *Ibid.*, pp. 31–33, paras. 6.4–6.7.

³⁷⁰ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

³⁷¹ *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

proper management of their transboundary aquifers, as recommended by the Commission, subject to their having the necessary capacity and resources.

13. On the topic “Reservations to treaties”, one delegation had observed that member States should study the draft guidelines carefully in the light of their respective practice and express their positions during the debate on the topic in the Sixth Committee.

14. One delegation had supported the proposed topic on international environmental law, since the Commission would be able to contribute effectively towards clarifying and redefining the basic principles and rules in that area.

15. Two delegations had favoured consideration by the Commission of the topic proposed by Mr. Murase on protection of the atmosphere. One delegation had stated that this had been made necessary by the fact that there existed significant gaps in the applicable principles and rules of international law in the field, and it had requested AALCO member States to give the proposal serious consideration and to support it.

16. In relation to the topic “The most-favoured-nation clause”, one delegation had been of the view that it must be addressed in the context of the agreements of the WTO and the many regional economic agreements, customs unions, bilateral free trade agreements, bilateral investment treaties and investment guarantee agreements. Most-favoured-nation clauses were closely intertwined with the bilateral and regional interests of the States involved, were driven by domestic policies and issues of State sovereignty, and were politically sensitive and technically and operationally complex. Other trade-related bodies, such as the WTO, the United Nations Conference on Trade and Development (UNCTAD) and OECD, were already undertaking studies on the subject; the Commission’s work must not overlap with studies already under way to which States were making a more direct contribution.

17. The delegations had also formulated a number of general comments and observations. One delegation had been in favour of sending young AALCO interns to the Commission and had proposed that the members of the Commission from African and Asian countries open their doors to them on the recommendation of the respective Governments, subject to applicable Commission rules and procedure. The same delegation had also called for the report of the Commission to be made available at least one month before it was considered by the Sixth Committee so as to facilitate its in-depth examination.

18. Another delegation had pointed out that there were three ways for the Commission to obtain the opinions of AALCO member States. It could seek their opinion before a topic was taken up, it could elicit the viewpoints of States by circulating questionnaires during its work or it could ask them to comment on draft articles already adopted. That delegation had urged the member States of AALCO to respond to those requests and to participate in the Sixth Committee’s consideration of the Commission’s report so that their views and positions could have an impact on the outcome of the Commission’s work.

19. Stressing the need for African and Asian States to make a substantial contribution to the work of the Commission, one delegation had suggested that the AALCO secretariat produce a questionnaire on each topic dealt with by the Commission and then communicate the responses to the secretariat of the Commission. Slowly but surely, that exercise would affect the formation and substance of customary international law.

20. Some delegations had been of the view that the annual sessions of AALCO should devote more time for deliberating on the agenda item on the work of the Commission. Taking that suggestion into account, AALCO had adopted a resolution at its fiftieth annual session requesting the Secretary-General to consider holding a special meeting on that topic at the next annual session.

21. The CHAIRPERSON thanked Mr. Mohamad for his report on the activities of AALCO and invited members of the Commission who so wished to ask questions.

22. Mr. MURASE regretted that some members of the Commission from African and Asian States had not participated sufficiently in its work, no doubt because they were too busy with other tasks. Not only was that a loss for the Commission, but it could only perpetuate the current situation of international law, which was under the predominant influence of Western States.

23. Mr. HASSOUNA welcomed the determination expressed by a number of AALCO member States to collaborate more closely with the Commission, and in particular the proposals concerning an enhanced contribution to the work of the Sixth Committee and the response to questionnaires which the Commission sent to Member States. He stressed, however, that AALCO must follow up on those good intentions. He asked what contacts AALCO had established and developed with regional legal organizations in Europe and Latin America, and he would also like to have some information on the modalities for the funding of the organization, in particular with regard to the involvement of the private sector.

24. Mr. PERERA said that, as noted by the Secretary-General of AALCO, one of the organization’s statutory obligations was to examine topics that were under consideration in the Commission. AALCO should devote more time to that item of its agenda: at least half a day should be set aside for that purpose. The proposal to hold a special session on the work of the Commission was a positive step in that direction. Concerning the working methods of AALCO, he endorsed the idea of establishing working groups, as had been done in the past.

25. Mr. HMOUD, pointing out that the New York office of AALCO was very active, said that the organization should look into the possibility of opening offices in other cities in which there was major activity in the area of international law. He asked whether AALCO had taken any initiatives to promote inter-State cooperation in the various fields of law, for example judicial cooperation or matters of regional interest. It would also be interesting to hear what steps had been taken to strengthen the institutional framework of AALCO and whether there were plans to encourage a greater involvement of AALCO

member States and other African and Asian States in the work of the organization, given that currently only seven or eight States participated actively.

26. Mr. NOLTE asked whether AALCO intended to address questions raised in the context of the “Arab Spring” and whether its consultative services had been solicited or offered.

27. Mr. WISNUMURTI welcomed the creation of the Eminent Persons Group announced by the Secretary-General of AALCO. He advocated closer cooperation between AALCO and the Commission, which could be achieved by ensuring that the comments of the members of AALCO were forwarded to the Commission and by taking steps to arrange for internships.

28. Mr. SINGH, observing that AALCO discussed topics that were on the Commission’s agenda, noted that, at its latest session, it had commented on the current work of the Commission and had concluded that it should also focus on work that it had completed and had been the subject of proposals and recommendations which it had addressed to the Sixth Committee. AALCO had also discussed the question of the implementation of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was based on the work of the Commission.³⁷² All those matters were very important for the member States of AALCO, which should continue monitoring those topics in order to ensure the full implementation in the member States of conventions that had been adopted. As underscored by the Secretary-General of AALCO, the Commission should take into account inputs from AALCO member States when considering items on its agenda.

29. Mr. McRAE noted that an African Union Commission on International Law had been created and asked whether AALCO had had contact with it and whether it could provide some details on its work.

30. Sir Michael WOOD said that he was grateful to Mr. Murase, Mr. Perera and Mr. Singh for having attended the latest session of AALCO, because that helped maintain good relations between AALCO and the Commission. Noting that Mr. Murase had raised the question of attendance at the Commission, he said that there were very active members from all regional groups, and he did not accept the view that some groups were less active and less influential than others. As indicated by Mr. Singh, it was very useful that AALCO discussed items on the Commission’s agenda, as well as work that it had completed, such as on transboundary aquifers or the United Nations Convention on Jurisdictional Immunities of States and Their Property. He hoped that the comments made at the Colombo meeting would lead to positive results and that other countries, in particular from Africa and Asia, would become parties to that instrument. He enquired whether AALCO planned to consider the work of the Commission on reservations to treaties, and especially the Guide to Practice, which was to be completed at the

current session. It would be very helpful if AALCO could examine the reservations dialogue—which did not consist merely in objecting to reservations but also in discussing them with the reserving States—and the activities of CAHDI in that area. He also asked about the composition of AALCO, whose membership seemed limited, and about the status of observer States and guests.

31. Mr. CANDIOTI, noting that the Commission had just completed its consideration of three important topics and was reflecting on possible future topics to be included in its long-term programme of work, asked whether AALCO could indicate, for example at the meeting to be held in New York, what new topics it would like the Commission to examine or whether it deemed it useful for the Commission to review certain issues which it had already addressed.

32. Mr. VASCIANNIE asked whether AALCO could forward its report to the Commission earlier, which could then make better use of comments on its work. He also enquired whether AALCO planned to adopt group positions on any subjects, since it would be helpful for the Commission if it knew, for instance, that 30 States shared the same view on a particular question.

33. Mr. DUGARD, noting that only States could be members of AALCO but that persons other than representatives of those States could attend its meetings, as for example Mr. Murase did, asked whether AALCO encouraged legal practitioners and academics from Africa and Asia to do so, in particular those living in the diaspora, notably in Europe and the United States, and who made a great contribution to international law in general but perhaps not sufficiently in their own region. Mr. Murase had referred to the failure of some of the members of the Commission who were from African or Asian States to attend its meetings regularly. One problem was that two African States had appointed their attorneys general to the Commission, which meant that they were, almost by definition, unable to attend regularly. AALCO could perhaps serve as a forum for identifying African and Asian legal practitioners who might be appointed to the Commission.

34. Mr. GALICKI said that it was always useful for the Commission to be able to count on comments from an organization that represented a large number of States. He would like to have the view of AALCO on the impact of the Commission’s work and asked in particular whether, in the opinion of its members, the Commission should continue to produce draft articles or whether it should elaborate conventions or, as in the case of the topic on reservations to treaties, guidelines.

35. The CHAIRPERSON, speaking as a member of the Commission, said that the AALCO report had given him the impression that there was a lag between the moment AALCO commented on a topic and the state of work in the Commission on that topic. If AALCO had been informed of the latest developments within the Commission, its comments would have been different. He suggested that AALCO invite to the part of its sessions devoted to the work of the Commission the special rapporteurs for the topics of particular interest to it, because that way it

³⁷² *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 28 (draft articles on jurisdictional immunities of States and their property and commentaries thereto).

could be informed of progress made on the topic in the Commission and could prepare its comments, which were very useful to the special rapporteurs. He also asked whether AALCO could elaborate joint positions, without prejudice to the individual positions of its members, because such positions would have a much greater impact on the work of the Commission and perhaps on the discussions in the Sixth Committee as well. He wondered whether it might not be necessary to improve the participation of African States in the work of AALCO, since the fact that the organization's headquarters were in Asia posed problems of costs, which could be prohibitive for many countries.

36. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that some of the questions exceeded his remit as Secretary-General, notably the one on how to encourage more African and Asian countries to participate actively in the work of AALCO. At its annual session, AALCO devoted an hour and a half to the work of the Commission, but it was planned to set aside half a day for that purpose as from 2012. An intersessional meeting was also being considered, at which member States would be invited to discuss questions of interest to the Commission. The creation of the Eminent Persons Group, in which several members of the Commission took part, would help AALCO to be informed about the Commission's current work. Most member States found it difficult to understand the Commission's work, because they did not have the necessary expertise or specialists. It was important to bear in mind that, unlike their European counterparts, most of the African and Asian members of the Commission did not have interns or assistant researchers to help them. For that reason, he had proposed the establishment of a foundation to solicit contributions, because AALCO, like other international organizations, was short of funding. Non-State entities could also contribute to the foundation in the framework of cooperation on specific projects. Member States would also need to be persuaded to pay their contributions; that was not always easy to do. In order to show States how they benefited from their membership, AALCO had set up training and capacity-building programmes as part of cooperation with WTO on trade questions, with the World Intellectual Property Organization on indigenous and traditional knowledge, and with UNCTAD.

37. A number of intersessional activities were taking place, for example the meeting of legal experts on the Rome Statute of the International Criminal Court. However, that required financial resources, and not all representatives of member States could travel regularly to New Delhi. For that reason, AALCO planned to hold online workshops, conferences and seminars on its website.

38. With regard to the relatively limited membership of AALCO, he said that, as Secretary-General, he was working to encourage more countries to become members. The Eminent Persons Group was responsible for seeking assistance in promoting a high profile for the organization. AALCO invited permanent observers from non-member States, including Australia, the Congo, Kazakhstan, New Zealand and the Russian Federation, to attend its annual sessions.

39. AALCO intended to discuss the future work of the Commission at the meeting to be held in October 2011 in New York and to solicit ideas from member States; it also cooperated with ASEAN and the African Union. Although it had not yet approached the legal advisers of the European Union or the OAS, that was one of his priorities, because he was aware of the value of working with other regional organizations.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued) (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

40. The CHAIRPERSON invited the members of the Commission to resume consideration of the fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/648).

41. Mr. NOLTE, noting that the report dealt with the different possible sources of an obligation or obligations to extradite or prosecute, said he agreed that the main possible sources for such obligations were treaties and customary international law and that the principle of cooperation played an important underlying role in that regard. He had doubts, however, whether the Special Rapporteur had gone far enough: although draft article 3 (Treaty as a source of the obligation to extradite or prosecute) was clearly correct, ultimately it was merely a way of saying that treaties must be complied with, or *pacta sunt servanda*. To make that proposition, it was not necessary to classify the different kinds of treaties that contained obligations to extradite or prosecute. Such a classification would instead be important either for showing that those treaties articulated a general principle or a rule of customary international law, or for suggesting that the obligation to extradite or prosecute was applicable to certain core crimes or that it had certain more specific procedural implications.

42. Draft article 4 concerned the much more difficult issue of the possible customary nature of the obligation or obligations to extradite or prosecute, and its formulation showed that the Special Rapporteur was undecided on the question. While it was, again, clearly correct that States were obliged to extradite or prosecute an alleged offender if such an obligation was derived from international law, the Special Rapporteur did not go so far as to say that such an obligation existed, even with respect to certain core crimes. Indeed, the material which the Special Rapporteur presented to substantiate a possible customary obligation to extradite or prosecute was limited. The non-binding resolutions and certain propositions advanced by parties in judicial proceedings as such and without further reasoning did not appear to be sufficient to establish a basis in customary international law for an obligation to extradite or prosecute. He did not rule out that other material or considerations could lead to such a conclusion, but the sources contained in the report did not support a stronger formulation than what the Special Rapporteur proposed in draft article 4, paragraph 2. However, that provision referred back to other norms without specifying them and ultimately left the question open. Bearing in mind that

the formulation in paragraph 2 cautiously stated that the obligation to extradite or prosecute “may” derive from customary norms of international law, it was somewhat surprising that the Special Rapporteur proposed in paragraph 3 that an obligation to extradite or prosecute “shall” derive from peremptory norms of international law. As noted by Mr. Dugard, that compulsory language was at variance with the doubts which the Special Rapporteur had himself expressed in paragraph 94 of his report.

43. With regard to draft article 2 (Duty to cooperate), once again the question was not whether such a general duty existed, but what it meant in the context of international criminal cooperation. There, it would seem to be necessary to assess how far the political goal of the fight against impunity had crystallized into more specific legal obligations, in particular in customary international law. That would require an analysis of possible countervailing considerations, which the Special Rapporteur alluded to in paragraph 74, but did not examine further.

44. In sum, the fourth report on the obligation to extradite or prosecute was a valuable contribution to the Commission’s consideration of the topic, but the issues that it raised needed to be studied further. It was not yet possible for the aspects of the topic that had been raised in the report to be dealt with as drafting matters. He did not agree with Mr. Murase that the Commission should abandon the topic, which, as Mr. Dugard had observed, was important and had raised expectations. There was a need to reflect on how to proceed further, but owing to lack of time, that would be an appropriate task for a newly elected Commission. He was not persuaded by Mr. Melescanu’s proposal that the Commission should submit the proposed draft articles to the Sixth Committee for debate. The Commission should not abandon its most important task, that of forming a collective opinion, and thus forego its privilege of submitting a considered view to the General Assembly.

45. Mr. PERERA thanked the Special Rapporteur for his fourth report and for his detailed introduction at the previous meeting. He shared the views expressed by other members of the Commission concerning the particular difficulties surrounding the treatment of the topic, notably whether and to what extent an obligation to extradite or prosecute had a basis in customary international law. The Special Rapporteur had sought to address that issue in sections C to F of the last chapter of the report, on which he personally wished to make several comments.

46. During the debate in the Sixth Committee in 2009, special attention had been given to the possible customary law character of the obligation *aut dedere aut judicare*.³⁷³ In section D of the report, the Special Rapporteur sought to capture the range of views that had emerged. Some delegations had considered that international treaties were not the sole source of the obligation to extradite or prosecute, which in their opinion was an obligation of a customary nature, notably in respect of serious international crimes. Others had argued that the obligation did not exist beyond the provisions of international treaties. The same

difference of opinion existed in the Commission. Yet other delegations had expressed a third view, one which merited further consideration, namely that a customary rule might be in the process of emerging, at least in respect of a limited category of crimes. The challenge was to determine what categories of crimes were core crimes. In section F of his report, the Special Rapporteur had dealt in a preliminary manner with the question of the identification of crimes and offences that could be classified as giving rise to the customary obligation to extradite or prosecute, and in that context he had proposed draft article 4. In paragraph 87, the Special Rapporteur referred to the necessity of differentiating between ordinary criminal offences—criminalized under national laws of States—and a “qualified” form of such offences or crimes, named in different ways as international crimes, crimes of international concern, grave breaches or crimes against international humanitarian law, or what were referred to as core crimes. In that connection, the Special Rapporteur observed in that same paragraph that those last crimes, in particular, possessing a combination of additional elements of international scope or a special grave character, could be considered as giving a sufficient customary basis for the application of the obligation *aut dedere aut judicare*. He was personally of the view that the severity of the offence must be the decisive factor in determining the list of crimes to be covered in draft article 4, paragraph 2, the wording of which was tentative in nature, as a number of members of the Commission had noted.

47. Serious consideration should be given to the question of the inclusion of the crimes defined in the set of conventions on suppression of terrorism, which had as their underlying rationale the prevention of safe haven being afforded to perpetrators of indiscriminate violence against civilians. An examination of the treaty sources of the obligation to extradite or prosecute showed that that obligation had had a limited character in early instruments, such as the 1929 International Convention for the Suppression of Counterfeiting Currency or the Convention for the Prevention and Punishment of Terrorism, adopted by the League of Nations in 1937 (but which had never entered into force), in which the obligation had been formulated to address the particular problems arising from the practice of certain States of not extraditing their own nationals. However, as noted in paragraph 57 of the report, the evolution of the obligation to extradite or prosecute towards an obligation of an absolute nature was best illustrated in the 1970 Convention for the suppression of unlawful seizure of aircraft, which required contracting States, if they did not extradite an offender, to submit the case to their competent authorities for prosecution, without exception whatsoever and regardless of whether the offence had been committed in their territory. That instrument had set a precedent and had had a clear impact on conventions that had followed in the field. The *aut dedere aut judicare* clause had been incorporated almost verbatim in a number of international conventions on terrorism, culminating in the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. It was also found in the negotiating text of the draft comprehensive convention on international terrorism.³⁷⁴ At the regional

³⁷³ See, *inter alia*, the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, prepared by the Secretariat (A/CN.4/620 and Add.1), sect. F, pp. 15–16 (available from the Commission’s website).

³⁷⁴ See General Assembly resolution 65/34 of 6 December 2010, on “Measures to eliminate international terrorism”, paras. 22–24.

level, the obligation was reflected in virtually the same terms in the 1977 European Convention on the suppression of terrorism and the 1987 SAARC [South Asian Association for Regional Cooperation] Regional Convention on Suppression of Terrorism. It was also enunciated in important documents such as the General Assembly's 1994 Declaration on Measures to Eliminate International Terrorism, which called upon States "[t]o ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law".³⁷⁵ A number of General Assembly and Security Council resolutions recognized that

[a]cts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society.³⁷⁶

48. All those elements needed to be duly considered in assessing whether the grave crimes covered under those instruments possessed a sufficient customary basis—through long and continuous State practice, as distinct from their original treaty-based character—to warrant their inclusion in the category of war crimes envisaged in draft article 4. He agreed with Mr. Vasciannie that the question was a stimulating one, that the Special Rapporteur should undertake a more detailed study of State practice and that draft article 4 had the potential to become a substantive rule.

49. On draft articles 2 and 3, he shared the general view that they needed to be worked on further during the next quinquennium. The draft articles could be annexed to the annual report of the Commission to the General Assembly, as proposed by Mr. Melescanu, and considered by a working group to be constituted within the framework of the future Commission.

50. Mr. PELLET said that, unlike others, he was of the view that the Commission had the mandate and the expertise to consider what he regarded as a very useful topic. However, it would have been preferable for the Commission to address the question of universal jurisdiction as a whole, rather than dealing with the current downstream subject, which was closely linked to universal jurisdiction, including its very definition. It was difficult to examine the question of the obligation to extradite or prosecute without first having a very clear idea of what universal jurisdiction was. That was particularly apparent in the fourth report. In it, the Special Rapporteur raised the question of the legal bases of the obligation to extradite or prosecute, and personally he was inclined to think that they were the same as for universal jurisdiction. Actually, the bases were extrajudicial, like any basis of law, a fact of which he, as a proponent of juridical objectivism, was absolutely convinced. Given that, in contemporary society, certain crimes were intolerable and were prejudicial to the most universally recognized values, all States—perhaps subject to certain conditions—were competent to prosecute the alleged

perpetrators of those crimes (universal jurisdiction), and if a State did not prosecute such persons, it must extradite them. Of course, if the latter principle was to apply, competence to prosecute must be established, which in essence was a question of universal jurisdiction. The Special Rapporteur then considered the sources of the obligation to extradite or prosecute. There again, he personally thought that it was difficult to separate the study of that question from a study of the sources of universal jurisdiction, given that the Special Rapporteur no doubt had an excessively broad understanding of the concept of "source", since he included in it the duty to cooperate in the fight against impunity. However, that question was more one of legal basis than of sources, and if it was the source that was concerned, it would be a material source and not a formal one. That said, he agreed with the idea that the principle *aut dedere aut judicare* had its basis, or its material source, in the duty to cooperate in the fight against impunity. However, that was also the case with universal jurisdiction, whereas the duty or the obligation to cooperate (the Special Rapporteur did not give any thought to the choice of that word) was perhaps more directly at the root of the principle *aut dedere aut judicare* than the principle of universal jurisdiction.

51. He had no objection of principle to draft article 2, although he had his doubts about the French version. He was not in favour of the restrictions attached to the duty to cooperate in the wording proposed by the Special Rapporteur, which perhaps was good diplomacy, but it was not good law. With regard to crimes for which universal jurisdiction and the principle *aut dedere aut judicare* were applicable, it was perfectly clear that a general obligation was involved that bound States at all times and places and in all circumstances. On the other hand, he was not persuaded by the very general formulation proposed by the Special Rapporteur at the end of paragraph 1 of draft article 2, which read: "the fight against impunity as it concerns crimes and offences of international concern". Neither universal jurisdiction nor the obligation to extradite or prosecute was applicable to all international crimes, and even less so to all offences of international concern which were not crimes.

52. Although it was not the subject of a separate section in the fourth report, the Special Rapporteur also repeatedly raised the question of which international crimes would entail application of the principle *aut dedere aut judicare*. There again, he was personally convinced that that question should not be separated from the question of crimes that warranted recourse to universal jurisdiction. The answer to that question was more or less the same in both cases: those principles were certainly applicable when the treaties in force so provided and in the conditions which they set. However, there was nothing startling about that firm conclusion, which was set out in draft article 3, paragraph 1. To say that a State was bound to extradite or prosecute a person accused of an offence if a treaty to which it was party required it to do so was tantamount to reinventing *pacta sunt servanda*, as Mr. Nolte had just pointed out, and was not much use. It was even dangerous, because it might give the impression that, if the future articles of the Commission on the subject did not say so, it was not the case. As to paragraph 2, the purpose of which seemed to be to specify the details of the application of the principle, it was very

³⁷⁵ General Assembly resolution 49/60 of 9 December 1994, annex, para. 5 (b).

³⁷⁶ *Ibid.*, para. 2.

unclear. It referred to general principles of international criminal law, but it was those very principles that had to be defined, and that was not a problem of source but of application and modalities. Accordingly, the problem was inherent in the principle *aut dedere aut judicare* without being entirely unrelated to universal jurisdiction, because, at least in the drafting formulated in paragraph 71, the point was to ascertain under what conditions a State could or must extradite or prosecute when it had competence to prosecute, whether in accordance with universal jurisdiction or for other reasons.

53. Even more fundamental was the question of the possibly customary nature of the principle *aut dedere aut judicare*. The link between that principle and universal jurisdiction also seemed essential. Treaties might separate the two principles and require extradition or prosecution in the absence of universal jurisdiction, but that appeared to be excluded when considered from the point of view of custom. He was firmly convinced that neither the maxim *aut dedere aut judicare* nor universal jurisdiction was applicable without distinction on a customary basis to all internationally defined crimes. If they were applicable, it was the case with certainty for only the four most serious crimes, or in any event for three of them, namely genocide, crimes against humanity and war crimes, although it seemed absurd to place war crimes on the same footing as genocide and crimes against humanity or on the same footing as aggression. Incidentally, he noted that, even after the Review Conference of the International Criminal Court,³⁷⁷ it was clear that aggression posed particular problems and that it was better to put it aside for the time being.

54. In any case, he had no doubt, despite those difficulties, that universal jurisdiction and *aut dedere aut judicare* were applicable to the four most serious crimes on a customary basis, as recognized by the Commission's draft code of crimes against the peace and security of mankind,³⁷⁸ which unfortunately had not received the attention it deserved, and to which the Special Rapporteur referred in paragraph 89 of the report. However, there again, the wording of draft article 4 was too weak and did not say very much. He was not convinced by the use of the word "if" in paragraph 1. The whole point was that the Commission should indicate when that condition was met. Similarly, paragraph 2 stated that the obligation *aut dedere aut judicare* "may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes]". Yes, but when was that the case? He was in full agreement with the first three examples in the short and convincing enumeration in the square brackets, but wondered why the Special Rapporteur referred to war crimes, which were already covered by the reference to serious violations of international humanitarian law; that seemed sufficient and in fact quite satisfactory, because it limited the scope of the article to grave violations without extending it to all war crimes, which he would disapprove.

³⁷⁷ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court*, Kampala, 31 May–11 June 2010 (publication of the International Criminal Court RC/9/11), resolution RC/Res.6, "The crime of aggression", p. 17.

³⁷⁸ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

55. He did not understand draft article 4, paragraph 3. The fourth report raised interesting questions which could probably also have been the subject of interesting discussions in a working group, but the Commission was at the end of the session, and it was too late to envisage setting up such a group again. As the Commission was also approaching the end of the quinquennium, it was inappropriate to refer the three draft articles proposed by the Special Rapporteur to the Drafting Committee. That circumstance led him to suggest another approach. As he had sought to show, the topic under consideration had been artificially separated from the broader topic of universal jurisdiction, of which it was merely an extension. The topic of universal jurisdiction also fit perfectly well within the framework of the Commission's mandate to promote the progressive development and codification of international law, and the end of the current quinquennium should be the occasion to question States about the possibility of enlarging the Commission's future consideration to universal jurisdiction, including the principle *aut dedere aut judicare*. That question should be highlighted in chapter III of the report, which should enumerate those points on which comments would be particularly useful for the Commission.

56. Mr. McRAE noted that, in his fourth report, the Special Rapporteur had sought to respond to the approach outlined in the discussions in the Working Group³⁷⁹ and had suggested three draft articles. He welcomed the Special Rapporteur's attempt to move forward with the topic, but he had serious concerns about the draft articles and the analysis on which they were based. With regard to draft article 2, the Special Rapporteur rightly pointed out that the Working Group had observed that the duty to cooperate in the fight against impunity appeared to underpin the obligation to extradite or prosecute, but it was not clear why that duty should be the subject of a separate obligation in the draft articles. The Working Group had been of the view that the duty to cooperate was at the basis of the fight against impunity, but that consideration alone did not justify the formulation of a draft article. The duty to cooperate in the fight against impunity was certainly relevant and must be taken into account in any consideration of the topic, but as a substantive article, it seemed out of place. What was missing in the draft article was an explicit link between the duty to cooperate and the obligation to extradite or prosecute. As suggested by Mr. Murase, the notion of the fight against impunity perhaps belonged in the preamble.

57. As for draft article 2, paragraph 2, he was not sure what was meant by "States will apply ... the principle to extradite or prosecute". Was that to suggest that there was a free-standing obligation to extradite or prosecute? If not, and if the point was simply to say that if an obligation existed it should be adhered to, then he did not see why that was needed. Nor did he see the point of draft article 3, paragraph 1, which was self-evident and did not add anything substantively. Further analysis was required.

58. Draft article 4 posed major problems, although it was potentially more promising. The question of customary international law, a subject to which the Commission and

³⁷⁹ *Yearbook ... 2009*, vol. II (Part Two), p. 143, para. 204.

the Sixth Committee had come back on many occasions, had been a main source of difficulty from the outset. Paragraph 1 likewise stated a self-evident proposition and merely indicated that, if an obligation existed under international law, it must be complied with. Paragraphs 2 and 3 were of greater interest with regard to their substance, as noted by Mr. Perera and Mr. Vasciannie. In those paragraphs, the Special Rapporteur went almost so far as to say that an obligation to extradite or prosecute existed, at least in respect of *jus cogens* crimes. That might be the case, and, if it was, it would be a useful element of progressive development to have a draft article to that effect. However, the Commission did not have the material to reach that conclusion in the form of a draft article. The Special Rapporteur referred in the report to the discussions in the Sixth Committee and saw a changing trend on the question, but it might be asked what weight was to be given to statements made in the Sixth Committee. Were they elements of practice, authoritative guidance or *opinio juris*? In any event, those statements were very divided, and thus it seemed difficult to draw any firm conclusions from the discussions in the Sixth Committee.

59. The fourth report attached great importance to the pleadings by Belgium before the ICJ in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. As pointed out by other members of the Commission, those were pleadings and not a dispassionate analysis on which the Commission could rely. It would not be wise to reach conclusions on the basis of the material contained in the fourth report; more and independent analysis was needed. The Commission could not deal with the question of customary international law without examining how States had incorporated the principle *aut dedere aut judicare* into their national legislation. The Special Rapporteur had referred to that issue in his previous reports³⁸⁰ and had indicated that he would return to it subsequently, but that had to be done before moving to the question of whether it could be concluded that a principle of customary international law existed. States were very interested in the topic and expected progress to be made, as shown by the discussions in the Sixth Committee (A/CN.4/638, para. 96), but the draft articles in the fourth report were not ready to be referred to the Drafting Committee. He could not endorse the suggestion by Mr. Melescanu and Mr. Perera to annex the draft articles to the annual report of the Commission to the General Assembly, and he agreed with Mr. Nolte that, at the current stage of work, further consideration was needed before the draft articles were submitted to the Sixth Committee. Concerning Mr. Pellet's proposal, he said that it was premature to decide whether to ask the Sixth Committee to link the topic with the topic of universal jurisdiction. For the moment, the Commission should take note of the fourth report and should continue to examine the topic in depth at the 2012 session, following the approach suggested by Mr. Nolte.

60. Mr. HMOUD recalled that the Working Group established by the Commission in 2008³⁸¹ had provided

³⁸⁰ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report), *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585 (second report), and *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report).

³⁸¹ *Yearbook ... 2008*, vol. II (Part Two), p. 142, para. 315.

guidance and had suggested a structure and a general framework for consideration of the topic. That should make it possible to reach proper conclusions on the sources of the obligation to extradite or prosecute, its content and scope, the conditions for its implementation and its relationship with other legal obligations and principles. In his fourth report, the Special Rapporteur had sought to take steps in that direction by focusing on the sources of the obligation. While there was an ample number of treaties that could constitute a treaty basis for the obligation, the report did not determine whether there was also a basis in customary law. Treaties in areas such as the law of armed conflict, international crimes and judicial cooperation were useful in identifying the obligation and giving direction to parts of the draft articles. Acts which were incriminated under such instruments could provide indications on the content of the obligation. For example, would terrorism or piracy be included in the crimes under the draft articles? Although it was unnecessary for the Special Rapporteur to enumerate the crimes in question, he should be able to find an alternative approach that was suitable for the project. Treaties could also be useful in identifying the conditions for the obligation's application. In certain instruments, the act was defined, and all parties were under an obligation to incriminate and exercise certain forms of jurisdiction under their national law. In others, there was no need for a definition; the act merely had to be criminalized in the legislation of both parties: the party requesting extradition and the requested party. That was especially true in judicial cooperation agreements. Treaties also gave guidance on any exceptions that might exist, for example political crimes or the right of asylum, and under what circumstances. They were also useful in identifying the rights of an individual who was the subject of criminal proceedings relating to the implementation of the obligation. The same could be said about the procedures associated with the obligation, including the process of official communication. In short, treaties provided enough material to be able to codify the rules relating to the obligation to extradite or prosecute. However, that was not achieved in draft article 3, which stated the obvious.

61. As for the basis of the obligation in customary law, further study was needed, in particular with regard to war crimes, crimes against humanity and genocide. It was not sufficient to cite the views of a few members of the Sixth Committee or to quote a counsel in a proceeding or the opinion of a jurist. There were voluminous sources from the proceedings of national courts that could help establish whether the obligation existed in customary international law or whether a norm was emerging in that regard, and for which crimes. That would assist the Commission in determining, as progressive development, whether certain crimes of international concern should be included in the scope of the obligation to extradite or prosecute. For example, no State had a policy of granting safe haven to perpetrators of genocide. Did that mean that there was an *opinio juris* in favour of the existence of a customary rule requiring extradition or prosecution?

62. Draft article 4 did not go in that direction. Paragraph 1 stated the obvious, and paragraph 2 posed a question rather than a rule. With regard to paragraph 3, as others had pointed out, it was not clear whether its purpose was

to enunciate the obligation to extradite or prosecute as a peremptory norm or whether it aimed to include in the obligation crimes that violated such norms. Clearly, there was no basis in *jus cogens* for the obligation. However, if the second meaning was intended, it should be borne in mind that such an obligation did not exist in a vacuum. It needed a context, even when it was enunciated as a general obligation. In terrorism conventions, for example, cooperation entailed an obligation to cooperate in the areas of prevention, prosecution, judicial assistance and law enforcement. That obligation could be reflected in the draft articles by specifying the content, as was done in conventions and treaties dealing with international crimes and judicial cooperation. Those instruments were also useful in setting the specific conditions of cooperation. National laws could be analysed to identify the legal mechanisms used by States to cooperate during situations involving extradition or prosecution. That could benefit the draft articles with regard to the duty itself and its implementation. However, that was not done in draft article 2, which provided for the duty to cooperate in the fight against impunity for offences of international concern and then made the obligation to extradite or prosecute an instrument for the accomplishment of that duty. The report did not contain any convincing argument that the duty to cooperate was a basis of the obligation, because there was no context. Moreover, the issue of cooperating in the fight against impunity was not part of the topic, as other members had said, and should at best be referred to in the preamble.

63. The topic should remain on the agenda of the Commission, but there was a need for extensive research within the framework proposed by the Working Group. Draft articles could be produced which defined a comprehensive legal regime on the obligation to extradite or prosecute, but it should be left to the members of the Commission in the next quinquennium to decide whether the draft articles proposed by the Special Rapporteur should be referred to the Drafting Committee and whether the Working Group on the topic should be re-established. He supported the idea of asking States, in chapter III of the report of the Commission, whether the Commission should continue with consideration of the topic as it stood or whether it should be included under the question of universal jurisdiction.

64. Ms. JACOBSSON said she was pleased that the fourth report on the obligation to extradite or prosecute contained three new draft articles, since the way to move forward with the topic was to formulate ideas in draft articles. She did not share Mr. Murase's view that the Commission should suspend or terminate consideration of the topic.

65. In his fourth report, the Special Rapporteur focused on the sources of the legal obligation to extradite or prosecute, and, in so doing, he dealt with three aspects of the obligation: the duty to cooperate in the fight against impunity, the obligation to extradite or prosecute in existing treaties and the principle *aut dedere aut judicare* as a rule of customary international law. Consideration of the sources of legal obligations remained a key aspect of the Commission's work, but it was particularly important for the topic at hand.

66. In draft article 2, the Special Rapporteur pointed to the duty to cooperate in the fight against impunity as a source of the obligation to extradite or prosecute. She subscribed to that idea, and she also thought that the draft articles should contain an article on the duty to cooperate. However, the wording of draft article 2, paragraph 1, was too cautious and should enunciate the duty to cooperate more directly. The formulations "as appropriate" or "wherever and whenever appropriate" were too conditional. The general duty to cooperate in the fight against impunity should be more directly phrased. Moreover, paragraph 1 should be divided into two paragraphs, the first dealing with inter-State cooperation, and the second with cooperation with international courts and tribunals. Although a distinction must be made between extradition and surrender, all forms of cooperation should be included in the article on the duty to cooperate. In addition, the duty to cooperate with the United Nations should be explicitly mentioned, because it was recognized not only in the Charter of the United Nations, but also in other conventions, such as the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), article 89 of which set out an obligation to cooperate with the Organization.

67. In draft article 3, paragraph 1, the Special Rapporteur addressed the case in which the obligation to extradite or prosecute was enunciated in a treaty; the paragraph served as a reminder to States of the old principle *pacta sunt servanda*. That was indeed a central principle of law, but she wondered why it was referred to in that provision.

68. Draft article 3, paragraph 2, was complicated and not entirely clear. It provided that States had an obligation to formulate in their national law the particular conditions for extradition or prosecution "in accordance with the treaty establishing such obligation and with general principles of international criminal law". That was rather confusing. Clearly, a State that was party to a treaty that provided for an obligation to extradite or prosecute had an obligation to ensure that its national law was in conformity with the treaty obligation. The problem was that the paragraph addressed the conditions for both extradition and prosecution, but they were different legal concepts and must be kept separate. There should be one paragraph on the conditions relating to extradition and another on the conditions relating to prosecution.

69. With regard to prosecution, the obligation of the State to see to it that its national law was in conformity with the treaty obligation required it to ensure that the crimes covered by the treaty were criminalized in its territory. The wording "in accordance with the treaty" seemed a little out of place, since the treaty could not lay down domestic rules for the prosecution process, and it was up to the State to decide such conditions, provided that they met the requirements of international law, such as those concerning due process. Paragraph 2 could be simplified. Although national implementation was essential, it was a question of national law.

70. As for extradition procedures, they were also a matter for the domestic legislation of the State. In some instances, bilateral or regional treaties might provide

for competing or parallel international obligations, yet the draft article failed to reflect that reality, although it existed with regard to extradition treaties. Moreover, although it was important in the fight against impunity, the obligation to extradite or prosecute had limits. The principle of *non-refoulement* and the prohibition of the death penalty were therefore crucial in that context, and the Commission should perhaps consider referring to them in the draft articles.

71. On draft article 4, the Special Rapporteur had indicated in his previous report that proving the existence of a customary basis for the obligation *aut dedere aut judicare* was the main purpose of the topic under consideration.³⁸² She welcomed the draft article on the obligation to extradite or prosecute in customary international law, but from a methodological point of view, she was surprised that the Special Rapporteur had treated the main sources of international law, namely treaties and customary law, separately. Drawing such a distinction between those two sources was not helpful at the current stage, since there were other important sources of international law. What was needed was a conclusion. Thus, she did not think that the title of the article should refer to international custom “as a source” of the obligation.

72. Although States were increasingly willing to conclude treaties containing an *aut dedere aut judicare* clause, State practice had not yet given rise to a rule of customary law in the area. It was important to be particularly cautious when analysing the issue and to differentiate between different categories of crimes. Two examples could serve as illustrations.

73. Grave breaches of the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) were the most prominent crimes that gave rise to an obligation for the State in which the suspect was present to either extradite or prosecute. The State had a choice—extradition or prosecution—but it must not remain passive. That obligation was clearly set out in the provisions of the Geneva Conventions for the protection of war victims and Protocol I. It was likewise clear that the Conventions codified customary law. However, it did not follow that all other war crimes that did not amount to grave breaches gave rise to the obligation *aut dedere aut judicare*. The second example concerned other crimes, such as piracy, which were subject to universal jurisdiction, but not necessarily to the obligation to prosecute or extradite. There, States had the right to prosecute, but the obligation was focused on cooperation. In that connection, draft article 4, paragraph 2, was too vague to be used in a legally binding convention, because it merely provided that an obligation “may” derive from customary norms of international law concerning certain crimes. Although that was not in doubt, the paragraph did not have an operative content. Moreover, the enumeration of crimes in the square brackets was confusing. For example, war crimes were clearly serious violations of international humanitarian law.

74. Admittedly, extensive State practice could be an indication of an emerging rule of customary law. If States acceded to a large number of international treaties, all of which contained a variation of the obligation to extradite or prosecute, that could be seen as strong evidence that they were willing to be bound by that obligation, and such practice might lead to the transformation of that obligation into a principle of customary law. It was a delicate task to determine the status of State practice in that regard, especially since the Commission had not received as many comments from States as it would have liked. Academic writings could not replace State practice as an expression of *opinio juris*. That needed to be made clear when the Commission moved from codification to progressive development, and the starting point should be the Commission’s 1996 draft code of crimes against the peace and security of mankind.

75. Given the difficulty of proving the existence of a customary obligation to extradite or prosecute, Ms. Jacobsson agreed with the Special Rapporteur’s conclusion in paragraph 86 of the report that the best way to move forward would be to concentrate on identifying those categories of crimes that might create such an obligation. That should be the starting point. She suggested that the Commission proceed with the identification of the different types of crimes. That was not to say that it needed to define all the crimes, but it should take a thorough and systematic look at the different categories. For example, it might be useful to consider crimes under terrorism conventions, as well as State practice, national legislation and the rulings of national courts regarding the crime of genocide, for which the relevant convention did not provide for an obligation to extradite or prosecute. An indicative list of the different categories of crimes could also attract comments from States.

76. With regard to the concept of *jus cogens* as a source of the obligation to extradite or prosecute, there were, as the Special Rapporteur pointed out, differences of opinion among scholars. However, even if crimes were identified that constituted a breach of a *jus cogens* norm, it did not necessarily follow that there was a parallel obligation to prosecute or extradite. She found draft article 4, paragraph 3, somewhat confusing in that regard, probably because there should be a clearer distinction between the response to an act considered to be a breach of a *jus cogens* norm and the procedural consequences that might result from such a breach.

77. She agreed with Mr. McRae and Mr. Nolte that the draft articles should not be referred to the Sixth Committee and that it was up to the Commission to decide how to continue with the topic at the beginning of the next quinquennium.

78. Mr. CANDIOTI said that, in the light of the debate, he agreed with those who thought that it would be premature to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. The problem was not to decide immediately and definitively whether treaties were the sole source of the obligation to extradite or prosecute, as some States asserted, or whether customary law was an earlier source, as other States contended. In pursuing that course, and even

³⁸² *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report), p. 131, para. 126.

assuming that it considered further its study of practice and jurisprudence, the Commission would not be able to move ahead. In any case, the new draft article 2, on the general duty to cooperate in the fight against impunity, was a step in the right direction, since it concerned the principle of general policy on which the obligation to extradite or prosecute was based.

79. However, the Commission must decide whether, as part of progressive development, it should enunciate the obligation to extradite or prosecute for the most serious crimes, namely those that posed a grave threat to the interests and values of the international community as a whole. The basis of the obligation to extradite or prosecute in order to combat the impunity of individuals accused of grave crimes was not clearly established in custom, nor did it emanate solely from specific treaties. The formulation of that obligation must be the expression of the progressive development of international law as set out in article 15 of the statute of the Commission. It should be a new law for the twenty-first century. As Ms. Jacobsson had just pointed out, and as noted by Mr. Pellet, the Commission had already engaged in progressive development by enunciating, in article 9 of its 1996 draft code of crimes against the peace and security of mankind,³⁸³ the obligation to extradite or prosecute with regard to the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. As recalled by the Special Rapporteur in paragraph 91 of his report, the Commission's proposal had served as a model for elaborating the Rome Statute of the International Criminal Court in 1998.

80. The Commission would succeed in overcoming the difficulties if it clearly reformulated, instead of draft articles 3 and 4, the obligation to extradite or prosecute along the same lines and with the same scope as in article 9 of the 1996 draft. If disagreement persisted between a formulation of progressive development of that kind and the acceptance of the obligation solely insofar as it was enunciated in specific treaties, it might be preferable to wait until ideas evolved and it was possible to make progress. To move ahead in the study under consideration, account must be taken of what could be concluded from the study of other topics, such as immunity of State officials from foreign criminal jurisdiction and, possibly, universal jurisdiction. In all three topics, the essence of the question was whether there was acceptance of individual international criminal responsibility and thus of the idea of extraditing or prosecuting, in any national or international jurisdiction, without the benefit of immunity, individuals—whether State officials or not—who were accused of serious crimes that caused grave harm to the interests of the international community as a whole, such as war crimes, crimes against humanity or the crime of genocide. As long as the Commission was unable to answer that question, it would be difficult to make progress on those topics. Perhaps the Commission should consult States on that point in the framework of chapter III of its report to the General Assembly.

81. Mr. FOMBA said that, unlike a number of other members of the Commission, he considered draft article 2

to be entirely relevant, since that aspect of the question constituted the central element of the entire philosophy of international criminal prosecution. Accordingly, the provision had its place in a draft article, and not in the preamble. The criticism of the wording of paragraph 1 for not being sufficiently specific was warranted, since the scope *ratione personae* of the duty to cooperate was somewhat confusing, and because the phrase “crimes and offences of international concern” was not very clear. Mr. Dugard had done well to stress that the principle *aut dedere aut judicare* was applicable solely to domestic courts, unless it was deemed that the surrender of an alleged offender to an international criminal tribunal amounted to an extradition, which was debatable.

82. With regard to draft article 2, paragraph 2, it had been rightly observed that the phrase “wherever and whenever appropriate” was not very clear and needed to be clarified. Important questions arose in that connection, for example regarding the definition of the crimes concerned and also the relevance of *nullum crimen sine lege*, which was more easily conceivable in the context of a pre-established code of crimes such as the one adopted by the Commission in 1996.

83. As had been pointed out by other speakers, draft article 3, paragraph 1, contained a self-evident legal proposition, merely reaffirmed the principle *pacta sunt servanda* and thus was of little use. The wording of paragraph 2 raised questions and required clarification with regard to the “particular conditions” and their legal basis. The same was true for the phrase “general principles of international criminal law”.

84. Draft article 4 raised questions and doubts. He shared the Special Rapporteur's reservations with regard to the proof of the existence of a customary obligation. As noted in particular by Mr. Vasciannie, the wording of the article seemed incomplete; it called for a clear and sufficiently corroborated position to be taken through a careful analysis of practice and jurisprudence, which did not seem to have been the case. At the current stage, paragraph 1 postulated the existence of a customary obligation, paragraph 2 the existence of a “hard core” of crimes from which a customary obligation derived and paragraph 3 the existence of an obligation based on *jus cogens*, although that contradicted the argument set out in paragraph 94 of the report. The problem was whether and to what extent international criminal law could be deemed to have the same characteristic as domestic criminal law—a maximum of preciseness and rigour—unless it was considered that it should be otherwise, which he did not. As to whether and to what extent the Commission could or should draw on the line of reasoning used by Mr. David³⁸⁴ before the ICJ in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, Mr. Melescanu had rightly pointed out that that had been a legal opinion that did not prejudge the decision that the Court would ultimately render in that case.

³⁸³ *Yearbook ... 1996*, vol. II (Part Two), pp. 30–32.

³⁸⁴ ICJ, Public sitting held on Monday, 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, verbatim record (CR2009/8), pp. 42–44, paras. 19–23 (available from the website of the ICJ: www.icj-cij.org).

85. The proposals made on what the Commission should do and how it should proceed—either to abandon the work on the topic or to suspend its consideration pending the conclusions of the Sixth Committee’s Working Group on universal jurisdiction—seemed somewhat excessive and unjustified, since States had not yet clearly and unequivocally disavowed the topic. He endorsed Mr. Pellet’s proposal to ask States for their opinion on whether the mandate of the Commission on the topic should be enlarged to include universal jurisdiction.

The meeting rose at 1 p.m.

3113th MEETING

Wednesday, 27 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (continued) (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/648).

2. Mr. PETRIČ said that he agreed with the view that no general rule existed under customary international law embodying the obligation to extradite or prosecute. He also agreed that the Special Rapporteur’s treatment of the topic did not sufficiently address the concept of universal jurisdiction and that more attention should be given to the progressive development of international law, in accordance with article 15 of the Commission’s statute. In general, the issues raised in the Special Rapporteur’s fourth report warranted further consideration.

3. With regard to draft article 2 and the serious reservations expressed by some Commission members concerning the duty to cooperate, he supported the suggestion that it might be more productive if the Commission identified the categories of crimes that fell within the scope of the obligation to extradite or prosecute. Although the duty to cooperate was well established in international law, including in the Charter

of the United Nations, draft article 2, as it was currently worded, appeared to have no practical impact, and he doubted whether it was necessary or useful.

4. Regarding draft article 3, he concurred with the assessment that it was essentially a restatement of the principle *pacta sunt servanda*. Because draft article 3 did not codify an existing customary rule or create a new rule but merely recalled that a State which was bound by a treaty must apply that treaty, it appeared to be of questionable value.

5. With regard to draft article 4, he shared the view that the wording of the text was too conditional and that it was not yet ready for serious consideration or adoption. As it was currently worded, draft article 4 had no binding component and should therefore be reformulated.

6. The Commission’s main problem was how to proceed, given that, despite past efforts—including those of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)³⁸⁵ over the past two years—it had still not made significant progress on the topic. He could not support Mr. Murase’s suggestion to suspend or terminate consideration of the topic, as its subject matter was important, timely and relevant. To terminate its consideration would mean that the Commission had not only failed to meet the expectations of Member States to produce worthwhile results after several years’ work but had also abandoned the topic prematurely.

7. Since it could be argued that there was no *lex lata* on the obligation to extradite or prosecute, the Commission should deal with the topic for the purpose of developing *lex ferenda*. The Commission’s mandate was to both codify existing international customary law and progressively develop it, particularly when the Commission was confronted with a topic of contemporary relevance. The Commission should therefore deal more proactively with the obligation to extradite or prosecute. There was no need to focus on the sources of the obligation, which were uncertain, owing to the lack of any clear *lex lata* on the subject. The Commission should instead direct its attention to the implications of a general obligation to extradite or prosecute and to the practical modalities of its enforcement.

8. The Commission’s approach should also reflect the widespread international trend towards guaranteeing the rule of law at both the international and national levels. That trend was reflected, *inter alia*, in activities conducted by the United Nations, such as the establishment of the Rule of Law Unit in the Executive Office of the Secretary-General and the inclusion of an item on the rule of law at the national and international levels in the agenda of the sixty-sixth session of the General Assembly.³⁸⁶ The interconnection between the rule of law, impunity and the obligation to extradite or prosecute should also be reflected in the Commission’s future work on the topic.

9. In his view, the Commission should clearly indicate in its report to the General Assembly on the work of

³⁸⁵ *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

³⁸⁶ General Assembly resolution 65/32 of 6 December 2010, para. 14.

its sixty-third session the problems it had encountered in dealing with the topic, mentioning the possibility of approaching it from the standpoint of progressive development. It would be unusual and counterproductive to submit the draft articles to the Sixth Committee before the Commission had finalized or adopted them. Rather, the Commission should keep the topic of the obligation to extradite or prosecute in its programme of work. At the beginning of the new quinquennium, a newly constituted working group could once again consider how best to proceed with that important topic.

10. Ms. ESCOBAR HERNÁNDEZ said that, with regard to draft article 2, she endorsed the Special Rapporteur's approach linking the principle *aut dedere aut judicare* and the duty to cooperate to efforts made by the international community in the fight against impunity. Curiously, however, the wording of draft article 2 was too broad in one place and too restrictive in another. It was too broad in paragraph 1, where it proclaimed a general duty to cooperate—whose general outlines and spirit she, of course, shared—but went beyond the scope of the principle *aut dedere aut judicare*; what was needed was to define the duty to cooperate in relation to that principle. In her view, the cooperation with international courts and tribunals mentioned in paragraph 1 lay outside the scope of draft article 2, since the application of the principle *aut dedere aut judicare*—in the classic sense at least—to cooperation with those courts and tribunals was clearly open to debate.

11. On the other hand, the wording of draft article 2 seemed excessively restrictive in that in paragraph 2, it limited the application of the principle *aut dedere aut judicare* to the fulfilment of several very general conditions, defined by the expression “wherever and whenever appropriate”, without specifying the circumstances in which those conditions would apply. It would therefore be advisable for the Special Rapporteur to propose at the Commission's next session a new version of draft article 2 that defined more precisely the scope of the duty to cooperate as it specifically applied to the obligation to extradite or prosecute.

12. In draft article 3, paragraph 1 contained an obvious and therefore unnecessary affirmation, and should be deleted. Conversely, paragraph 2 contained an important provision, namely, that States parties to a treaty embodying the obligation *aut dedere aut judicare* must take measures to give effect to that obligation in their internal law. Consequently, the text proposed by the Special Rapporteur in paragraph 2 should constitute the core of draft article 3. However, at the Commission's next session, the Special Rapporteur should propose a new formulation of draft article 3, eliminating any ambiguities and taking due account of differences in the legal systems of monist and dualist States.

13. Draft article 4 referred to an essential element of the principle *aut dedere aut judicare*, namely the identification of crimes and offences of international concern to which the obligation to extradite or prosecute should apply under customary law. In that connection, she supported the proposal for the obligation *aut dedere aut judicare* to be applied in respect of genocide, crimes against humanity and war crimes, since a broad consensus had formed among

States concerning the need to strengthen the suppression of all three at both the national and international levels.

14. Nonetheless, draft article 4 contained a number of elements that required substantive revision. In paragraph 1, the expression “alleged offender” [*presunto delincuente*] should be deleted or a replacement found since, at least in Spanish, the expression was incompatible with full respect for the principle of the presumption of innocence. In paragraph 2, it was necessary to find an alternative formulation to the expression “may derive” [*puede proceder*]. That wording diminished the role that should be played by the core crimes [*crimines nucleares*] mentioned in the paragraph in defining the scope of the principle *aut dedere aut judicare*. In paragraph 3, the wording and syntax used in the reference to *jus cogens* norms was not quite right, particularly in the expression “in the form of international treaty or international custom” [*en forma de tratado internacional o de costumbre internacional*]. Overall, subject to the submission of a revised proposal by the Special Rapporteur, she believed that draft article 4 should be retained in a future set of draft articles on the topic.

15. Lastly, with respect to the issue raised by Mr. Murase concerning the future of the topic, she was in favour of its retention in the Commission's programme of work. It was an important topic, of great interest to States and relevance to State practice, and was consequently precisely the kind of topic that fell under the mandate of the Commission. That did not mean, however, that it was necessary to pursue it as it was currently structured. The Commission might need to give further consideration to its approach to the topic and to take into account the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction.

16. In any event, those were tasks to be entrusted to the Commission in its future composition following the elections to be held in November 2011. It was therefore not appropriate for the current members of the Commission either to refer the three proposed draft articles to the Drafting Committee, since they required substantive revision, or to include them in the report of the Commission to the General Assembly on the work of its sixty-third session.

17. The CHAIRPERSON, speaking as member of the Commission, said that he joined with other members in commending the Special Rapporteur for his pioneering work on the difficult topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”.

18. With regard to the title of draft article 2, “Duty to cooperate”, he wondered whether the word “duty” had been selected instead of “obligation” because the provisions of the draft article were considered to express a moral rule, given that “duty” had stronger moral connotations than “obligation”. However, if those provisions merely expressed a requirement associated with inter-State relations—since cooperation was a necessary component of such relations—then they were in fact describing a general obligation. Various examples of legal instruments that established that kind of obligation existed as positive law or as products of the work of the Commission. It seemed to him that what was at issue in draft article 2 was the obligation—not the duty—to cooperate.

19. In paragraph 1 of the same draft article, in the French version at least, the expression “*les États coopèrent comme il y a lieu les uns avec les autres*” [States shall, as appropriate, cooperate among themselves] was a rather infelicitous formulation and should be reconsidered.

20. With regard to draft articles 3 and 4, it seemed unusual for the Commission to begin an exercise of codification or progressive development with a rule on relevant sources of law. Usually when the Commission studied the sources of a particular rule, it did so in order to confirm that the rule was established in international law, so that it could then proceed to codify secondary rules on that basis. It did not establish the source itself, as draft articles 3 and 4 attempted to do. Thus, while it was indeed necessary to determine whether the obligation *aut dedere aut judicare* existed as a rule of treaty law and/or of customary international law, that did not mean that the Commission should produce a draft article on the subject.

21. Perhaps the Commission might avoid the problem by reformulating paragraph 1 of draft article 3 along the following lines: “Each State is obliged either to extradite or to prosecute an alleged offender whether such an obligation is contained in a treaty or arises from a rule of customary international law” [*Un État est tenu d’extrader ou de poursuivre une personne accusée d’une infraction qu’une telle obligation soit contenue dans un traité ou qu’elle découle d’une règle de droit international coutumier*]. In other words, if the Commission’s research revealed that there was a sufficient basis in international law to support the obligation *aut dedere aut judicare*, then it should be concerned with drafting rules that enabled States to comply with it, not with demonstrating the existence of the sources of that obligation by means of a draft article. As his own proposal was worded, it did not presuppose any certainty concerning the existence of a treaty or customary basis but simply stipulated that, if such an obligation was provided for in a treaty or under customary law, States should comply with it. Such a solution would enable the Special Rapporteur and the Commission to make progress on the topic. He had been prompted to make that proposal because all the members who had spoken previously on the topic had expressed doubts concerning the existence of a customary basis for the obligation *aut dedere aut judicare*, and he agreed with them that it was not established that the obligation existed in customary international law.

22. Draft article 3 embodied a basic obligation to respect treaties to which States were parties; however, to establish that obligation in a draft article was to weaken the general treaty obligation to which the draft article referred and which arose out of the principle *pacta sunt servanda*. The inclusion of such an obligation in draft article 3 could be interpreted to mean that the parties to a treaty would perhaps not have had to fulfil their treaty obligations if the draft article had not explicitly required them to do so. For that reason, he was of the view that paragraph 1 of draft article 3 should be deleted.

23. With regard to draft article 4, he was of the opinion that the Special Rapporteur had not succeeded in demonstrating the existence of a customary basis for the obligation *aut dedere aut judicare*. In addition,

there was a mistake in translation in paragraph 82 of the French version of the Special Rapporteur’s report, where the English phrase “made by Eric David in the aforementioned case”³⁸⁷ had been translated as “*dans l’ouvrage d’Eric David déjà mentionné*”. That mistake was not insignificant because the arguments presented constituted the position of counsel in a court case in which the interests of the client took precedence, not the scholarly opinion of a noted legal expert, which would be more instructive to the Commission in pursuing its work.

24. The Special Rapporteur stated in paragraphs 39 and 40 of his report that the principle *aut dedere aut judicare* was related to the duty—he himself would say “obligation”—of each State to cooperate in the fight against impunity. That did not appear to be a customary rule but rather a logical rule implicit in the *ratio legis* of an explicit rule. Even the principle of *pacta sunt servanda* had not originally been a customary rule. Rather, it had been an implicit logical rule expressing the idea that, if States undertook obligations—notably treaty obligations—they were required to respect them. It was only after the passage of time that that principle had come to be regarded as a customary rule. To a certain extent, the same could be said of the principle *aut dedere aut judicare*, since, fundamentally, it was a logical rule that could possibly become—or was in the process of becoming—a customary rule, in other words, a customary rule *in statu nascendi*. The Special Rapporteur’s fourth report fundamentally concerned the emergence of new obligations, which themselves arose from the emergence of a category of international crimes the commission of which constituted a grave violation of international law.

25. The establishment of a rule that States were under the obligation to extradite or prosecute crimes against humanity or genocide did not depend on the existence of a customary obligation to extradite or prosecute but rather on the fact that the obligation to punish perpetrators of crimes against humanity or genocide was implicit in the prohibition against committing them. Thus, in essence, the principle *aut dedere aut judicare* was an implicit rule.

26. In conclusion, it was possible to envisage the formulation of provisions based on the actual nature of the obligations in question. That would, however, require refining the consideration of the topic, including its general orientation and the main aspects that the Special Rapporteur proposed to tackle, as he in fact had outlined in his paper entitled “Bases for discussion in the Working Group on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’”.³⁸⁸

27. The question of whether to suspend the consideration of the topic or withdraw it from the Commission’s programme of work could be answered only after determining the main thrust of the topic and the main interconnections between the planned draft articles. The preparation by the Special Rapporteur of a proposed

³⁸⁷ ICJ, Public sitting held on Monday, 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, verbatim record (CR2009/8), pp. 42–44, paras. 19–23 (available from the website of the ICJ: www.icj-cij.org).

³⁸⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/L.774.

workplan would allow the Commission to envisage the subsequent stages of its work on the topic and give the new membership of the Commission, following elections in November 2011, what it needed to choose the best course of action.

28. Mr. MELESCANU said that he wished to clarify some comments he had made at a previous meeting concerning his proposal to attach the draft articles to the Commission's report. First, doing so would ensure that the General Assembly was informed of the Commission's progress on the topic. Secondly, it would offer Member States the opportunity to comment on the draft articles. However, he had never said that it was up to the Sixth Committee to take a final decision on how the Commission should proceed with the topic.

Immunity of State officials from foreign criminal jurisdiction (*continued*)* (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

29. The CHAIRPERSON invited the Commission to resume its consideration of the third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646). He understood that some members would also like to comment on the second report.³⁸⁹

30. Mr. MURASE, referring to the Special Rapporteur's second report, said that he wished first to address the question of the range of State officials to be covered. The Special Rapporteur indicated that the status of all State officials should be considered—but was such a maximalist approach justified? Sufficiently clear immunity rules already existed, under the relevant conventions, for members of diplomatic and consular missions and for members of special missions. With regard to immunity for military officers and personnel in time of peace, a distinction must be made between two categories: members of forces stationed abroad and members of forces visiting a country temporarily. The immunity of stationed forces was based on specific treaty instruments, such as status-of-forces agreements, while the immunity of visiting forces was based on customary international law. The latter category was probably no longer of particular importance, and given that the former category was not really regulated by customary law, he believed that diplomats and military personnel should be excluded from the scope of the topic.

31. Article 27, paragraph 1, of the Rome Statute of the International Criminal Court provided that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility”. Still, it was unclear how far down the line in the hierarchy of government officials immunity could be assigned. The focus of the topic should

be a limited category of officials, not all State officials. The persons covered should be Heads of State, Heads of Government, Ministers for Foreign Affairs and other high-ranking officials. In any event, work could not begin on elaborating draft articles unless the scope of the project was clearly defined.

32. Turning to the methodology used to determine the legal grounds for immunity, he said that the Special Rapporteur had started from the premise that State officials generally enjoyed immunity; he had then tried to clarify the exceptions to the general rule. However, the opposite approach could also be taken: everybody should be treated equally, regardless of whether they were a Head of State or a private individual, and State officials did not have immunity unless there were particular reasons for exceptions to be made. In the past, the Commission had taken the latter approach, at least for crimes under international law. Paragraph (6) of the commentary to article 7 of the draft code of crimes against the peace and security of mankind indicated that the article was intended to prevent an individual from invoking his or her official position as a circumstance conferring immunity.³⁹⁰ Similarly, article 27, paragraph 1, of the Rome Statute of the International Criminal Court applied equally to all persons, without distinction based on official capacity.

33. However, such provisions were open to abuse by excessively zealous prosecutors at both the international and domestic levels. State officials who were prosecuted by foreign or domestic prosecutors would find it very difficult to continue with their official functions, even if they were presumed innocent until final sentencing. If their innocence was clear beyond all doubt in their own country, then the actions of foreign prosecutors ought to be regarded as interference in the State's domestic affairs and therefore a breach of sovereignty. That might explain the Special Rapporteur's rationale for adopting an approach that conferred broad immunity on State officials. Still, there was no demonstrated evidence for the general proposition that State officials enjoyed immunity—it was only so assumed. The validity of that assumption should be examined in the light of contemporary practice and the legal literature.

34. Heads of State were said to enjoy immunity by virtue of their status, perhaps based on an old theory of national honour or dignity, a legacy of the nineteenth century. Such concepts might still be important for the normal relations of States, but the Commission was dealing with criminal responsibility for serious crimes under international law that might have been committed by a Head of State. If it were to apply the ancient idea of national dignity to the modern world, it would be criticized for pedantry.

35. Nor could the rationale for official immunity be based on the ambiguous concept of sovereignty, which had undergone considerable change since the latter half of the twentieth century. It was now conceived not only as a combination of prerogatives and rights but also as a set of obligations entailing a responsibility to ensure the welfare and security of a nation. If a sovereign Head of State was no longer able or willing to fulfil that responsibility, then he or she should be denied immunity.

* Resumed from the 3111th meeting.

³⁸⁹ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631. For the consideration of the second report at the present session, see the 3086th, 3087th and 3088th meetings above.

³⁹⁰ *Yearbook ... 1996*, vol. II (Part Two), p. 27.

36. Lastly, it was important to ensure that adequate safeguards were put in place to avoid abuse of prosecutorial discretion. That was easier said than done, even though prosecutors in both international and national criminal systems were now required to exercise their discretionary powers transparently. In that regard, he drew attention to paragraph 17 of the United Nations Guidelines on the role of prosecutors,³⁹¹ which stated that in countries where prosecutors were vested with discretionary functions, guidelines should be provided to enhance fairness and consistency of approach in taking decisions in the prosecution process. Arbitrary or aggressive exercise of prosecutorial discretion against foreign Heads of States could be prevented most effectively through guidelines for domestic prosecutors, in the form of laws or regulations, and international guidelines to prevent the abuse of prosecutorial discretion by international prosecutors.

37. Mr. SINGH said that he would first like to comment on the Special Rapporteur's second report. He expressed appreciation for its comprehensive, in-depth examination of the topic and said he generally agreed with the conclusions set out in paragraph 94.

38. The principle of immunity, which was well established in customary international law, was based on comity and reciprocity and the imperative need to remove the risk of politically motivated criminal proceedings. It ensured that State officials could function independently while representing their State in the conduct of its international relations. The immunity *ratione personae* of the troika, namely the Head of State, Head of Government and Minister for Foreign Affairs, was well recognized in customary international law. However, in view of the growing range of areas in which international cooperation now took place, there was a need to examine whether immunity *ratione personae* should be considered as also extending to other high officials such as ministers of trade and defence.

39. Turning to the Special Rapporteur's third report, he said that he was in broad agreement with the conclusions set out in paragraph 61. He shared the view that immunity needed to be considered at an early stage of judicial proceedings because the outcome determined the forum State's continued ability to exercise criminal jurisdiction over the foreign official. The State claiming immunity must notify the authorities of the forum State, not the court before which the proceedings were being conducted, as immunity could be invoked through diplomatic channels. In the case of a foreign Head of State, Head of Government or Minister for Foreign Affairs, the State exercising criminal jurisdiction must itself raise the question of immunity. The official's State was not obliged to invoke immunity, unlike the situation in respect of other officials enjoying personal immunity. The right to waive the immunity of an official was vested in the State and not in the official. Waiver of immunity must always be express.

³⁹¹ Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990 (A/CONF.144/28/Rev.1, United Nations publication, Sales No. E.91.IV.2), Guidelines on the role of prosecutors, p. 193 (available from www.unodc.org/documents/congress/Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf, accessed 31 March 2017).

40. A State's invocation of immunity on the grounds that a wrongful act was an official act did not in itself imply that it acknowledged responsibility for that wrongful act. A State might invoke immunity to avoid the possibility of a serious intrusion into its internal affairs if a foreign State was investigating the acts of its officials. Indeed, the State itself might wish to investigate and, if warranted, prosecute its own official for an alleged wrongful act.

41. Mr. DUGARD thanked the Special Rapporteur for his excellently researched and informative third report. Although he did not always agree with the Special Rapporteur, in the present instance he generally concurred with his conclusions regarding procedural matters. He agreed, in particular, that the issue of immunity should be raised at an early stage and that immunity belonged to the State and not to the official, and he generally endorsed the discussion of waiver, with the exception of the material presented in paragraphs 44 and 45.

42. Referring to paragraph 15 of the report, he said the Special Rapporteur had indicated that a declaration of immunity by a State official himself did not appear to have much legal significance. That brought to mind the contemporary case involving the former Managing Director of the International Monetary Fund, Mr. Dominique Strauss-Kahn. It would be interesting to know what would have happened if he had asserted his own immunity when taken into custody by the New York police. Similar problems could well arise for a Head of State or Head of Government from a relatively unknown State. Should States be obliged to inform their police authorities of the presence of all visiting Heads of State? In the first footnote to paragraph 19, the Special Rapporteur said that members of the troika were known to the authorities of all other States—but that was by no means always true. Some significance thus had to be attached to a claim of immunity on his or her own behalf by a Head of State or Government.

43. In his third report, as in earlier ones, the Special Rapporteur failed to distinguish between ordinary crimes and core crimes. He referred repeatedly to the immunity of the troika, as if by asserting often enough that Ministers for Foreign Affairs should be included among the officials who enjoyed personal immunity, it would be accepted as custom. The immunity of Ministers for Foreign Affairs was disputed, however. In its judgment in the *Arrest Warrant* case, the ICJ had failed to provide any evidence of State practice, and Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert had written important dissenting opinions. The judgment had also received considerable academic criticism. In the first footnote to paragraph 58 of the report, the Special Rapporteur drew attention to an article by Akande and Shah,³⁹² but he failed to mention their views on the inclusion of the Minister for Foreign Affairs in the troika. They accepted that the Head of State and Head of Government enjoyed immunity *ratione personae*, but they declared that extending such broad immunity to other ministers, including the Minister for Foreign Affairs, was erroneous and unjustified.

³⁹² D. Akande and S. Shah, "Immunities of State officials, international crimes, and foreign domestic courts", *European Journal of International Law*, vol. 21, No. 4 (2010), pp. 815–852.

44. He was not asking the Special Rapporteur to abandon his position, but just to consider such criticism carefully and to research the question of State practice a bit better than the ICJ had done. If the Commission included the Minister for Foreign Affairs in the troika, it would send out the message that it wished to expand immunity, at a time when there was a demand for more accountability and less impunity.

45. His second comment related to the Special Rapporteur's failure to consider the interesting procedural problem that would arise when local or national law prohibited immunity in the case of core crimes. South Africa, for instance, had incorporated in its legislation the provision of the Rome Statute of the International Criminal Court that excluded immunity for Heads of State and Government and other senior officials. Was South Africa, or any State with similar legislation, obliged to follow the ruling in the *Arrest Warrant* case, despite the fact that Article 59 of the Statute of the International Court of Justice said that States were not bound by decisions of the Court? Or would it be bound instead by its obligations under the Rome Statute of the International Criminal Court? Surely the treaty obligation prevailed. The Commission should provide some guidance on how a State was to proceed in such situations.

46. His third and most important comment was on the issue of whether a court of the State exercising jurisdiction could examine a foreign official's entitlement to claim immunity *ratione materiae* and whether a State that invoked immunity must substantiate or justify such a claim. As paragraph 25 of the report indicated, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, France had argued that it was incumbent upon the State invoking immunity to justify its claim. But the Special Rapporteur disagreed with that position, as was clear from his conclusion in paragraph 61 (i) of his third report that: "[i]t is the prerogative of the official's State, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of functions carried out by a high-ranking official for the purpose of ensuring State sovereignty". In support of that conclusion, the Special Rapporteur relied on certain elements of the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* and the advisory opinion of the ICJ concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. But since neither of those cases had been concerned with serious or core crimes, they were not relevant to the issue of immunity in respect of such crimes.

47. The Special Rapporteur also relied on a decision of a United States court of appeal in the *Belhas et al. v. Ya'alon* case, which had concerned the bombing by Israel in 1996 of a compound in Lebanon that had been protected by the United Nations. The bombing had been ordered by a former general, General Ya'alon, who had been serving at the time as head of military intelligence. The court had found in favour of the general's immunity based on a letter in which the Israeli Ambassador to the United States had written that anything the general did had been done in the course of his official duties. Interestingly enough, the court had also examined the question of whether an official continued to

enjoy immunity after he or she had left office—a question that the Special Rapporteur had not addressed. The court had also considered whether the *jus cogens* exception applied, and had found that it did not.

48. The Special Rapporteur went even further than had the United States court, however. In paragraph 30 of his report, he acknowledged that the State exercising jurisdiction was not obliged to "blindly accept" a claim by the official's State that he or she had acted under its authority and therefore enjoyed immunity. Apparently, however, the obligation not to "blindly accept" a claim related only to acts that were inherently personal or private. In cases where an official had committed some act in furtherance of State policy, immunity was absolute and the claim of immunity might not be questioned by the court exercising jurisdiction. That absolutist approach was further evidenced by the Special Rapporteur's references to sovereignty and the prerogatives of the State in paragraph 61 (i) and in paragraph 31, where he had written that "[t]he question of an official's status, functions and importance for the exercise of State sovereignty, and the question of whether the person is acting in an official capacity, fall within the domestic competence of the official's State".

49. He wished to ask the Special Rapporteur the following hypothetical question: what if Mr. Ratko Mladić had gone to the Russian Federation in disguise, had been identified by the Russian police and had been brought before a Russian court, but the Government of Serbia had submitted to the court a letter similar to that of Israel in the *Belhas et al. v. Ya'alon* case, stating that anything done by Mr. Mladić had been done in the course of his official duties? What should the Russian court then do? Should it accept the assertion by Serbia of functional immunity for Mr. Mladić; seek further information on his conduct to ascertain whether he had actually been a Serbian official; or, in line with the argument advanced by Akande and Shah and cited in paragraph 58, rule that there could be no immunity for serious international crimes subject to extraterritorial jurisdiction?

50. The Special Rapporteur would probably reply that that was a *sui generis* case. However, many similar cases could be adduced. The main point was that the crimes with which the Commission was concerned were very serious crimes, and when such crimes were involved, a State claiming the immunity of its official must be required to justify its plea of immunity. It was not enough to say that the act was official in nature.

51. If the Special Rapporteur considered that the Commission should approve the detailed conclusions contained in the second and third reports, that would be unfortunate, as it would unduly tie the hands of the next Special Rapporteur. The Commission should simply take note of those interesting, albeit controversial, conclusions.

52. Reputations were long in the making but could be lost overnight. The Commission had adopted many progressive instruments over the years, but its good reputation could be damaged if it leaned too far, with regard to immunity, towards the interests of the State, if it did not find a balance between the old legal traditions and new expectations.

53. Mr. KOLODKIN (Special Rapporteur) said that he would reflect on and respond later to Mr. Dugard's hypothetical question. The South African legislation implementing the Rome Statute of the International Criminal Court, to which Mr. Dugard had referred, had been mentioned in the second footnote to paragraph 74 of the second report on the topic (A/CN.4/631). Mr. Dugard's second question, on what action South Africa should take in view of the existence of such legislation, missed the point. The issue was not whether South Africa should follow the reasoning of the ICJ in the *Arrest Warrant* case—which had nothing to do with South Africa—or abide by its obligations under the Rome Statute of the International Criminal Court—which it obviously must do as a party thereto. The point was that all States—South Africa included—had certain obligations under general international law and had to act in accordance with them in certain circumstances. Whether or not South Africa deemed the findings of the ICJ to concord with general international law was a separate matter. He personally believed that they did.

54. The Commission was dwelling on one “unfortunate” ruling by the ICJ on the personal immunity of the troika—the *Arrest Warrant* case. In fact, however, that ruling had been clearly confirmed by the Court in paragraph 170 of the judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. There were thus two rulings, not just one, on the personal immunity of the troika.

55. Mr. PELLET said that he agreed on most points with Mr. Dugard, but wondered why he wished to exclude the Minister for Foreign Affairs from the troika. If the other State officials in the troika enjoyed personal as opposed to functional immunity for their acts, Ministers for Foreign Affairs obviously ought to be included also, since their function was to represent the State. Good arguments in support of that position could be found in treaty law and in case law. Nevertheless, he agreed with Mr. Dugard that Heads of State, Heads of Government and Ministers for Foreign Affairs did not enjoy immunity if they committed serious crimes.

56. Mr. SABOIA said he agreed with Mr. Pellet that Ministers for Foreign Affairs should not be excluded from the troika but said that he nonetheless shared most of Mr. Dugard's views on the report, especially those on the inadvisability of extending immunity *ratione personae* to officials beyond those in the troika and on using the summary in paragraph 61 of the report as the Commission's conclusions on the topic.

57. Mr. DUGARD said that his main point was that the Commission should look very closely at the issues of accountability and impunity when serious, core crimes had been perpetrated. An exception to immunity should be made in such cases. The case concerning *Certain Questions of Mutual Assistance in Criminal Matters* had not involved such crimes and, for that reason, it did not support the *Arrest Warrant* case on the facts. In any event, if a court was wrong on one occasion and then repeated itself, it was wrong on the second occasion as well.

58. Mr. PETRIČ said he agreed with Mr. Dugard that to unduly enlarge the circle of people enjoying personal

immunity would militate against efforts to ensure that everyone should be punishable if they committed core crimes. He also shared Mr. Dugard's concerns regarding the substantiation of a claim of immunity.

59. Mr. PERERA, referring to the Special Rapporteur's third report, said that it showed a high degree of scholarship in its treatment of the timing for the intervention of considerations of immunity, the invocation of immunity and the waiver of immunity, all of which were well supported by case law, State practice and academic opinion.

60. The Special Rapporteur rightly emphasized the fact that the immunity of a State official from foreign criminal prosecution should be examined at an early stage of judicial proceedings, or even at the pretrial stage. His conclusion that failure to consider the issue of immunity *in limine litis* might be viewed as a violation of the obligations of the forum State under the norms governing immunity was correct and was supported, *inter alia*, by the advisory opinion of the ICJ in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.

61. In the treatment of the invocation of immunity, a carefully structured and balanced approach was taken to the different categories of State officials. The Special Rapporteur started from the proposition that, in order to be “legally relevant”—in other words, to have legal consequences—immunity had to be invoked by the official's State and not by the official. For that purpose, the official's State must be informed of criminal proceedings undertaken or planned against the official concerned. In the case of the troika, however, the official's State did not bear the burden of raising the issue of immunity, since the authorities of the State exercising criminal jurisdiction were expected to know the person's status and the capacity in which he or she had been acting. On the other hand, the burden of invoking the immunity of an official enjoying functional immunity must lie with the official's State, since only that State was well placed to testify as to the official's status and the fact that the acts were performed in an official capacity. In the event of a failure to discharge that burden, the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu* and it might therefore continue with criminal prosecution.

62. The position with regard to other high-ranking persons enjoying functional immunity, apart from the troika, was more complex. Part of the difficulty was due to the absence of agreed criteria for determining such categories. The importance of the functions performed by such officials from the perspective of State sovereignty and relevance to the conduct of international affairs might be possible criteria. It would be reasonable to require that the invocation of immunity in respect of that category of officials be supported by cogent material confirming that the official concerned, by reason of his or her status and functions and their connection to the sovereign functions of the State, did in fact satisfy the criteria for asserting personal immunity. Much would depend on the circumstances of each case and on the available material justifying that claim. As noted in paragraph 31 of the third report, while the State

exercising jurisdiction could not ignore the invocation of the personal immunity of such officials—to which he would add the caveat “in appropriate instances”—such a State was not obliged to “blindly accept” any such claim. In short, the category of high-ranking officials, apart from the troika, who enjoyed functional immunity deserved very careful consideration.

63. He maintained his position that a Minister for Foreign Affairs should be considered to be part of the troika. He or she acted as the intermediary between the State and the international community and had standing authority, conferred by the Head of State or Government, to commit the State to certain acts, an authority recognized in the 1969 Vienna Convention.

64. As for the modalities of informing a court of an official’s immunity, he agreed that there was ample State practice to show that such information could be communicated through diplomatic channels, so that the State need not assert the immunity of its official before a foreign court.

65. He was in broad agreement with the Special Rapporteur that the right to waive immunity was vested in the State and that the waiver of immunity in respect of officials forming part of the troika must be expressly stated, whereas a waiver of immunity with regard to all other categories of officials could be express or implied.

66. Concerning the difficult question, addressed in paragraph 44 of the report, of whether a State party to a treaty for the defence of certain human rights implicitly waived the immunity of its officials if they committed violations of such rights, his view was that, in the absence of express provisions on waiver of immunity, an inference of implicit waiver should not be drawn lightly. In that connection, he referred to the memorandum by the Secretariat,³⁹³ cited in paragraph 46 of the report, which indicated that there was a general reluctance to accept an implied waiver based on the acceptance of an agreement. As the resolution of the Institute of International Law³⁹⁴ mentioned in paragraph 47 of the report stated, the emphasis must be on the clarity and lack of ambiguity of the waiver of immunity.

67. Lastly, as to the responsibility of the State that had invoked the immunity of the official, he was in broad agreement with the Special Rapporteur that this constituted an act on the part of the State that could establish grounds for its international responsibility. However, he also shared Mr. Singh’s view that that was only one aspect, and not necessarily a conclusive one, in the establishment of responsibility.

68. In conclusion, he commended the Special Rapporteur for his work on the topic, as reflected in his three reports.

69. Mr. PELLET said that from his own personal experience, he knew that special rapporteurs were often fair game for the hunters lurking among the ranks of

Commission members. For his part, he would certainly try to trap the Special Rapporteur on a number of points because, like Mr. Dugard, he thought that some of his views were a bit dangerous.

70. The third report was well argued, consistently interesting and, overall, far less provocative than the second report. It was somewhat disturbing, however, to see that the third report had been submitted for the Commission’s consideration before any decision had been taken on the second report which, despite its indubitable technical merits, had been met with mixed reactions.³⁹⁵ It seemed the Commission was being forced to embark on the codification of the modalities for granting or refusing immunity to State officials while still not having agreed on the grounds for, limits of and conditions surrounding such immunity. It could be argued that those matters hardly came into play in the third report, which dealt with procedural aspects, but the fact that the Commission’s discussions during the first half of the session had been so inconclusive did have a direct bearing on certain aspects of the third report.

71. For instance, it was very difficult for the Commission to outline the conditions for waiving immunity without having established when and under what circumstances, if any, an official enjoyed such immunity, and without having resolved the crucial question of whether members of the troika enjoyed immunity for the most serious international crimes such as genocide, crimes against humanity and very grave human rights violations. He shared Mr. Dugard’s views: immunity should not be allowed in such cases.

72. Paragraph 20 of the report quoted a statement that he himself had made as counsel for France in the oral pleadings in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.³⁹⁶ Although the quotation was correct, it was taken out of context. It might lead to the erroneous conclusion that, in his view, Heads of State, other members of the troika and heads of diplomatic missions enjoyed unlimited immunity. As he had said in the past and more recently, there was no immunity for grave international crimes: the State became transparent and could no longer shield its officials from international law. Furthermore, as Mr. Dugard had observed, the case involving Djibouti and France had dealt, not with grave crimes, but with much more trivial matters.

73. In the oral pleadings, he had acknowledged that the State did not need to prove that acts by members of the troika were performed as part of official duties, because their immunity was personal, and in that sense absolute. But the Special Rapporteur had not quoted the rest of his statement, which read: “*par contre, pour les autres fonctionnaires de l’État, cette présomption ne joue pas et l’octroi (ou le refus) des immunités doit être décidé au cas par cas, en fonction*

³⁹⁵ For the consideration of the second report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631) at the present session, see the 3086th, 3087th and 3088th meetings above.

³⁹⁶ ICJ, Public sitting held on Friday, 25 January 2008, at 10 a.m., at the Peace Palace, President Higgins presiding, in the case *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, verbatim record (CR2008/5), pp. 23 *et seq.* (available from the website of the ICJ: www.icj-cij.org).

³⁹³ Document A/CN.4/596 and Corr.1; mimeographed, available from the Commission’s website (documents of the sixtieth session).

³⁹⁴ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.*

de tous les éléments de l'affaire. Ceci suppose que c'est aux juges nationaux qu'il appartient d'apprécier si l'on se trouve face à des actes accomplis—ou non—dans le cadre des fonctions officielles” [“on the other hand, where the other officials of the State are concerned, that presumption does not operate and the granting (or refusal to grant) of immunities must be decided on a case-by-case basis, on the basis of all the elements in the case. This supposes that it is for national courts to assess whether we are dealing with acts performed—or not—in the context of their official functions”].³⁹⁷

74. From that passage it was clear that, while he agreed with the Special Rapporteur that the official's State had no need to formally request immunity for the official if he or she was a member of the troika, it did need to do so where other officials were concerned; in the latter case, moreover, the State must give reasons to support that request, but ultimately, the decision on whether to grant immunity rested with national courts.

75. There were certain aspects of the report that caused him concern in that regard. He found it difficult to accept that a State could invoke the immunity of its officials without stating the reasons for such immunity, as the Special Rapporteur seemed to assert in paragraph 27. That was hardly consistent with the statement in paragraph 30 that “[a] court may independently inquire into the reasonableness of such a claim”. The inconsistencies culminated in the final sentence of paragraph 61 (i): “It is the prerogative of the official's State, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of functions carried out by a high-ranking official for the purpose of ensuring State sovereignty.” He could not agree less: it was the responsibility of the State exercising jurisdiction, taking into account the explanations provided by the State of the official, to decide whether that official should be granted immunity.

76. He disagreed with the Special Rapporteur on another point related to the debate during the first half of the session, about which Mr. Dugard had also expressed concern. In paragraph 44, the Special Rapporteur indicated that treaties providing for universal jurisdiction in respect of certain conduct did not constitute implied waivers of immunity. That was certainly not true, particularly where a universal jurisdiction clause contained an obligation to prosecute or extradite. In addition, he took issue with the statement in the penultimate sentence of paragraph 44 that “an international agreement cannot be construed as implicitly waiving the immunity of a State party's officials unless there is evidence that that State so intended or desired”. The objective was not to find out what was the intention or will of an individual State, but rather to determine the collective intention or will of all the States parties to a treaty or agreement, using the general rule of interpretation laid down in article 31 of the 1969 Vienna Convention. It could hardly be disputed that States parties to a treaty that established universal jurisdiction for certain crimes and imposed on States the obligation to extradite or prosecute, making no exception for a country's leaders, aimed to combat the impunity

that was guaranteed by immunity. The collective will of such States must be interpreted as precluding the alibi of immunity.

77. Another point connected with the inconclusive debate during the first half of the session came up in the footnote to paragraph 60, which cited a comment made during the Commission's sixtieth session by Ms. Jacobsson.³⁹⁸ She had argued that a State that refused either to prosecute one of its officials or to waive his or her immunity could incur responsibility for internationally wrongful acts. However, the problem might be addressed from a different angle, by stipulating that there were cases in which a State must waive the immunity of its officials, or, better still, by firmly establishing that, in respect of certain crimes, certain officials did not enjoy any form of immunity.

78. The Special Rapporteur had drawn his conclusions in the form of a summary rather than of draft articles, thereby skirting the problem of consigning texts to the scrutiny of the Drafting Committee. Despite the sometimes questionable nature of the Special Rapporteur's arguments, the extensive research he had done had enabled him to tackle important issues and to propose a certain number of solutions. He himself would therefore recommend that the new special rapporteur to be appointed start work on the topic from scratch and find some middle ground between the culture of impunity, towards which the Special Rapporteur inclined, and total rejection of immunity for State leaders, which was obviously not an option.

79. Mr. McRAE said that the Special Rapporteur's third report contained a great deal of convincing analysis, even though his conclusions, as he himself recognized, were extrapolations rather than clear-cut conclusions based on State practice.

80. The consideration of the third report highlighted the fact that some of the Commission's uncertainties concerning the first and second reports remained; as Mr. Pellet had pointed out, perhaps those matters should have been resolved before discussing the third report. For example, the issue of whether the troika should be enlarged to include other senior officials such as ministers of international trade or ministers of defence had resurfaced. The Special Rapporteur held that for persons with functional immunity, it was the responsibility of the State claiming immunity to raise the matter with the prosecuting State, whereas for members of the troika, who were entitled to personal immunity, it was the prosecuting State itself that was responsible for recognizing immunity. The reasons given by the Special Rapporteur seemed attractive: the fact that certain individuals were Heads of State or Government or Ministers for Foreign Affairs and enjoyed personal immunity was generally well known. He nevertheless endorsed Mr. Dugard's comment that, while that might be the case for large, prominent States, it was unlikely to be true for certain other States.

81. Since the Minister for Foreign Affairs was now only one among several who represented the State abroad, broadening the categories of officials for whom personal immunity was to be asserted seemed to make sense. Yet to

³⁹⁷ *Ibid.*, p. 51.

³⁹⁸ *Yearbook ... 2008*, vol. I, 2985th meeting, p. 205, paras. 5–7.

enlarge the troika involved difficult decisions about which officials should be added, and, as a matter of policy, that was probably undesirable. Perhaps the responsibility for asserting immunity should in all cases be borne by the State claiming it, irrespective of whether or not the individual was a member of the troika. It seemed highly unlikely that a State would fail to notice that a Head of State was being prosecuted in a foreign court, unless it deliberately ignored the fact. In practical terms, requiring an official's State to assert immunity to the prosecuting State hardly seemed to be a great burden. Accordingly, the Special Rapporteur's conclusions in paragraph 61 (e), (f) and (g) of his report might merit reconsideration.

82. In addition, the assertion in paragraph 61 (i) that it was the prerogative of the official's State to characterize the conduct of an official as being the official conduct of the State went much too far. Surely the prosecuting State was also entitled to look into whether an act could be characterized as official: that was not solely the "prerogative" of the official's State. In paragraph 30, the Special Rapporteur recognized that the prosecuting State could inquire into the reasonableness of such a claim. Basing his argument on the advisory opinion of the ICJ in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, he suggested that the appointment of an individual as an official created the presumption that he or she was acting in an official capacity. There, the Special Rapporteur went further than the Court, which had been referring to a presumption created by a claim of the Secretary-General of the United Nations that the individual concerned was acting as an official, not to a presumption based on the mere fact of appointment. It was really a question of how far the prosecuting State should go in looking into claims that an official was acting in an official capacity. Obviously each case would have to be assessed on its facts, but to suggest that there was a "presumption" arising out of the mere appointment of an official was to go too far and could not be substantiated.

83. The comprehensive series of reports³⁹⁹ produced on the topic by the Special Rapporteur had provided an excellent basis for the Commission to move forward. However, there was one important issue on which the Special Rapporteur and many members of the Commission remained divided—the extent of possible exceptions to the immunity of State officials, particularly in respect of serious international crimes. It should be the first item to be considered at the sixty-fourth session and should be dealt with initially by a working group. Until the issue was resolved satisfactorily, the Commission would not be able to make real progress.

84. In conclusion, he thanked the Special Rapporteur for his most valuable contribution to the Commission's work.

The meeting rose at 12.50 p.m.

3114th MEETING

Thursday, 28 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646).

2. Mr. PETRIČ noted with satisfaction that, in his third report, the Special Rapporteur had identified all the relevant rules *de lege lata*, which on the whole derived from customary law, and had set out the procedural aspects of the immunity of State officials. The Special Rapporteur's viewpoint was carefully based on relevant State practice and national and international judicial practice, as well as the doctrine, and his approach was characterized by sharp legal logic. As he had already indicated during the consideration of the Special Rapporteur's second report,⁴⁰⁰ he personally continued to believe that the Commission should adopt a balanced approach to the topic. Immunity had been well established in past centuries as a reflection of State sovereignty and thus of the principle *par in parem non habet imperium*, from which immunity *ratione personae* was derived, and as a consequence of the greater need for safe international communications, which was a source of immunity *ratione materiae*. Today, and probably even more so in the future, the principle of non-impunity for crimes under international law, the concept of universal jurisdiction and efforts to establish the rule of law as a common value accessible to all peoples should have an impact on the concept of immunity and its applicability. Thus, when the Commission elaborated the draft articles on the immunity of State officials in the next quinquennium, it should codify existing customary rules, but it should also not hesitate to promote progressive development. Serious consideration should be given to the point made at the previous meeting by Mr. Dugard on the importance of distinguishing between ordinary crimes and core crimes.

³⁹⁹ The preliminary report is reproduced in *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

⁴⁰⁰ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631. For the consideration of the second report at the present session, see the 3086th, 3087th and 3088th meetings above.

3. In several paragraphs, essentially paragraphs 23 to 31 of his third report, the Special Rapporteur touched upon the problem of substantiating the invocation of immunity by the official's State. The Special Rapporteur took the categorical view that substantiation was not needed and could not be requested by the State exercising the jurisdiction or by its court, and he did not see any significant difference between personal and functional immunity. In paragraph 26, he explained that his position was based primarily on the fact that, if acceptance of the invocation of immunity must be substantiated, "an official's State may be requested to provide information that is of an extremely sensitive nature for it and to disclose data related to its internal sovereign affairs". Even if it was generally accepted that in case of invocation of immunity *ratione materiae*, substantiation was necessary, nothing would prevent the official's State from substantiating the invocation of immunity only as much as it would consider necessary for the invocation to be persuasive and effective. In any event, as the Special Rapporteur himself argued, the official's State must at least invoke the fact that the person concerned was its official and had been acting in an official capacity. Thus, in many cases substantiation might not be much more than a sufficiently elaborated invocation of immunity, which would neither force the jurisdictional State to "blindly accept" (para. 30) the invocation nor put it in a position to ignore it.

4. It could be claimed that in the case of functional immunity, since it was not obvious that the person who had committed the illicit act was a State official acting in an official capacity, there might be a need or even a duty to substantiate the invocation of immunity. That issue had been raised in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* by France, which had contended that the absence of substantiation "would signify that all an official, regardless of his rank or functions, needs to do is assert that he was acting in the context of his functions to escape any criminal prosecution in a foreign State" (para. 189 of the judgment). That warning, which should be taken into consideration, was particularly relevant in the context of progressive development. Clearly, if a State was not required to substantiate the invocation of the immunity of its officials, then immunity *ratione materiae* could be granted in an arbitrary manner, in disregard of the rationale of such immunity, and could create legal uncertainty. Moreover, if a State could invoke the immunity of all its officials without substantiating that the illicit act was of an official nature, that would amount to granting *de facto* immunity *ratione personae* to all its officials, and immunity for acts actually performed in a private capacity might also be granted. Thus, immunity *ratione materiae* would lose its functional character and would also become the privilege of persons who were not part of the troika. If a State was not under an obligation to substantiate the invocation of immunity *ratione materiae*, that might favour unjustified impunity. He hoped that the Special Rapporteur could provide some clarification on that matter.

5. In paragraph 31, and implicitly in other paragraphs, the Special Rapporteur asserted that "the State must set out the grounds for a claim that, although its official is not a Head of State or Government or a minister for foreign affairs, his or her status and functions nevertheless meet the criteria

for asserting personal immunity". At issue was personal immunity, and not functional immunity. Concerning the latter, there was no question that the official's State was sovereign to decide, *inter alia*, who its officials were and what acts they were authorized to perform on its behalf. Personal immunity for acts performed by members of the troika in their official capacity overlapped with functional immunity. However, the immunity *ratione personae* of those officials, which covered not only acts performed in an official capacity while in office, but also acts performed in a private capacity, including when they were no longer in office, was in his understanding a privilege based on international law, and not on domestic law. That huge privilege, which was limited to the three highest State officials, was a direct reflection of State sovereignty, which the Head of State and the Head of Government symbolized, and of the special position of the Minister for Foreign Affairs in inter-State relations. The three members of the troika enjoyed *jus representationis omnimodae* in international law, and thus (contrary to what the Special Rapporteur seemed to imply in paragraph 31) the State should not be authorized to enlarge the troika of officials enjoying immunity *ratione personae*. That narrow circle of three persons could be enlarged—which would have an impact on international law and in the area of immunity—by a new convention or by general converging practice of States creating a new *opinio juris*—a new customary rule of international law—and not just by the official's State.

6. Views had been expressed during the debate at the previous meeting on the immunity *ratione personae* of the Minister for Foreign Affairs and other possible beneficiaries of such immunity. The position of Ministers for Foreign Affairs in international relations, which traditionally was special and fairly well established in international law, should be respected. An enlargement of the troika to include new beneficiaries of immunity *ratione personae* should be considered in the contemporary context: today, expectations were that there should be less rather than more immunity, in particular for crimes of international law, and that such crimes would not go unpunished.

7. He hoped that his comments would help clarify a number of remaining questions. Apart from that, he endorsed the views and conclusions contained in the Special Rapporteur's excellent third report.

8. Mr. HMOUD said that, as with the conclusions of the preliminary report,⁴⁰¹ the second report had given rise to differences of opinion in the Commission which reflected the division in the international community and among legal scholars about the scope of immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur advanced very solid arguments in support of his core conclusions, but the fact remained that the traditional concept of immunity was on the defensive. The current state of law was not the same as it had been in the 1800s. While few would contest the need to implement the principles of sovereign equality and non-interference in international relations, the content of the rights and obligations of such principles took into account the changes that occurred at the international level and the different perspective of the international community

⁴⁰¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

in that regard. Those were core principles in international relations that existed in order to protect States, no matter what their status, size or weight on the international scene, but they were not a licence to abuse the underlying rights. On the contrary, sovereign equality and non-intervention could be used in certain circumstances as arguments against absolute immunity. When a State committed acts against the territory, population and national interests of another State in violation of international law and the national law of the latter State, it was violating the principles of sovereign equality and non-intervention. Thus, by invoking absolute immunity to shield its officials on the basis of the very principles that it was violating, a State significantly undermined its legal position. As such, the immunity of State officials from the criminal jurisdiction of another State was on a case-by-case basis and was not a blanket immunity. Despite certain assertions by the Special Rapporteur, his second report, even more than the preliminary report, had the consequence of granting blanket immunity, which would affect the conduct of international relations and would actually lead to more tensions than those caused by the blanket application of universal jurisdiction. When an aggrieved State, knowing that it had no recourse at the international level, was unable to assert its criminal jurisdiction in a case in which its sovereignty had been violated by the criminal action of an official of another State, there was a potential that it would retaliate unlawfully against the latter State, and that would have an adverse impact on international relations. The Commission should take that into account and reach conclusions on the topic that ensured sovereign equality and protected against abuse. As a result, he supported the proposal that the Commission establish a working group to consider the core principles associated with immunity of State officials, whether immunity was the norm or the exception, as Mr. Murase had said, the relationship with national jurisdiction, the scope of functional and absolute immunity, and the relationship between those types of immunity and various offences, including the most serious international crimes. In so doing, the working group would need to examine international jurisprudence and to note that the judgments of the ICJ in the *Arrest Warrant* and the *Certain Questions of Mutual Assistance in Criminal Matters* cases had not endorsed the principle of absolute immunity and had in fact introduced limitations on immunity. The *Arrest Warrant* case actually provided an opening for the exercise of jurisdiction in certain situations and had upheld immunity in that particular situation, because the Court had concluded that the exercise of universal jurisdiction by one State hindered the proper performance of the functions of a Minister for Foreign Affairs of another State. However, the Court had not ruled out the possibility of the exercise of foreign jurisdiction following the departure of a high-ranking official from office in cases of the most serious international crimes and had not conditioned such jurisdiction on a waiver of immunity by the official's State. That was confirmed by the joint separate opinion of Judges Higgins, Kooijmans and Buergethal. Thus, the working group would have to look into the question of whether, in the case of the most serious international crimes, functional immunity continued to exist after the departure of the State official from office. In *Certain Questions of Mutual Assistance in Criminal Matters*, the Court had not ruled out the application of functional immunity, but it had also not

specified the elements of such immunity or indicated whether "acts carried out in [a]n official capacity" constituted a sufficient threshold for such immunity.

9. The working group should also examine the issue of attribution in the context of functional immunity. The Special Rapporteur contended that the act of a State official was an act of the official's State in order to counter any argument that such an act could be subject to the criminal jurisdiction of a foreign sovereign. He then stated that it was an act with "dual" attribution, which confirmed the proposition that the forum State could assert its criminal jurisdiction in certain circumstances over the foreign official without ruling on the attribution of the act to the official's State. Even if the act was attributed to the official's State, that State could not be considered under general international law to have committed an international crime, but the official could be, and a closer consideration was needed of the circumstances in which the official could not be shielded from foreign criminal jurisdiction when acting in an official capacity.

10. The Special Rapporteur advanced a proposition with a very limited exception—which he called absence of immunity—in the case of an act by a State official committed against the sovereignty of another State while his/her presence in the territory of that State was not consented to. Actually, if the logic used in the three reports on immunity was followed, even in that case the official's State could invoke immunity on the official's behalf; after all, it was an act of that State, which under international law should not be subject to foreign criminal jurisdiction.

11. A State whose sovereignty had been violated by the official of another State must be entitled to exercise its criminal jurisdiction and should not in all circumstances be prevented from doing so in the name of "procedural" immunity. A State had the right and duty to protect its nationals and its territory against violations of international law committed by another State, including through its officials. Assuming that customary international law provided for immunity for the State official, there was an equal if not superior principle stemming from sovereign equality, which gave the other State rights and obligations under international law in relation to its territory and citizens. If a State was the victim of an act of sabotage committed in its territory by foreign State officials who had not been present in that territory during the commission of the act, or if members of its population living abroad were victims of ethnic cleansing committed by officials of another State, did that "procedural immunity" prevent it from exercising its right and obligation under international law to protect its territory and its nationals? That was not a question of *lex lata* versus *lex ferenda*: only *lex lata* was involved. At a minimum, the injured State had the right, under the doctrine of countermeasures, to suspend the application of the obligation towards the injuring State of granting immunity to the latter's official who had committed the act. That was not *lex ferenda*. That was certainly better for the stability of international relations than for the injured State to resort to the use of force because the injuring State invoked "procedural immunity", and it advanced the principle of sovereign equality better in case the State could not resort to the use of force.

12. The Commission in its future composition, and possibly the working group that might be established, should examine the issue of the prosecution of grave international crimes that violated the principle of *ius cogens* and consider whether they prevailed over procedural immunity. In a conflict between two principles of international law, the one with the higher value was applicable, even if the two principles were of a different nature. The ruling of the ICJ in the *East Timor* case was not comparable, as the issue had involved the jurisdiction of the Court and the possibility that a ruling on the *erga omnes* character of certain obligations would have required the Court to rule on the conduct of a State that had not been a party to the case before it.

13. On the whole, he agreed with most of the propositions advanced by the Special Rapporteur on the procedural aspects of immunity, except when such propositions aimed to reinforce substantive conclusions in the second report. He concurred with the Special Rapporteur that the question of immunity must be considered at an early stage of a trial and must be decided expeditiously due to the potential harm that might arise from any delay. In general, if the official concerned was part of the troika, the State of jurisdiction must assume immunity—the official's State did not need to invoke it. However, further consideration should be given to the proposition that the two States—the State of jurisdiction and the State of the high-ranking official—needed to cooperate. When the State of jurisdiction learned that the official concerned might be part of the troika, it should seek confirmation from the official's State if there were doubts concerning the official's status, and the State of that official should then confirm or deny the existence of such status. The official's State should also inform the State of jurisdiction when the latter was not aware of such status.

14. As for functional immunity, apart from the troika, the conclusion that the official's State was the entity entitled to invoke immunity was plausible and was supported by international practice and jurisprudence.

15. Ms. JACOBSSON said that the third report on immunity of State officials was vital for the further consideration of the topic, because it provided a good picture of the Special Rapporteur's approach. Coming from a country which made a clear distinction between the right to establish jurisdiction over crimes by legislative means and the right to apply legislative measures by procedural means, she particularly appreciated the Special Rapporteur's focus on procedure, which, although it could not be separated from material law, was a distinct feature. The Special Rapporteur had suggested a well-structured line of reasoning that should be built upon.

16. Confining herself to the propositions contained in paragraph 61 of the third report, she said that her comments on the procedural aspects of immunity did not mean that she shared the Special Rapporteur's generous view on which persons enjoyed, or should enjoy, such immunity. She agreed with the proposition in paragraph 61 (a) that the question of immunity must in principle be considered as early as possible. In practice, that might be difficult to do, since a pretrial procedure might be initiated by the police authorities long before it became known that

the person subject to the procedure might be entitled to immunity. The Special Rapporteur's approach might require the adoption of legislation. Even if national legislation provided that the question must be raised at an early stage, the national authorities might have difficulty assessing the specific situation.

17. With regard to paragraph 61 (b), she said that, unlike the Special Rapporteur, she did not believe that “[f]ailure to consider the issue of immunity *in limine litis* may be viewed as a violation of the obligations of the forum State under the norms governing immunity”, at least not in all cases, because that would take the obligation too far. The forum State, and in particular its officials, must have a certain latitude to examine whether considerations of immunity were relevant to the case. Moreover, it would be very difficult to define clearly a fixed point at which the responsibility of the forum State should be established. The problem of responsibility for failure to examine the question of immunity must be posed at a later stage.

18. She understood the rationale behind paragraph 61 (c), but thought that the wording of that general rule should be expressed more cautiously. The time element had a role to play in that context. If the State was not in a position to invoke immunity (it might not even know about the case), then the official must be entitled, if not to invoke, at least to inform the forum State that he/she enjoyed immunity. The forum State and its officials would have to take that information into account. That was not the same as saying that such information constituted a legally binding invocation of immunity, but it would certainly be “relevant”.

19. On paragraph 61 (d), she agreed with the Special Rapporteur that the right to be informed was a prerequisite for invocation of immunity. The question was at what stage information should be transmitted, and by whom. First of all, she did not think that it was feasible to establish an obligation that required the forum State to inform the official's State as soon as it considered taking measures. In most democratic societies built on the balance of power, the Government would not even know what the police or a prosecutor was planning. In fact, the preliminary police inquiry into a case would most likely be secret. If there was an international legal obligation to inform at too early a stage, it would probably be necessary to amend national legislation, since representatives of the judiciary would have to consult with the Government. It would not be easy to have such a law passed in parliament, because such provisions would be perceived as a threat to the independence of the police and the prosecution.

20. She did not agree entirely with the proposition contained in paragraph 61 (e). Not all Heads of State or Government and Ministers for Foreign Affairs were as well known as the representatives of the major political powers. Clearly, the State exercising criminal jurisdiction had a special responsibility to inform the official's State when one of the members of the troika was involved. Once it had done so, it had fulfilled its obligation. The duty to cooperate would also have a role to play in that regard and should be granted greater importance in the topic as a whole.

21. Whereas she agreed with the conclusions in paragraph 61 (f), she did not share the assumption on which paragraph 61 (g) was based, namely that such a category of persons actually existed, and that the official's State could simply declare that a person enjoyed immunity and that such immunity must be respected. She would therefore refrain from commenting on paragraph 61 (g). As had been pointed out, paragraph 61 (g), like paragraph 61 (f), concerned the scope *ratione materiae* of immunity. With regard to paragraph 61 (h), she agreed that it was sufficient for the immunity to be invoked through diplomatic channels, but she was far from convinced that such invocation would imply that the court of the State exercising jurisdiction would be barred from continuing its procedure. However, she noted that the Special Rapporteur used the formulation "in order for that court to consider the question of immunity", which seemed somewhat more cautious than simply saying that the court would be barred from continuing its procedure. Regarding paragraph 61 (i), she agreed in part and disagreed in part. She agreed that the State invoking immunity was not "obliged" to provide grounds, apart from those referred to in paragraph 61 (f) and (g), but then it could not assume that such invocation would be accepted in all cases. The State invoking immunity should at least be encouraged to provide grounds for its invocation, which could be done in simple terms and without infringing the principle of the equality of States and other important principles.

22. The proposition set out in paragraph 61 (j) seemed to be the general rule, but the conclusion needed to be qualified. The conclusion in paragraph 61 (k) likewise needed to be further elaborated. On the other hand, the reasoning in paragraph 61 (l) was not entirely clear, first, because it was the first time that the Special Rapporteur had referred to a "serving" Head of State, and, secondly, because the situation described in the second sentence was not necessarily connected to the requirement that the waiver of immunity be express. However, she agreed with the example given. She also endorsed paragraph 61 (m), but with the understanding that she did not share the Special Rapporteur's view on which State officials enjoyed immunity, and she concurred with the proposition in paragraph 61 (n). In paragraph 61 (o), she agreed that immunity must have been invoked before criminal proceedings commenced, except in situations in which the State was not aware that proceedings had been instituted.

23. She endorsed paragraph 61 (p), but emphasized that when a State waived the immunity of its official, it was not necessarily relieved of its responsibility under international law. If an official of a State that had a *de facto* policy of ethnic cleansing had committed illegal acts in accordance with that policy, and that State (which denied that it had such a policy) admitted that the official had committed illegal acts but was prepared to waive his immunity, the State could not then claim that it had no responsibility for the illegal policy and for the acts committed under that policy. She was therefore pleased that the Special Rapporteur had raised the point in paragraph 61 (q), whose conclusion was very important. She fully agreed with paragraph 61 (q) and (r). She thanked the Special Rapporteur for his well-structured and well-researched report and hoped that the Commission in its new composition would address the topic as a matter

of priority in order to decide on the most important issue, namely the extent of immunity, so that it could then move on to the elaboration of draft articles.

24. Mr. NOLTE said that the Special Rapporteur had once again provided the Commission with a well-researched and thoughtful report that carefully digested the pertinent sources and balanced the relevant arguments. The Special Rapporteur had not relied too much on extrapolations from logic; rather, he had drawn on enough practice to enable the report to serve as an excellent basis for future work. As he was in general agreement with the Special Rapporteur's approach and conclusions, he would limit himself to a few points. However, since some members of the Commission had reopened the debate on issues raised by the second report, which had been discussed in the first part of the current session, he would also add a few remarks in that regard.

25. Mr. Dugard had ended his impassioned intervention with a warning that the Commission might damage its reputation if it did not meet the expectation that it recognize an exception to immunity in cases of core crimes or human rights violations. Mr. Dugard's concern was unjustified for two reasons. First, the Commission always sought to strike a balance between different legitimate considerations and did not let itself be guided disproportionately by one of them. Secondly, neither the ICJ nor the European Court of Human Rights had compromised their reputation with their rulings in the *Arrest Warrant* case or the case concerning *Al-Adsani v. the United Kingdom*. In any event, although there was a trend to restrict immunity in the context of the creation of international jurisdictions, a countervailing trend to recognize immunity before national jurisdictions could also be observed, as shown by the *Arrest Warrant* and *Al-Adsani v. the United Kingdom* cases. The two trends were not contradictory, but complementary from the more general viewpoint of the fight against impunity, which required restricting immunity, although primarily before international jurisdictions, and not in a way that would threaten peaceful international relations; hence the legitimacy, in principle, of immunity before national jurisdictions. Ultimately, such a balance was the way to combat impunity effectively without running the risk of being discredited or of paying too high a price.

26. For lack of time, Mr. Pellet had confined himself to forcefully asserting that there was no immunity for core crimes. Both Mr. Pellet and Mr. Murase had argued on a very general and abstract level. The Commission should address the matter in greater detail during the next quinquennium and should examine the possible implications and consequences of such an assertion. He therefore supported Mr. McRae's proposal on how to proceed.

27. He agreed that the Commission should not reopen the debate on the personal immunity of the Minister for Foreign Affairs and that it should not extend such immunity to other official functions. Today, in the age of globalization, international relations were not necessarily limited to the troika, and the Commission should not rule out the possibility that other State officials, depending on the circumstances, were in a situation sufficiently comparable to that of the members of the troika to benefit from personal immunity.

28. Turning to the questions addressed by the Special Rapporteur in his third report, including whether a State which exercised jurisdiction was required to consider the issue of immunity *proprio motu*, he said that the Special Rapporteur's careful analysis, in paragraphs 16 to 18, of the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* should be pursued a bit further. He agreed with the Special Rapporteur's point of departure, which was the statement by the Court according to which "[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned". Given the context in which it had been formulated, it was clear that that statement had not been intended to mean that a State could exercise criminal jurisdiction against one of the three highest officials until their State invoked their personal immunity. The Special Rapporteur rightly noted that the identity of those officials was usually well known or could be immediately verified. As pointed out in paragraph 19, in such a case "the State exercising criminal jurisdiction should itself raise the question of that person's immunity", should "make a determination" and should "ask the official's State merely to waive immunity".

29. The argument concerning the duty of the forum State to raise the question *proprio motu* could not be limited to cases in which the three highest State officials were implicated. It was equally applicable when it was manifest, in the circumstances, that jurisdiction would be exercised with respect to an official who had acted in his official capacity. In such a case, the State of the official should have the opportunity to invoke immunity—if the preconditions were established—before relevant measures were taken that would violate immunity. He agreed with the Special Rapporteur, however, that if the State concerned, after having been made or having become aware of the situation, did not express its position within a reasonable time, the forum State could assume that the other State did not claim immunity for its official. That was another aspect of the proceduralization of immunity, which the ICJ had recognized in the *Certain Questions of Mutual Assistance in Criminal Matters* case, and it reflected the principle of *bona fides* which must govern international relations.

30. He acknowledged that the use of the word "manifest" as a criterion in cases of immunity *ratione materiae* might sometimes not prevent a disagreement over whether it was manifest that an official act by a public official was concerned. However, it was not uncommon for procedural preconditions to be determined by the standard of "manifest", which preserved smooth international intercourse and prevented mutual recriminations about whether an initial exercise of jurisdiction had actually been motivated by the wish to make a political point. Therefore, in cases which manifestly involved acts performed by officials in their official capacity, the State which exercised jurisdiction must indicate *proprio motu* to the State of the official concerned that jurisdictional measures were being contemplated and thereby give that State an opportunity to claim immunity for that official before such measures were taken. That condition did not contradict the requirement of the ICJ that the State concerned must invoke immunity. On the contrary, it was part of the logic of the procedural approach and was in keeping

with the rule of mutual consideration and cooperation in international relations. He also agreed with the Special Rapporteur's general line of reasoning in paragraphs 25 and following, according to which the burden on the State of the official to substantiate its invocation of immunity *ratione materiae* did not go very far, in particular where the official capacity of the person concerned and the official nature of the act were manifest. However, he personally would not speak of a presumption that the acts of an official were being performed in an official capacity, as the Special Rapporteur suggested in paragraphs 29 and 30 of his report. The advisory opinion of the ICJ concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* did not support such a broad interpretation. On the contrary, it confirmed the general proposition that if the official capacity of the person and the official nature of the person's acts were manifest in a specific situation, the burden of proof was significantly alleviated. Indeed, as the Special Rapporteur noted in paragraph 31, "as in the case where the actions of an official are characterized as official acts, the State exercising jurisdiction is not obliged to 'blindly accept any' such claim by the State" which the official represented. That meant, to take the hypothetical example given by Mr. Dugard at the previous meeting, that a State which prosecuted Mr. Mladić must not accept a simple letter from Serbia that he was its official and that the acts in question had been official acts. Rather, Serbia would have to refute what appeared to be public knowledge about Mr. Mladić. On the other hand, if a person clearly was a commander in the armed forces of a country, and the accusation concerned the activities of the armed forces of that country, it should be sufficient for the State of the official to say so. It must be borne in mind that the purpose of any duty to substantiate was merely to determine whether an official had acted in an official capacity, and not to indirectly force a State to defend itself for its actions in a foreign jurisdiction. That also meant that the question of whether the forum State or the State invoking immunity had the prerogative to decide the question of immunity was not very helpful. The forum State must ultimately decide whether it recognized the immunity, but it must do so within narrow and clear limits.

31. Concerning the question of waiver of immunity, two situations should be more clearly distinguished: waiver of immunity in individual cases and waiver of immunity for certain categories of cases that might be contained in a general treaty rule. He agreed that the standard for identifying such exceptions to immunity was that the waiver must be certain, as stated by the Institute of International Law in its resolution on immunities from jurisdiction and execution of Heads of State and Government in international law,⁴⁰² and not any particular formal criterion, such as a presumption in one direction or the other. The commonality between the two forms of waiver should not obscure the fact that the determination of when immunity had been excluded was not the same in both cases. When a general waiver of immunity was provided for by a treaty rule, the required certainty related mainly to the interpretation of substantive law, whereas for individual waiver, the question was one of an assessment of a specific procedural act. Basically, his

⁴⁰² Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.*

sense was that, to determine whether waiver applied in a particular case, the standard of certainty implied a *bone fides* duty to inquire with the State of the official if there was any doubt. States and their organs might not readily accept that the conduct of another State constituted a waiver of immunity. On the other hand, it followed from the rule of mutual consideration and cooperation in international relations that States also had a duty to express themselves clearly within a reasonable time if they wished to invoke immunity and were confronted with a situation which required their response.

32. As to the question of “whether a State’s non-invocation of the immunity of an official can be considered an implied waiver of immunity”, he agreed with the Special Rapporteur that the ICJ had not held, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, “that in not invoking immunity, Djibouti had waived it”. He also agreed that it depended on the circumstances of the specific case whether the non-invocation of immunity constituted a waiver. Therefore, the most important problem was the point in time at which the question of implicit waiver arose. As long as a State did not have certain knowledge of the exercise of jurisdiction against one of its officials or had not yet had sufficient time to respond, the non-invocation of immunity could not be regarded as a waiver. However, once the State concerned had been fully informed and given sufficient time for reflection (which must not be too long), non-invocation of immunity was usually considered as constituting an implied waiver or a valid acquiescence in the lapse of the claim in the sense of article 45 of the draft articles on responsibility of States for internationally wrongful acts, on loss of the right to invoke responsibility.⁴⁰³ The Commission might draw inspiration from paragraph (11) of the commentary to article 45, subparagraph (b), according to which

[i]nternational courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.⁴⁰⁴

33. For reasons of legal and procedural security, a waiver could not be revoked, and therefore he did not share the Special Rapporteur’s view that certain implied waivers did not exclude that a State could invoke immunity at a later stage. That was an unnecessary and misleading proposition which the Special Rapporteur only seemed to need for those cases with respect to which he had accepted that the State which exercised jurisdiction could go forward until the other State invoked immunity. However, such a situation was not one of implied waiver. Rather, it concerned the period during which the question of immunity was still open and during which it must be decided as soon as possible, in a process of mutual cooperation between the two States concerned, whether

⁴⁰³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁴⁰⁴ *Ibid.*, p. 123.

the preconditions for immunity were present and whether immunity was invoked. If there were serious indications that immunity might be invoked, the State that exercised jurisdiction must act with restraint and give the other State an opportunity to do so. Jurisdictional measures that were taken during that period and that were proportionate would not become invalid if immunity was ultimately and rightfully invoked; however, their validity was not based on an implied waiver, but rather on a limited power to initiate proceedings even in the face of the possibility that immunity might be invoked. The character of a waiver as a unilateral act that determined *in fine* the position of a State with respect to one of its rights should not be called into question.

34. It was true that the scope of a waiver could be broad or narrow. Thus, what initially might have been a limited waiver that authorized the forum State to take certain preliminary measures did not prevent the State of the official from invoking the remaining immunity later with respect to a regular criminal procedure. He also concurred with the Special Rapporteur’s view on the issue of State responsibility, in particular where he observed in paragraph 60 that “the State which invokes its official’s immunity on the grounds that the act with which that person is charged was of an official nature is acknowledging that this act is an act of the State itself”. He also agreed that, in so doing, that State was not necessarily acknowledging its responsibility for that act as an internationally wrongful act. In closing, he thanked the Special Rapporteur for his excellent report, which had laid the groundwork for the Commission’s consideration of the topic during the next quinquennium.

35. Mr. DUGARD, referring to Mr. Nolte’s assertion that the refusal of immunity should apply only in the case of international tribunals and that immunity should prevail in the case of national courts, stressed that that was the situation in an ideal world. Today, *ad hoc* tribunals were on the way out, and only 116 States had ratified the Rome Statute of the International Criminal Court. That meant that most prosecutions of State officials for serious international crimes were before national courts, which must be the centre of the Commission’s focus.

36. Mr. NOLTE said that he had merely wanted to underline the legitimacy, in principle, of immunity; he had not taken a specific position on how far it went. He had simply sought to underscore the interrelationship between the two trends, which the Commission would need to work out in greater detail.

37. Mr. WISNUMURTI thanked the Special Rapporteur for his third report and for his lucid introduction. The report reflected an in-depth analysis and extensive research on judicial decisions, State practice and legal opinion. It dealt with procedural aspects of the immunity of State officials from foreign criminal jurisdiction as well as the important question of the immunity *ratione personae* of an official and the responsibility of the official’s State. The third report logically followed the second report, which had examined substantive issues, including the scope of immunity *ratione personae*, and on which he had commented earlier. In his view, personal immunity should be limited to the members of the troika,

namely the Head of State, the Head of Government and the Minister for Foreign Affairs. It should not be extended to include other senior officials, and there should not be any exception to the rule on personal immunity when a Minister for Foreign Affairs had committed core crimes, even when acting in an official capacity.

38. On the whole, he concurred with the views expressed by the Special Rapporteur on the various aspects of the issues discussed in the third report and would like to make a few comments. With regard to the timing of consideration of immunity, he agreed that the issue of the immunity of a State official from foreign criminal jurisdiction should, in principle, be considered at an early stage of the judicial proceedings, or earlier still, at the pretrial stage. As pointed out in paragraph 11 of the report, early consideration of immunity was necessary in order to achieve its fundamental objectives: ensuring normal relations among States and the maintenance of their sovereignty. In more concrete terms, early consideration of immunity would ensure legal certainty and would protect in particular the State official acting in an official capacity, although the right to invoke immunity belonged to the State which the official served, and not to the official concerned. That should not prevent the official from declaring to the authorities of the State exercising criminal jurisdiction, before legal proceedings were initiated, that he or she had immunity. It was certainly true that the official's State must convey to the State exercising jurisdiction a reaffirmation of the immunity of that official. Recognition of the right of the official to declare, even before legal proceedings were initiated, that he or she enjoyed immunity was essential for preventing the official's mistreatment.

39. He endorsed the point made in paragraph 32 that only the State could legally invoke the immunity of its officials, whether these officials were members of the troika, who had personal immunity, or other officials who had functional immunity. Thus, it was only when immunity was invoked or declared by the official's State that the invocation of immunity had legal consequences. He agreed with the analysis of the judgment rendered by the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters*: the burden of invoking immunity fell to the State which wanted to shield its official from foreign criminal jurisdiction, whereas in the case of personal immunity applicable to the Head of State, the Head of Government and the Minister for Foreign Affairs, it was the State exercising jurisdiction that had to determine its position regarding the action it might take on the immunity of the official in accordance with international law. The Special Rapporteur had concluded that in that case the official's State did not bear the burden of raising the issue of personal immunity with the authority of the State exercising criminal jurisdiction; however, this should not be construed to mean that the official's State was deprived of its inherent right to raise the issue of immunity with the authorities of the State exercising criminal jurisdiction and to invoke the personal immunity of its official, as and when necessary. As noted in paragraph 61 (*i*), the State invoking the immunity of its official was not obliged to provide grounds for immunity, but it must inform the State exercising jurisdiction that the person in question was its official and enjoyed personal or functional immunity, since he had acted in an official capacity.

40. It was important to stress that the State, and not the official, had the authority to waive the immunity of a State's official, whether it be immunity *ratione personae* or immunity *ratione materiae*. The Special Rapporteur discussed the question of whether waiver must be express or whether it was sufficient for it to be implied. On the whole, he agreed with the Special Rapporteur that, when applied to a serving Head of State, Head of Government or Minister for Foreign Affairs, a waiver of immunity should be explicitly stated, whereas in the case of other serving or former officials who enjoyed functional immunity, a waiver of immunity could be either express or implied. However, he had difficulty understanding what the Special Rapporteur meant by the phrase "serving officials who are not included in the 'threesome' but who enjoy personal immunity".

41. In the last part of the report, the Special Rapporteur addressed the issue of the link between an official's immunity and the responsibility of the official's State and had referred to the dual attribution of responsibility. A waiver of the immunity of an official acting in an official capacity that resulted in legal proceedings being instituted by the State exercising jurisdiction could lead to the invocation of the responsibility of the official's State in the event that the act performed by the official constituted a violation of the State's obligation under international law. The act of the official, having been performed in an official capacity, was an act of the State concerned. However, that principle could only be applied case by case, taking into account the facts surrounding the act and the specific circumstances. The reports on the topic of immunity of State officials from foreign criminal jurisdiction contained a number of contentious issues that had to be resolved before the Commission could commence with the elaboration of draft articles. He therefore agreed with Mr. McRae's proposal that a working group be set up in 2012 to address those questions.

42. Sir Michael WOOD said that the Special Rapporteur's three reports, together with the Secretariat's 2008 memorandum,⁴⁰⁵ would remain essential reading for anyone who had to deal with the issue of immunity of State officials from foreign criminal jurisdiction. The third report was an important part of the overall picture drawn by the Special Rapporteur, and, in that connection, he did not share the concerns expressed by Mr. Pellet at the previous meeting: it was true that, for lack of time, the Commission had not been able to reach conclusions on the second report, but that did not matter, because the third report could just as well have been part of the second report. Equally, it could have constituted an addendum to the second report, addenda being common practice in the consideration of other topics.

43. Like other speakers, he was on the whole in agreement with the third report. The Special Rapporteur had explained during his introduction that a different methodology underlay the report, which to a large extent was based on deduction and logic rather than practice, which was scarce. However, it was also apparent that the report reflected the Special Rapporteur's wide experience.

⁴⁰⁵ Document A/CN.4/596 and Corr.1; mimeographed, available from the Commission's website (documents of the sixtieth session).

He agreed with what the Special Rapporteur said on the timing of consideration of immunity and with almost everything he said on the invocation of immunity, and he endorsed the two sections on waiver. However, Ms. Jacobsson's comments on the conclusions and the Special Rapporteur's response clearly showed that many details still needed to be explored. In that regard, it would be interesting to have more information about the procedural position under the various national legal systems.

44. He had four comments on the report. First, the report did not appear to deal expressly with inviolability of the person as opposed to immunity in the narrow sense. Inviolability could be very important in practice, and it might be particularly relevant to questions concerning the timing of the invocation of immunity.

45. Secondly, on the question of the invocation of immunity, he was not as convinced as the Special Rapporteur that a clear distinction could be made between the troika and other high-ranking office holders who might enjoy immunity *ratione personae*. As other members had said, it might well be that a State's authorities, such as its police or its courts, did not know all the Heads of State, Heads of Government and Ministers for Foreign Affairs of the world's 193 States, and it might equally be that they were aware of the status of certain other high-ranking officials outside the troika. He therefore doubted that hard and fast rules could be laid down; much depended on the particular circumstances of the individual case. In any event, if a State wished to see the immunity of its official upheld, it would be well advised to be clear on that point, and if the legal or factual issues surrounding immunity were complex, then although there should probably be no obligation to do so, it might well be in that State's interest, where it could, to participate directly in the proceedings to explain its case, rather than relying on the authorities of the forum State or the court itself to evoke those questions.

46. With regard to the troika, he stressed once again that, in his opinion, there was no doubt that under present-day customary international law, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* while they remained in office. Attempts, whether by authors or even by members of the Commission, to cast doubt on the judgment of the ICJ on that point were little more than wishful thinking. The majority in the *Arrest Warrant* case was a strong one, and careful explanations for that position appeared in the judgment. The real issue was how to determine which other office holders also enjoyed immunity *ratione personae*. He did not agree that the immunity of serving members of the troika was not absolute, at least if it was put forward as a proposition *lex lata*, and he endorsed the view expressed in that regard by the counsel for France in *Certain Questions of Mutual Assistance in Criminal Matters*.

47. Thirdly, concerning the invocation of immunity, he agreed with the Special Rapporteur that the State of the official would normally have to claim immunity *ratione materiae*. Some of the criticisms of the Special Rapporteur's formulations on the respective roles of the State of the official and the forum State seemed misplaced. He personally did not see the use of the technical term "prerogative" as being sinister, although it could have

been avoided. The Special Rapporteur's language was carefully chosen and appropriate. He was not sure, however, that the same deference as had been shown by the ICJ to the statement by the United Nations Secretary-General⁴⁰⁶ in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* would necessarily be appropriate in the case of assertions by a State, because sometimes it would be necessary to look behind what a State said.

48. Fourthly, with regard to the section of the third report on waiver, he noted that in paragraphs 44 to 46, the Special Rapporteur dealt with the possibility that States might be deemed to have given an implied waiver of immunity by becoming party to certain treaties. He agreed with the Special Rapporteur's overall conclusions on that point, the opposing view being based on what he would term the "wishful thinking" approach to treaty interpretation. At the same time, he endorsed Mr. Pellet's comment that the reference at the end of paragraph 44 to the intention of the individual State was out of place. Either a treaty necessarily implied a waiver, and for all parties, or it did not. In the *Pinochet* case, the British House of Lords had reached such a conclusion in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but only after a detailed analysis of the terms of that instrument. Its reasoning could not be blithely carried over to other treaties.

49. The topic under consideration was of great interest to States and others. Foreign ministries and their legal advisers constantly faced serious legal questions in that area that required an immediate response. The Special Rapporteur's work could be of great practical assistance, since it was based on experience and sought to find practical solutions to practical problems. It had been asserted at the previous meeting that the Commission's reputation could be at stake if it failed to adopt a certain approach to the topic. On the contrary, the Commission was more likely to damage its reputation by adopting unrealistic positions, pandering to the more extreme views of certain campaigning bodies. Members of the Commission were present in their individual capacity as lawyers, and their task was to contribute to the codification and progressive development of international law; they were not spokespersons for particular groups or interests.

50. In 2012, the Commission would have to decide how to proceed with the topic. Essentially, it had two choices. Either it could seek to codify existing law, or it could take a conscious decision to propose new rules for consideration by States. It was to be hoped that a carefully reasoned and balanced statement of new rules would be acceptable to States and indeed welcomed by them. Presumably such rules would need to be incorporated into a convention in due course. Each choice had its advantages and disadvantages. A codification exercise might be helpful, as it would clarify and fill in gaps, such as those which had come to light in the procedural matters dealt with in the third report. Elaborating new rules would be more challenging and would only be useful if they were widely accepted by States. It would

⁴⁰⁶ ICJ, "Written statement submitted on behalf of the Secretary-General of the United Nations", 2 October 1998 (available from www.icj-cij.org).

be interesting to hear from States, before the next session, what they expected of the Commission.

51. Mr. PELLET said that he had criticized the Commission's consideration of the third report on the topic for reasons of method. Normally, a Special Rapporteur elaborated a preliminary report which served as a basis for future examination. In the current case, some aspects of the preliminary report had proved controversial, yet the Commission had continued without agreeing on what its basis was.

52. With regard to the choices put forward by Sir Michael, he stressed that, in the Commission's mandate, progressive development preceded codification.

Reservations to treaties (*concluded*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

REPORT OF THE WORKING GROUP ON
RESERVATIONS TO TREATIES (*concluded*)**

53. The CHAIRPERSON invited the Chairperson of the Working Group on reservations to treaties to introduce his second report on the work of the Working Group.

54. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) recalled that, at its 3099th meeting on 6 July 2011, the Commission had referred to the Working Group on reservations to treaties for consideration the text of the draft recommendation or conclusions of the International Law Commission on the reservations dialogue, which had appeared in paragraph 68 of the Special Rapporteur's seventeenth report on reservations to treaties (A/CN.4/647 and Add.1). After careful consideration, and in the light of past Commission practice, the Working Group had agreed that it was more appropriate for the Commission to elaborate a set of conclusions on the question of the reservations dialogue, to be followed by a recommendation to the General Assembly, rather than to address direct recommendations to States. The nine conclusions provisionally adopted by the Working Group, which were preceded by eight preambular paragraphs and followed by a recommendation to the General Assembly, were reproduced in document A/CN.4/L.793.

55. Several of the changes made by the Working Group to the text originally proposed by the Special Rapporteur were worth mentioning. With respect to the preamble, the Working Group had added a second preambular paragraph, including a reference to the Special Rapporteur's seventeenth report. The third preambular paragraph constituted a reformulation of the original second preambular paragraph; it now referred to "the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein". The

fourth and fifth preambular paragraphs resulted from the splitting and reformulation of the original third preambular paragraph. In the last preambular paragraph, the reference to regional organizations had been replaced by a general reference to international organizations.

56. With respect to the conclusions listed under section I, the first part of the text of the third conclusion was new. It referred to the importance of the statements of reasons by the author of a reservation for the assessment of the validity of the reservation. The Working Group had felt that the inclusion of that element was important in order to balance the statement contained in the fifth conclusion, which referred to the potential usefulness, for the assessment of the validity of reservations, of the concerns expressed about a reservation by States and international organizations. The content of the fourth conclusion was taken from the last sentence of paragraph 1 originally proposed by the Special Rapporteur, with the addition of a reference to the possible limitation of the scope of certain reservations as an alternative result of the periodic review of reservations. Finally, the recommendation contained in section II corresponded, with minor adjustments, to paragraph 9 of the text originally proposed by the Special Rapporteur. The Working Group recommended that the Commission include the text reproduced in document A/CN.4/L.793 in an annex to the Guide to Practice.

57. With regard to the recommendation on mechanisms of assistance in relation to reservations, he recalled that the Commission had referred to the Working Group on reservations to treaties the consideration of the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, which appeared in paragraph 101 of the Special Rapporteur's seventeenth report. The Special Rapporteur had also submitted to the Working Group a revised draft recommendation, which he had elaborated in the light of the comments made during the plenary debate. The Working Group had worked on the basis of that revised text, which it had examined paragraph by paragraph.

58. Taking into account the position expressed by some members during the plenary debate, the Working Group had considered that the text of the recommendation should be formulated in terms of a suggestion addressed to the General Assembly and that the Commission's proposals should remain general so as to leave largely open the modalities of any mechanism that might be established. The text of the recommendation as provisionally adopted by the Working Group was reproduced in document A/CN.4/L.795, and the Working Group proposed that this recommendation be included in chapter IV of the Commission's draft report on the work of the current session.

59. With regard to the modifications introduced to the text as initially proposed, the Working Group had deemed it preferable to limit the scope of the recommended mechanism to States. Thus, the references to international organizations had been deleted from the text of the recommendation and from the annex.

60. With respect to the preamble, a reference to the formulation of reservations had been included in the

* Resumed from the 3106th meeting.

** Resumed from the 3090th meeting.

second preambular paragraph, and the last preambular paragraph now referred to “flexible mechanisms”, so as to cover both the “observatory” referred to in paragraph 1 and the assistance mechanism envisaged in paragraph 2 and in the annex.

61. Paragraph 1 was new. Based on a proposal by the Special Rapporteur, it contained a suggestion that the General Assembly consider establishing within the Sixth Committee an “observatory” on reservations to treaties at the universal level and that it recommend that States consider establishing such mechanisms at the regional and subregional levels. As indicated in the footnote to paragraph 1, such observatories could draw their inspiration from the one established within CAHDI.

62. With regard to the annex, he said that, following a suggestion by the Special Rapporteur and in the light of comments made during the plenary debate, reference was now made to a mechanism consisting of “experts”, rather than “government experts”. The formulation of paragraph (ii) had been simplified; reference was now made to reservations, objections to and acceptances of reservations, without mentioning interpretation, permissibility or effects of reservations. In paragraph (iii), the term “disputes” had been replaced by the more general expression “differences of view”. An additional footnote had been included suggesting that the experts engaged in assisting States in settling differences of view should not be the same as those who would have provided assistance to one of the parties.

63. He hoped that the Commission would be in a position to take note of the report and of the recommendations of the Working Group regarding an annex to the Guide to Practice on the reservations dialogue and the inclusion in the draft report of a recommendation on mechanisms of assistance in relation to reservations.

64. Mr. VASCIANNIE, referring to the recommendation on the reservations assistance mechanism, said he was surprised that the observatory, the nature of which was not very clear, had been given pride of place before the assistance mechanism in the suggestions to the General Assembly. He sought clarification on that point.

65. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) said that the two suggestions were not mutually exclusive and that it was for reasons of drafting logic that the suggestion relating to the establishment of an assistance mechanism immediately preceded the annex in which the assistance mechanism was defined.

66. Mr. VASCIANNIE said that, if the order of the suggestions did not matter, he proposed reversing it.

67. Mr. PELLET (Special Rapporteur) said it followed from his report that he considered the mechanism envisaged in paragraph 2 to be more important than the observatory contemplated in paragraph 1, but he did not have any set opinion on the order of the paragraphs.

68. Mr. CANDIOTI suggested that, for the sake of convenience, the footnote to paragraph 1 provide the website address of CAHDI. In that connection, he asked

whether CAHDI itself constituted the observatory or whether it contained a body exercising that function. He also stressed that depositaries should be encouraged to continue to improve their means of communicating reservations, for example by creating databases or easily accessible Internet sites in order to help countries with limited resources in that area.

69. Ms. ESCOBAR HERNÁNDEZ, speaking as Vice-Chairperson of CAHDI, said that CAHDI itself exercised the function of observatory on a permanent basis, in collaboration with the secretariat of the Council of Europe.

70. Mr. NOLTE said he preferred that the order of the suggestions remain as given by the Working Group. It was easier to give effect to the first suggestion, namely establishing a reservations observatory, than to the second suggestion, and thus the current order was more realistic.

71. Mr. DUGARD supported Mr. Vasciannie’s proposal, especially since paragraph 1, with its reference to CAHDI, was “Eurocentric”, whereas paragraph 2 concerned a general mechanism.

72. Mr. PETRIČ agreed with Mr. Nolte that the current order of the paragraphs should be retained.

73. Mr. PELLET (Special Rapporteur) said that he was troubled by the reason given by Mr. Nolte and even more so by the one given by Mr. Dugard, but he reiterated that, as far as he was concerned, the order of the paragraphs was of little importance.

74. After a discussion in which Mr. NOLTE, Mr. PETRIČ, Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group) and Mr. PELLET (Special Rapporteur) took part, the CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to take note of the oral report of the Chairperson of the Working Group on reservations to treaties, with the amendment proposed by Mr. Vasciannie on the order of the paragraphs in document A/CN.4/L.795, on the understanding that the annex on the reservations dialogue and the recommendation on the assistance mechanism would be considered by the Commission paragraph by paragraph when it adopted its annual report.

It was so decided.

Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPporteur (continued)

75. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur’s third report was closely in line with the two previous reports⁴⁰⁷ and reflected careful logic. The substantive aspects of the topic having been examined in

⁴⁰⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report) and *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report).

the preliminary report and the second report, the third report, which focused on procedural questions, was much less controversial.

76. However, some of the propositions formulated in the third report and summarized in paragraph 61 of the document were debatable.

77. Particularly troubling was the lack of clarity with regard to State officials or agents who enjoyed immunity, notably where reference was made to a category already established in the previous reports, that of other officials who enjoyed personal immunity, and the Special Rapporteur's insistence on defining immunity in a manner that was sufficiently broad to include former State officials.

78. In the third report, the Special Rapporteur continued to attach absolute importance to the wish of the official's State, which resulted in that wish being given primacy when determining which persons enjoyed immunity and in its being taken solely into account when defining what could be deemed "official acts".

79. Although the Special Rapporteur introduced a number of elements aimed at establishing a balance between the State of the official and the forum State, that type of "safeguard clause" was inadequate for three reasons. First, the determination of the beneficiaries of immunity was a question of international law. It could not be exclusively subordinated to rules of domestic law, and even less to a decision by the authorities of another State. Secondly, the concept of "official acts" must be objective and must be subject to criteria defined under international law, and not unilaterally by the official's State. Such an exclusivity could not even be justified by the fact, noted by the Special Rapporteur, that the qualification of an act as "official" might entail the international responsibility of another State. Thirdly, the principle of sovereign equality and the principle *par in parem non habet imperium* required that the opinion of the forum State must be taken into account. While it was certain that a State could not be subject to the compulsory jurisdiction of another State without account being taken of its wish, it was equally certain that the absolute primacy of the wish of the official's State automatically resulted in a limitation of the sovereign rights of the forum State, whose courts would not be able to exercise their jurisdiction over a person because of another State's mere decision, the validity or legitimacy of which could not be contested.

80. Consequently, she could not subscribe to all the propositions formulated in paragraph 61 (*d*), (*g*) and (*i*) of the Special Rapporteur's third report. On the other hand, she fully agreed with the assertion that the question of immunity must in principle be posed as soon as possible, including at the pretrial stage.

81. She also endorsed the idea that the right to waive the immunity of an official was vested in the State concerned. However, she had reservations about the possibility of invoking immunity at any time, including when the State had not made any prior declaration of waiver or when it had partially waived the immunity of its official. She had even stronger reservations about the conclusion that the official's State could invoke immunity at the stage of appeal proceedings if it had implicitly or explicitly

waived it in the court of first instance. Waiver of immunity had important consequences not only at the political, but also at the legal level. Thus, it must be subject to a strict interpretation of the principle of legal certainty. For that reason, she could not fully endorse the conclusion contained in paragraph 61 (*o*).

82. The Special Rapporteur's comments in the third report on the international responsibility of the forum State which followed from its not having raised the question of immunity were acceptable, although the assertion in the first sentence of paragraph 61 (*b*) went too far.

83. With regard to the relationship between the immunity of a State official from foreign criminal jurisdiction and the international responsibility of the State concerned, she agreed on the whole with the conclusions in paragraph 61 (*q*) and (*r*).

84. On the other hand, she found it more difficult to endorse the warning contained at the end of paragraph 60 that, if it did not invoke the official's immunity, the State opened the way for that person to be criminally prosecuted in a foreign State and thereby created the possibility of occasionally serious intrusion by a foreign State into its internal affairs. The reference to such an intrusion as a consequence of the exercise of foreign criminal jurisdiction went too far.

85. She deeply regretted that Mr. Kolodkin would not pursue his task as Special Rapporteur on the topic and hoped that the new Commission that emerged from the elections in November 2011 would continue to give priority to the topic in its work.

86. Mr. VASCIANNIE said that he supported most of the conclusions put forward by the Special Rapporteur in the third report. As noted by Mr. McRae, the Special Rapporteur had not been dogmatic when practice had been insufficient or did not suggest definitive answers.

87. Concerning the conclusions set out in paragraph 61 of the report, he fully agreed with other speakers that the question of immunity must be considered either at the pre-trial stage or early in the court proceedings and that failure to consider the issue of immunity *in limine litis* might give rise to responsibility on the part of the forum State.

88. The Special Rapporteur had done well to stress in paragraph 61 (*c*) that the invocation of immunity should be by the official's State, although personally he thought some degree of flexibility could be contemplated. In paragraph 15, the Special Rapporteur noted that "only when it is the State of the official which invokes or declares immunity is the invocation or declaration of immunity legally meaningful, i.e., only under those circumstances does it have legal consequences". He joined Mr. Dugard and others in asking whether there might be any exceptions to that. The Special Rapporteur might consider whether any legal effects attached to the invocation of immunity by the official himself, for example a stay in proceedings until the official's status was confirmed by his State. That approach might already be implicit in the Special Rapporteur's requirement that the forum State know that criminal measures were contemplated if the

rule on invocation was to apply, but it might be helpful for accused persons to be aware that they should bring their putative status to the attention of the court at an early stage in the proceedings.

89. On a related point, the Special Rapporteur noted, partly in reliance on *Certain Questions of Mutual Assistance in Criminal Matters*, that the court of the forum State was not obligated to consider the question of immunity *proprio motu*. He agreed with that conclusion and asked whether there were any guidelines which could be recommended concerning the circumstances in which the court in the forum State could exercise its *proprio motu* discretion. That would not necessarily undermine the main rule that the court could choose to rely only upon the invocation of immunity by the official's State.

90. On the whole, he was in agreement with the Special Rapporteur on the procedure to be adopted by the official's State in notifying the forum State of the invocation of immunity, and in particular the idea that it was not necessary for such notification to be given to the foreign court, but could go through diplomatic channels. However, it would be good not to have a hard and fast rule to the effect that, in the case of the troika, the forum State must consider the question of immunity on its own and without regard to the invocation of immunity by the official's State.

91. As to waiver, he agreed with the approach recommended by the Special Rapporteur. Waiver for members of the troika must be express, with due note taken of the case in which the official's State requested that another State take criminal procedure measures. For other officials, waiver could be express or implied. The technical issues raised by implied waiver could be addressed when the Commission considered the draft articles.

92. In paragraph 61 (*r*) and in the section of the report preceding the summary, the Special Rapporteur examined the relationship between the official's immunity and the responsibility of the official's State and asserted that a State which invoked the immunity of its official in relation to a charge recognized that the act constituted an act by that State itself and that this established the prerequisites for the international legal responsibility of the State. He disagreed with the Special Rapporteur on that point. As noted by Mr. Singh, there might be a variety of reasons that explained the invocation of immunity by the official's State, including the desire of the official's State to investigate the matter that formed the basis for the criminal charge. The official's State might also wish to invoke immunity quickly in order to avoid undue embarrassment for the official, and it might do so before forming a clear view as to its responsibility. In the circumstances, the invocation of immunity might be a factor to be considered in determining whether the prerequisite of attribution had been satisfied with respect to the invoking State, but he did not support the strict rule that appeared to be contemplated by the Special Rapporteur in paragraph 61 (*r*).

93. Finally, he noted that there were important matters outstanding from the second report, including the nature and extent of the immunity to be enjoyed by members of the troika. He agreed with Mr. McRae and others that the issue should be sent to a working group in 2012 for

further consideration in the light of the different opinions expressed in the Commission. The Commission might also consider appointing a new special rapporteur first, who would be given the opportunity to formulate a position on the question before its referral to a working group. Drawing attention to the chapter on jurisdictional immunities of States and their property in the *Yearbook of the International Law Commission, 1989* (vol. II, Part Two), he recalled that article 4, paragraph 2, of the draft articles provisionally adopted by the Commission stated the following: "The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*."⁴⁰⁸ Why not also Heads of Government and Ministers for Foreign Affairs? The Special Rapporteur, Mr. Sucharitkul, responded by saying that "the privileges and immunities enjoyed by these persons as well as by members of the families of heads of State were granted on the basis of international comity rather than in accordance with established rules of international law".⁴⁰⁹ However, the Special Rapporteur had been pressed further, because he noted the following: "With regard to paragraph 2, several members suggested that the scope of the provision be extended to heads of State in their private capacity, as well as to heads of Government, Ministers for Foreign Affairs and other persons of high rank."⁴¹⁰ The Special Rapporteur said that he would not object to adding a reference to Heads of Government, Ministers for Foreign Affairs and other high-ranking officials, but he would not do so for families of the Head of State, as he still doubted that families had special status "on the basis of established rules of international law".⁴¹¹ That implied that the Special Rapporteur had changed his mind on whether the members of the troika had immunity *de lege lata*.

94. As the extract showed, the question was not new, and it was not the first time that the Commission had had to address it. Thus, it was difficult to imagine that the reputation of the Commission would turn on the way it sought to resolve the issue.

The meeting rose at 1 p.m.

3115th MEETING

Friday, 29 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

⁴⁰⁸ *Yearbook ... 1989*, vol. II (Part Two), p. 102, para. 443.

⁴⁰⁹ *Ibid.*, pp. 102–103, para. 446.

⁴¹⁰ *Ibid.*, p. 103, para. 448.

⁴¹¹ *Ibid.*, para. 450.

Immunity of State officials from foreign criminal jurisdiction (concluded) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. FOMBA congratulated the Special Rapporteur on the substantial amount of research and analysis he had done in order to provide the Commission with a logical, coherent framework for its discussion of the topic. It was regrettable that no draft articles had been formulated, although it would have been premature to do so prior to the consideration of the Special Rapporteur's second report,⁴¹² since the approach adopted for substantive issues would have a bearing on the procedural aspects addressed in the third report.

2. With regard to the fundamental question of exceptions to immunity, he said that in paragraph 94 (o) of his second report, the Special Rapporteur asserted that there was no norm of international law that had developed for such exceptions nor any trend towards the establishment of such a norm. Such an assertion should be substantiated by a methodical, rigorous examination of the relevant practice. In the absence of such substantiation, international law should be progressively developed by providing for an exception to immunity relating to serious international crimes.

3. Moving on to the third report (A/CN.4/646), he said that as far as knowing the identity of the “threesome” or troika was concerned, the words “as a rule”, in paragraph 19, were quite appropriate, since it could also be the case that the identity of those persons was not known. Breakdowns in protocol did occur, after all.

4. He agreed with the conclusion in paragraph 55 of the report on the form to be taken by the waiver of immunity. Paragraph 60 contained an excellent description of the dilemma faced by a State in deciding whether to acknowledge an official's conduct as official, thereby establishing the premises for its own potential responsibility for such conduct.

5. Generally speaking, a distinction had to be drawn between personal and functional immunity. As far as personal immunity was concerned, it was also necessary to distinguish between what might be termed “primary immunity”, namely that enjoyed by the troika, and “secondary immunity”. A second distinction had to be made between cases where the issue of immunity must or must not be raised *proprio motu* by the State exercising jurisdiction. A third distinction was between cases where the official's State had or had not been informed of its official's situation.

6. It would be logical to infer from the argument that immunity must be brought up *in limine litis* that it could be invoked only before a court of first instance and not at the

appeal stage. But that was an absolutist approach: thought should be given to allowing immunity to be invoked at the appeal stage, if that proved necessary in certain cases. In any event, the function of immunity must be taken into account and it would be necessary to work out how immunity would operate in courts at various levels.

7. The 18 points contained in the summary of the report (para. 61) reflected the main issues raised by the topic. Paragraph 61 (c) suggested that the invocation of immunity by the official himself was not of legal relevance; nevertheless, it would be wise to take that situation into account when drawing up draft articles, especially as, in paragraph 15, the Special Rapporteur indicated that such a declaration of immunity by an official was not without significance in judicial proceedings. The third sentence of paragraph 61 (f) was perhaps too categorical when it stated that the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu*. It might be wise to give more thought to the matter.

8. He agreed with the descriptions of a situation in which a waiver of immunity might not need to be express and of the non-invocation of immunity in paragraph 61 (l).

9. In conclusion, he said he was in favour of taking note of the conclusions contained in the reports and of passing the torch to a newly elected Commission in 2012. It would be the latter's responsibility to consider whether a working group should be set up to examine the crucial question of exceptions to immunity.

10. Mr. KOLODKIN (Special Rapporteur), summing up the debate on his second and third reports, said he was glad to have set off a lively discussion and welcomed the comments and sometimes sharp criticism that had been proffered. The central issues that had emerged were which State officials enjoyed, did not enjoy, or should not enjoy, immunity from foreign criminal jurisdiction; the scope of immunity; whether immunity was a recognized international legal norm and, if so, whether there were or should be any exceptions to or restrictions upon it; and whether the approach to immunity should be graduated, based on the type of offence committed by State officials—ordinary offences or the most serious ones that were a matter of concern to the entire international community.

11. Members of the Commission who favoured a minimalist approach had emphasized the need to fight impunity, considering immunity to be an institution of the past that was out of phase with current trends in international law. They had reproached him for paying insufficient attention to facts; falsely assessing some facts; taking an absolutist approach to State sovereignty; and being an apologist for sovereign equality and non-interference in internal affairs. Some members of the Commission had drawn a distinction between immunity and responsibility and identified it with impunity, by reference to the principle of equality of all before the law. Thus, the main conclusions and even the conceptual basis of his second report had been vigorously challenged.

12. Other members of the Commission had generally supported his point of view. Without playing down either the significance of fighting impunity or current trends in

⁴¹² *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631. For the consideration of the second report at the present session, see the 3086th, 3087th and 3088th meetings above.

international law, they had underscored the importance of immunity in ensuring proper international and inter-State relations and preventing their abuse.

13. A third line of thought espoused by some members of the Commission had been that his analysis of international law *de lege lata* might be largely justified, but that, in the interests of progressive development of international law *de lege ferenda*, and of striking an appropriate balance between combating impunity and ensuring stability and predictability in international relations, immunity and the circle of people who enjoyed it must be further restricted.

14. In response to certain general and specific criticisms of his second and third reports, he had the following points to make.

15. In defence of his assertion that most attempts to establish universal or extraterritorial jurisdiction were made by developed countries against officials or former officials of developing States, he listed 18 countries whose officials had been or were currently the subjects of attempts to exercise foreign criminal jurisdiction, 15 of which were developing countries. Among the countries launching such proceedings were Argentina, Belgium, France, Germany, Italy, the Netherlands, Spain, Switzerland, the United Kingdom and the United States. Perhaps he should simply have included the lists in one of his reports.

16. He could not accept the criticism levelled against his supposed neglect of the facts in favour of a legalistic approach. While law was of course meaningless without facts, it was hardly difficult to find out such facts in relation to attempts to exercise criminal jurisdiction over specific officials. Facts could be viewed from different angles, however, and the Commission was not a fact-finding body. Its members had different world views and legal and personal backgrounds, which naturally influenced their positions on the matters they considered. Such a diversity of views was beneficial, even if it complicated the search for consensus.

17. Contemporary notions of international law in general and of sovereignty in particular differed markedly from the views that had prevailed 20 or 30 years ago. Fighting impunity now occupied a key place on the contemporary international agenda. Individual criminal responsibility for serious crimes under international law and international criminal jurisdiction had become facts of life. All those statements were truisms. Yet it was also obvious, at least to him, that the development of human rights had deeply affected, but had not undermined, the principles of sovereign equality of States and of non-interference in their internal affairs. The problem that merited consideration was not the extent to which changes in the contemporary world and in international law had influenced State sovereignty in general, but more specifically, how the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular had been affected.

18. The current trend in international law was clearly towards the emergence of international criminal jurisdiction and against immunity from such jurisdiction.

However, a distinction must be drawn between the immunity of State officials from foreign criminal jurisdiction and immunity in the context of international criminal jurisdiction. Article 27 of the Rome Statute of the International Criminal Court, which had been cited as evidence of changing attitudes towards immunity, was not really relevant to the topic, dealing as it did with immunity from the jurisdiction of the International Criminal Court, not from foreign criminal jurisdiction. Since that Statute had been mentioned, however, it was worth recalling article 98, which confirmed that obligations under international law arising from the immunity in States parties to the Statute of officials of States not parties to it must still be met, even if the officials were suspected of offences that fell under the jurisdiction of the Court.

19. Obviously, he had firm views on the subject of immunity, and he had thought it better to express them in his reports, rather than simply to list possible approaches, something that had been done comprehensively in the Secretariat's excellent memorandum.⁴¹³ His views had been formed, not *a priori*, but through empirical study. His personal and legal background, particularly his long experience with the legal department of the Russian Ministry of Foreign Affairs, had naturally had a bearing on his largely positivist outlook on the law, an outlook that offered some valuable insights.

20. His analysis of the practice and position of States, rulings of the ICJ and national courts and the literature did not indicate that State sovereignty and the immunity of State officials had lost their significance in the context of foreign criminal jurisdiction. The interaction between sovereignty and immunity was particularly important in respect of foreign criminal, as opposed to civil, jurisdiction. Measures taken during criminal investigations often involved constraint, deprivation of liberty or the questioning of officials, including about acts carried out in an official capacity. Officials, including high-level officials, could be detained or arrested. All those factors directly affected the exercise of State sovereignty and domestic competence. Hence the significance of the consent of the State, expressed in one form or another, to the exercise by a foreign State of criminal jurisdiction over its officials. The changes in international law had not yet altered those basic foundations of the international system.

21. Various opinions had been expressed regarding the scope of immunity and his "generalist" approach. He had proceeded on the assumption that all serving and former State officials enjoyed functional immunity from foreign criminal jurisdiction, in other words, immunity for acts undertaken in their official capacity. Sufficient grounds for that assumption were provided in his second report, particularly paragraphs 21 and 23. In such instances, the acts of officials were not theirs alone but were in fact acts of the State.

22. Opinions had varied on who should enjoy personal immunity. Claims that Ministers for Foreign Affairs or even the troika did not or should not enjoy immunity could not, in his view, be supported by objective political and

⁴¹³ Document A/CN.4/596 and Corr.1; mimeographed, available from the Commission's website (documents of the sixtieth session).

legal analysis. The debate had revealed little support for such a position within the Commission. Several members had said that the group of officials who enjoyed personal immunity should be restricted to the troika. However, he had already drawn attention to a ruling of the ICJ suggesting that, in addition to the troika, other high-level officials enjoyed personal immunity. Several rulings of national courts which recognized that personal immunity was enjoyed not only by the troika, but also by other high-level officials, such as ministers of defence and ministers of trade, were based on that ruling. The favourable disposition of Governments had been taken into account by national courts in reaching such decisions, which were now facts of law. The logic behind those decisions resulted in part from global changes: important State functions, including representation of the State in international relations, were no longer the exclusive preserve of the troika. He was not aware of any legal rulings to the effect that absolutely no officials other than the troika enjoyed personal immunity. To what extent, then, was a restrictive approach grounded in law?

23. Several members of the Commission had underscored the need for care and rigour in addressing the issue, and that was obviously the right approach. Indeed, he had applied it in formulating the proposals in his preliminary report⁴¹⁴ on establishing the criteria that high-level officials other than the troika had to meet in order to enjoy personal immunity and in the suggestion in his third report that a distinction should be made between such individuals and the troika for procedural aspects of immunity, despite the fact that personal immunity was the same for both groups.

24. The most serious differences of opinion related to exceptions to immunity. The proposition that the immunity of State officials from foreign criminal jurisdiction was a firmly established rule of international law and that exceptions to immunity must be proven, particularly where the most serious crimes were concerned, had generated much debate. When some said that immunity was a rule, while others disagreed, perhaps they were simply looking at different issues and situations. The right of States to exercise jurisdiction in respect of crimes committed in their territory was undoubtedly a rule, but the fact that particular individuals, such as foreign officials, were protected from territorial jurisdiction by their immunity was an exception to the rule. On the other hand, as to whether one State could take criminal procedural measures that imposed an obligation on another State's official or were coercive, he would reply no, in general, but yes in certain cases; immunity would be the rule, and lack of immunity the exception.

25. In spite of the differing views expressed, he found it difficult to imagine, even with respect to core crimes, how the Commission could depart from the legal position of the ICJ in its rulings concerning the *Arrest Warrant* case and, six years later, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. Not only did the two rulings refer to the inalienable personal immunity of high-level officials from foreign criminal jurisdiction, but the latter stated: "In international law

it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal" (para. 170). Thus, two rulings adopted within the space of six years treated immunity as a firmly established rule, at least with regard to the personal immunity of the troika. Moreover, according to the Court, there could be no exceptions to that rule, and its position enjoyed wide support from States, in the rulings of national courts and in the literature, although the literature naturally presented other viewpoints.

26. He agreed that he had been wrong to use the term "absolute" immunity, for although it was frequently encountered, it was out of place when applied to personal immunity. Personal immunity was time-bound. It pertained only while a person occupied one of the highest positions within a State. Like functional immunity, personal immunity provided protection, not from all criminal procedural measures, but only from those that imposed an obligation on the official or were coercive.

27. Thus, if the Commission were to consider the question of exceptions to immunity, it would most likely have to do so only with respect to immunity *ratione materiae*. Even proponents of exceptions to immunity could not agree on the grounds for possible exceptions: much ink had been spilled on that score. Furthermore, neither the practice of States, nor the rulings of national courts, revealed a trend towards such exceptions, although, as he had mentioned in his second report, in certain circumstances functional immunity might not apply during the exercise of territorial jurisdiction by a State where an offence had been committed. In the light of the debate on the subject, it would be useful to consider further the circumstances in which territorial jurisdiction could be exercised.

28. For an emerging rule restricting immunity to be posited, the corresponding practice must predominate. His analysis had shown that it did not. However, there was room to consider certain exceptions that were not mentioned in the second report—for instance, when immunity was suspended as a countermeasure.

29. If the Commission received no new information from States that shed new light on the possible exceptions to immunity, then it would be hard to argue, *de lege lata*, that there were no exceptions to either personal or functional immunity, apart from the one mentioned in his second report. That would not preclude the Commission from drafting international legal standards, for example in the form of an international treaty, if it considered that that was appropriate.

30. Turning to the context in which many members of the Commission had considered the subject, namely the grounds for further restrictions on immunity, he said that the idea that immunity from foreign criminal jurisdiction should be minimized, in line with the principle of equality of all before the law, was not viable. The principle of equality notwithstanding, officials and members of parliament in a great many countries continued to enjoy immunity from criminal prosecution in domestic courts. Why, then, should officials not enjoy immunity from foreign criminal jurisdiction?

⁴¹⁴ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

31. Immunity from foreign criminal jurisdiction had been contrasted with the fight against impunity and with responsibility. That was also not a viable position, in his view. It had rightly been said that at the international level, the struggle against impunity took place on a very broad front, in the vanguard of which were bodies with international criminal jurisdiction and States that were cooperating to fight crime. International law had made huge strides in recent years in that particular area. As for the prosecution of officials of one State under the jurisdiction of another, there, the emerging concept of universal criminal jurisdiction had come up against serious problems, and not only on account of immunity. That type of prosecution was a fairly discrete and limited aspect of the international efforts to combat impunity, and was not overly popular among States themselves. There was little merit in the argument that State officials should be prosecuted for the most serious international offences in other States. If States had considered such an approach to be appropriate, then there would have been no need to set up the International Criminal Court.

32. Overall, his third report had been less controversial than his second, although the conceptual similarities between the two had given rise to similar differences of opinion, particularly with regard to how prerogatives were apportioned between the State of the official and the State exercising jurisdiction.

33. Some of his conclusions enjoyed fairly wide support. That was true of the idea that the issue of the immunity of a State official from foreign criminal jurisdiction must in principle be addressed at an early stage of court proceedings or even earlier, at the pretrial stage. On that subject, the view had been expressed that failure to do so could not always be taken as a violation of the obligations arising from immunity—an observation with which he agreed. Useful comments had also been made concerning the pertinence of the issue of the inviolability of officials, particularly in the early stages of criminal proceedings.

34. There had also been reasonably broad agreement with his idea that, in order to have legal significance, immunity must be invoked by the State of the official, not by the official himself. It had been pointed out, however, that the invocation of immunity by an official should nevertheless have some sort of consequences. He agreed with that position: in fact, paragraph 15 of his third report indicated that a declaration by an official that he or she enjoyed immunity had a certain significance. It could not be simply ignored by the State exercising jurisdiction, which could, on the basis of such a declaration, consider the question of the official's immunity. It might even be obliged to do so under its domestic legislation. Nevertheless, from the point of view of international law, a declaration of immunity by the individual concerned could not be accorded the same significance as a declaration by the State of the official, as the official was merely the beneficiary of immunity, which actually belonged to the State.

35. Substantial support had been expressed for the idea that waiving immunity was the prerogative of the State of the official, not of the official himself.

36. With regard to the burden of invoking immunity, there had been some support for differentiating between

persons who enjoyed immunity as members of the troika and other officials. The view had also been expressed, however, that such a distinction was meaningless, since it was just as easy for a State to invoke immunity for officials belonging to the troika as for other officials. He did not entirely agree with that observation. It was true that States often raised the issue of immunity of high-ranking officials themselves, but that did not mean they should be obliged to do so.

37. It had also been said that the police and other authorities of the State exercising jurisdiction did not always know who were the highest-ranking officials of certain States, and that they should not have to be responsible for raising the issue of immunity in relation to the troika. He was not convinced that ignorance by one State's police of the fact that it had detained the President of another State released the first State from responsibility for that act. The issue was really one of coordination between law enforcement agencies and Ministries of Foreign Affairs. The importance of communication between States had been emphasized, with particular stress laid on the need for the State exercising jurisdiction to inform the official's State of the measures being taken.

38. The question of grounds for functional immunity had given rise to disagreements. He agreed that further elaboration of the finer points was needed in order to ensure a balance between the prerogative of the official's State to declare that a person was acting in an official capacity and the prerogative of the State exercising jurisdiction not to accept such a declaration blindly. Much would depend on the specific circumstances of the case. It might happen that an official's conduct was so obviously official in nature that the State exercising jurisdiction could draw that conclusion for itself, although that did not mean it should be obliged to do so.

39. Disputes had also arisen over the extent to which it was necessary to give grounds for the functional or personal immunity of officials not belonging to the troika. The very idea that the troika existed had been repeatedly disputed. However, it had been pointed out, and he agreed, that the purpose of the obligation to provide grounds for functional immunity was solely to determine whether an official had acted in an official capacity, not to force a State to defend its interests in a foreign court. A fair amount of support had been expressed for the proposition that grounds for immunity did not have to be presented in a foreign court, diplomatic channels sufficing for the purpose.

40. Various views reflecting divergent conceptual approaches had been expressed in connection with paragraphs 44 and 45 of his report, which discussed whether the signature by a State of an international agreement criminalizing certain acts implied a waiver of the immunity of officials who committed such acts.

41. Overall, he had the impression that, aside from the issues raised in paragraphs 44 and 45, the waiver of the personal immunity of individuals outside the troika and the existence of such a category *per se*, there had been fairly good support for his ideas about the ways in which immunity could be waived.

42. The concept of dual responsibility, or dual attribution, seemed to have garnered significantly more support after having been explained in more detail in his third report. The remaining differences of view related to the finer points of the issue, rather than the underlying principle.

43. The question of balance had been raised in relation to both his second and third reports.

44. As the ICJ had rightly confirmed, immunity from foreign criminal jurisdiction implied neither impunity nor the absence of responsibility. It was therefore inaccurate to draw a distinction between responsibility and impunity. The correct distinction was between immunity and foreign criminal jurisdiction, and indeed, not jurisdiction in general, but only criminal procedural measures that imposed an obligation on the official or were coercive. Immunity provided protection only from such measures, not from foreign criminal jurisdiction as a whole.

45. The balance sought by many, himself included, would be found, not when the maximum number of officials of one State could be subjected to the jurisdiction of another, but perhaps using the following reasoning.

46. First, personal immunity might be enjoyed by officials not belonging to the troika; however, their number must be limited, and the time frame restricted to when they held office.

47. Secondly, functional immunity provided protection only in respect of actions undertaken in one's official capacity. Actions undertaken in a personal capacity, including while holding high-ranking government positions, were not covered.

48. Thirdly, restrictions on personal immunity limited the protection enjoyed by officials in respect of actions undertaken prior to taking up office.

49. Fourthly, the burden of invoking and providing grounds for functional immunity fell to the State of the official, which must declare that the conduct concerned had been official in nature and that the person in question was or had been an official of that State, acting on its instructions. Such a declaration established the premises for that State's responsibility to be invoked under international law. The need to make such a declaration often left the State with a difficult choice.

50. Fifthly, if the State of an official made no declaration of immunity, and consequently of the official nature of its official's conduct, it would be silently or implicitly waiving that official's functional immunity.

51. Sixthly, immunity provided protection only from criminal procedural measures that imposed an obligation on the official or were coercive. A State exercising jurisdiction could bring criminal proceedings against an official; gather appropriate evidence on the official's conduct and wait until his or her personal immunity expired, if it was a high-ranking official, and then institute criminal proceedings; forward the evidence to the International Criminal Court; suggest to the foreign State

that it waive the official's immunity; or present it with the evidence gathered and suggest that it bring criminal proceedings itself. States often preferred to deal with their own former officials independently.

52. Finally, if an action had been carried out in an official capacity, the possibility arose of invoking the responsibility of the official's State under international law.

53. Obviously, there were other options. The debate had alerted him to the lack of any reference in his reports to the importance of cooperation between States in matters relating to the immunity of foreign officials and the exercise of criminal jurisdiction. In its future work, the Commission might devote some attention to obligations relating to cooperation. His reports also said nothing about settlement of disputes between States with regard to specific aspects of the immunity of officials from foreign criminal jurisdiction. If such a dispute arose, it should be examined by an international court or arbitration body, not a national court, since such disputes were regulated by international law. The Commission might also consider that issue.

54. He hoped that his three reports and the debate thereon, including within the Sixth Committee, would provide a useful foundation on which to build. The ideas that he had formulated, particularly at the end of his second and third reports, were in no way intended to be taken as the basis for draft articles. They were simply a summary of his reports, setting out the conclusions he had reached in his work on the subject to date, primarily for the reader's convenience. He would not object to their being used to develop draft articles in the future, but he thought that more work on the topic was required first in order to resolve basic issues.

55. The Commission could already approach States on two matters, requesting them, first, to pay particular attention to the issues raised in his second report and in the Commission's debate on it; and, secondly, to provide information on their legislation and practice, including judicial practice, with respect to the matters covered in his second and third reports and in the Commission's debate thereon.

56. The issue of the Commission's reputation had been raised—ever a pertinent question. He wished in turn to speak about the responsibility of the Commission, and indeed of all who wrote about international law. To illustrate his thoughts on the matter, he cited an article by Professor A. Gattini⁴¹⁵ showing how successive editions of the most popular Italian textbook on international law had, at different historical moments, taken diametrically opposed views on the questions of State immunity, with a consequent influence—adverse in the case in question—on a ruling by an Italian court. As Professor Gattini pointed out, the *Ferrini v. the Federal Republic of Germany* case and its aftermath should be a reminder for international lawyers of their responsibility as subsidiary sources of international law.

⁴¹⁵ A. Gattini, "The dispute on jurisdictional immunities of the State before the ICJ: is the time ripe for a change of the law?", *Leiden Journal of International Law*, vol. 24, No. 1 (March 2011), pp. 173–200.

57. Mr. DUGARD welcomed the Special Rapporteur's fair-minded summing up of the debate, in which he acknowledged the existence of views contrary to his own and provided an excellent exposition of the subject. He suggested that, together with the three reports prepared by the Special Rapporteur, it should form the basis for further consideration of the topic.

58. The CHAIRPERSON expressed appreciation to the Special Rapporteur for his excellent work in laying the foundations for future study of the question of immunity.

The meeting rose at 11.25 a.m.

3116th MEETING

Tuesday, 2 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (concluded)* (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

1. The CHAIRPERSON invited the Special Rapporteur on the topic of “The obligation to extradite or prosecute (*aut dedere aut judicare*)” to summarize the debate on his fourth report (document A/CN.4/648).

2. Mr. GALICKI (Special Rapporteur) expressed his sincere gratitude to all the members of the Commission who had so actively participated in the debate on his fourth report. He was grateful for their constructive and friendly criticism, which was more valuable than traditional congratulations for moving ahead on a topic that had proved to be so complex, as most speakers had stressed. The topic had entailed an in-depth analysis of international norms, both conventional and customary, and of national regulations, which had grown more numerous in recent years and had changed significantly, as confirmed in 2009⁴¹⁶ and 2010⁴¹⁷ by the Working Group on the obligation to extradite or prosecute.

Although one member of the Commission had suggested that consideration of the topic should be suspended or even terminated, the overwhelming majority of speakers had argued that the work should continue without interruption. Its suspension could create the false impression that the Commission believed that the topic was inappropriate, that it was not ready for a codification exercise or that it should be discontinued for other reasons. Some speakers had been of the view that the topic should be linked to and addressed together with the question of universal jurisdiction, which had already been discussed in a number of United Nations bodies. In his preliminary report,⁴¹⁸ he had proposed a joint analysis of the two questions, but that proposal had been criticized and had not received sufficient support from the Commission or from the Sixth Committee. As the question of universal jurisdiction was now on the agenda of other United Nations bodies, it seemed inevitable that the Commission should again consider, and the sooner the better, whether and to what extent the two topics should be examined together or separately.

3. Most of the new draft articles introduced in the fourth report had been approved. There had been agreement that, at the current stage, the Commission should simply take note of the draft articles and should not adopt them or submit them officially to the Sixth Committee for consideration. He suggested, however, that the draft articles could be quoted for information only in a footnote in the relevant chapter of the Commission's annual report.

4. The new draft article 2 (Duty to cooperate) had given rise to numerous comments, most speakers having agreed that States had such a duty and that the draft article should be included in the draft articles on the obligation *aut dedere aut judicare*. However, there had been differences of opinion on whether such a provision should be the subject of a separate draft article or should be contained in the preamble. Moreover, several speakers had criticized the use of the word “duty” and preferred “obligation”, and others had expressed doubts as to whether the duty to cooperate could be considered to be a primary source of the obligation *aut dedere aut judicare*. A number of members had also argued that the phrase “the fight against impunity” was not appropriate for a legal text. However, the Commission had already stressed the importance of the duty to cooperate in the fight against impunity, which was one of the most important legal bases of the obligation to extradite or prosecute in the proposed general framework for the Commission's consideration of the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” prepared by the Working Group in 2009 and included in the report of the Commission of that year.⁴¹⁹ That argument had been confirmed in 2010 in the discussions in the Working Group, in which it had been pointed out that “the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute”.⁴²⁰ Moreover, the words “fight against impunity” or “combat impunity” appeared in many international legal documents and did not weaken the legal value of draft

* Resumed from the 3113th meeting.

⁴¹⁶ *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

⁴¹⁷ *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340.

⁴¹⁸ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

⁴¹⁹ *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

⁴²⁰ *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, para. 339.

article 2. Similarly, the formulation “duty to cooperate” was used at least as often as “obligation to cooperate”, and the Commission had recognized its importance when it had provisionally adopted, in 2010, a draft article on the duty to cooperate in the event of disasters.⁴²¹ In his fourth report on the topic “Protection of persons in the event of disasters” (A/CN.4/643), Mr. Valencia-Ospina had also underscored the importance of such a duty in general, and with regard to cooperation in the event of disasters in particular. Thus, he personally was in favour of retaining the draft article on the duty to cooperate at the beginning of the draft articles, and he fully approved most of the suggestions made to improve its wording.

5. The proposal to divide draft article 2, paragraph 1, into two parts, the first dealing with inter-State cooperation and the second with cooperation with international courts and tribunals, was very useful. A specific reference could also be made to the obligation to cooperate with the United Nations which followed from article 89 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

6. Some speakers had been of the view that the question of sources or of the legal bases of the obligation to extradite or prosecute was not the most important aspect of the topic, but he agreed with the opinion expressed by most members that the legal basis of that obligation could and should be treated as a good starting point for a subsequent in-depth analysis of the subject. For that reason, draft article 3 (Treaty as a source of the obligation to extradite or prosecute) began by reproducing the provision already contained in the third report and which read: “Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.” Although that proposal had not given rise to any objections in the Commission or the Sixth Committee in 2008, at the current session a number of speakers had questioned the need to repeat the well-known principle *pacta sunt servanda* in draft article 3, paragraph 1. Admittedly, with that provision the Commission would not be saying anything new, but the paragraph on treaties as sources of the obligation to extradite or prosecute was a good starting point for later work. First of all, the relevant treaty provisions enunciating the obligation *aut dedere aut judicare* were the strongest and most unquestioned primary sources of that obligation. To omit them in the draft article might give the false impression that they were unimportant. Secondly, a brief review of existing treaties which contained the obligation *aut dedere aut judicare* showed that their numbers had grown significantly in recent years and that the number of States bound by that obligation was growing rapidly. As indicated in his preliminary report of 2006, some authors had tried to prove the existence of customary norms by citing the general practice deriving from treaties. The following opinion had already been expressed in the doctrine in 1998: “If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision,

and that such practice should lead to the entrenchment of this principle in customary law.”⁴²² That was not a majority view, but if a State had signed and ratified a significant number of treaties containing the obligation *aut dedere aut judicare*, it was reasonable to assert that that State had demonstrated through its practice that it also recognized the principle *aut dedere aut judicare* as a customary norm, at least with respect to certain international offences. In the debate during the current session, one speaker had stressed that extensive State practice could be a sign of an emerging rule of customary law. If States acceded to a large number of international treaties, all of which enunciated an obligation to extradite or prosecute in one form or another, that was strong evidence that those States were willing to be bound by that obligation. He shared the view that this practice could lead to the transformation of the obligation into a principle of international customary law. Consequently, in view of the possible link between international treaties and international custom as parallel bases for the obligation to extradite or prosecute, international treaties should not be omitted in the draft article on sources. He agreed that the affirmation that international treaties were the principal source of the obligation *aut dedere aut judicare* should be explained in greater detail, especially since a new paragraph 2 had been added in draft article 3 which provided that particular conditions for exercising extradition or prosecution could be formulated by the internal law of the State party concerned, even if the obligation to extradite or prosecute was established by an international treaty.

7. The reference in draft article 3, paragraph 2, to “general principles of international criminal law” had been criticized. However, the concepts of “general principles of international criminal law” and “general principles of criminal law” appeared to be accepted and were often used in the doctrine. For instance, the well-known work of Gerhard Werle on principles of international criminal law⁴²³ dealt with the question in connection with the relevant provisions of the Rome Statute of the International Criminal Court. Werle correctly noted that Part 3 of the Statute currently contained comprehensive provisions on “general principles of criminal law” that formed the nucleus of a self-contained set of general principles of international criminal law, and he also underlined that, although Part 3 of the Statute listed numerous general principles of criminal law, it had not exhausted all of them, and they were to be supplemented especially by rules that were part of general international law. Since, in practice, both elements of the implementation of the obligation to extradite or prosecute appeared to be governed by both domestic legislation and international law, draft article 3, paragraph 2, on particular conditions for exercising extradition or prosecution, might also invoke general principles of international criminal law as a framework in accordance with which particular conditions for exercising extradition or prosecution might be established by individual States.

⁴²² C. Enache-Brown and A. Fried, “Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law”, *McGill Law Journal/Revue de droit de McGill*, vol. 43 (1997–1998), pp. 613–633, at p. 629.

⁴²³ G. Werle, *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2005.

⁴²¹ *Ibid.*, paras. 330–331 (draft article 5).

8. He approved the suggestion that the particular problems connected with extradition and prosecution should be considered separately. It was true that, in practice, there was no equivalence or even a sustainable balance between legal requirements concerning extradition and prosecution deriving from international treaties and those established in national legislation. Hence the need for one paragraph on the conditions for extradition and a separate paragraph on the conditions relating to prosecution. In any case, the future draft article required further elaboration, since it concerned a complex set of extradition treaties.

9. The last important point related to international custom as a source of the obligation *aut dedere aut judicare*, which was the subject of draft article 4. Although all speakers had recognized the importance of the question, some had criticized the title of the draft article and had contended that it should not refer to the source of the obligation, but to the obligation itself as a rule of customary international law. The enumeration of crimes in draft article 4, paragraph 2, was not exhaustive, but merely cited possible examples of crimes. He fully recognized the need for a more precise definition of “core crimes” likely to give rise to the customary obligation *aut dedere aut judicare*. That approach seemed to be more realistic and promising than an attempt to establish the existence of a general customary rule. As noted in paragraphs 82 to 89 of the fourth report, article 9 of the Commission’s 1996 draft code of crimes against the peace and security of mankind⁴²⁴ was a good example of a list of “core crimes”. He had also suggested in his previous reports to follow the pattern of the draft code in identifying crimes which could be classified as giving rise to a customary obligation to extradite or prosecute. Thus, he fully supported the viewpoint expressed during the debate that the 1996 draft code should be the starting point for any future consideration of crimes and offences likely to trigger that obligation. The Rome Statute of the International Criminal Court might also be useful in that regard. Future examination of those core crimes would not spare the Commission the task of considering problems relating to universal jurisdiction, its points in common with the obligation *aut dedere aut judicare* and differences between the two.

10. With regard to the provisions proposed in draft article 4, paragraph 3, he stressed, in order to avoid any misunderstanding, that even when the obligation to extradite or prosecute derived from a peremptory norm of general international law that was accepted and recognized by the international community of States, it did not automatically acquire the status of a *jus cogens* norm. The question of the mutual relationship and interdependence between *jus cogens* norms and the principle *aut dedere aut judicare* would require further analysis. As concerned future work on the topic, he shared the prevailing view that the exercise should be continued. The Commission should take into account the development of the topic during the past quinquennium, the conclusions of the Working Group of 2009 and 2010 and in particular the proposed general framework for the Commission’s consideration of the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” elaborated in 2009, which the Commission had included in its annual report.

11. Mr. SABOIA asked whether the Special Rapporteur’s proposal to include the new draft articles for information only in a footnote in the annual report of the Commission was in keeping with established practice.

12. The CHAIRPERSON confirmed that such a proposal did not pose any problem and was standard Commission practice.

13. Mr. DUGARD enquired whether the Commission would take a decision on the inclusion of universal jurisdiction in the topic or whether the question would be left to the Commission in its new composition to decide.

14. The CHAIRPERSON said that perhaps the question should be posed directly to the Member States in the relevant chapter of the Commission’s annual report.

15. Mr. GALICKI (Special Rapporteur) said that he had no objection to posing the question directly to States, but it would be more practical for the Commission in its new composition to decide the question.

16. Mr. PETRIČ suggested that it be left to the Commission in its new composition to decide the important question of the link between the obligation to extradite or prosecute and universal jurisdiction, because that presupposed an in-depth debate which, for lack of time, the Commission would not be able to conduct at the current session.

It was so decided.

**Protection of persons in the event of disasters
(concluded)* (A/CN.4/638, sect. D, A/CN.4/643, A/
CN.4/L.794)**

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)**

17. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Committee on the topic “Protection of persons in the event of disasters” (A/CN.4/L.794).

18. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the report before the Commission related to draft articles 10 and 11 adopted by the Drafting Committee on 19 July 2011. The Committee had held three meetings on 18 and 19 July 2011 and had had before it draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report (A/CN.4/643). The three draft articles had been referred to the Drafting Committee at the 3107th meeting of the Commission, on 18 July 2011. Owing to a lack of time, the Drafting Committee had only been able to address draft articles 10 and 11. Accordingly, draft article 12 remained in the Drafting Committee for consideration at the 2012 session.

19. Draft article 10 concerned the duty of the affected State to seek assistance in a situation in which a disaster exceeded its national response capacity. Three issues

* Resumed from the 3107th meeting.

** Resumed from the 3102nd meeting.

⁴²⁴ *Yearbook ... 1996*, vol. II (Part Two), pp. 30–32.

were worth noting. First, the provision applied in a specific context, namely when the national response capacity of a State affected by a disaster was overwhelmed. The Drafting Committee had decided to move the contextual phrase to the beginning of the draft article so as to emphasize the exceptional nature of the duty. Such an assessment would be undertaken primarily by the affected State, in accordance with draft article 9. Nonetheless, the Drafting Committee had decided not to make that explicit out of recognition that the duty to seek assistance would also arise in situations in which it was manifestly clear that the national response capacity had been exceeded, but the affected State maintained the contrary. The assessment was intended to be objective. However, the Drafting Committee had included a subjective element in the new opening phrase (“To the extent that”), which acknowledged the possibility of a differentiated outcome, in the sense that situations might arise in which the response capacity was only partially overwhelmed. The duty to seek assistance would then only apply to that extent.

20. The second issue, which was perhaps key in connection with draft article 10, pertained to the nature of the obligation envisaged. There was a difference of opinion in the plenary as to whether a legal obligation, implying all the usual legal consequences in case of breach, was contemplated, or whether the provision should be cast in recommendatory or hortatory terms. While most members had been in favour of a legal obligation, as indicated by the word “duty”, there was another view in the Drafting Committee which had preferred a formulation along the lines of “the affected State should seek assistance”. Those who had favoured a legal obligation had maintained that it was grounded, *inter alia*, in existing obligations under international human rights law and that the duty had arisen as a corollary to draft article 9 establishing the duty of the affected State to ensure the protection of victims of a disaster. Others had taken the position that such an obligation did not reflect the current state of the law and was not called for as a matter of progressive development, given that, in most cases of disasters, and regardless of whether their national capacity was overwhelmed or not, affected States were willing to receive assistance from the international community as a matter of international cooperation and solidarity, and not out of a sense of legal obligation. The Drafting Committee had also agreed with the Special Rapporteur’s proposal to use the word “seek” as opposed to “request”, since the idea of “seeking assistance” implied a process of interaction with assistance providers.

21. The third issue that had arisen during the consideration of the draft article related to the actors from which assistance should be sought. The Drafting Committee had decided to retain the reference to the United Nations out of recognition of the central role that the Organization played in the coordination of humanitarian relief assistance. It had also decided to retain the reference to NGOs in view of the important role that such entities played in the actual delivery of assistance. Nonetheless, draft article 10 contained the same qualifier as in draft article 5, namely “relevant”, which was an indication that it would be sufficient for the affected State to seek assistance from those NGOs in the best position to assist it.

22. The provision included two additional qualifiers. First, the reference to “from among” granted the affected State the discretion to choose which international actors it considered appropriate to seek assistance from. The Drafting Committee had also decided to include the qualifier “as appropriate”, which had been proposed by the Special Rapporteur, but to do so at the end of the provision to avoid any interpretation that the duty to seek assistance only existed in cases where it would be appropriate to do so. Instead, the words served to provide a further indication of the margin of appreciation that the affected State had in determining not only from which actors to seek assistance, but also what types of assistance and what combination of offers of assistance to accept, it being implicit that the affected State was expected to make a good faith determination. The title of draft article 10 was “Duty of the affected State to seek assistance”.

23. Draft article 11 concerned the important question of the consent of the affected State to external assistance. Paragraph 1 established the basic principle that the provision of external assistance was subject to (“requires”) the consent of the affected State. The provision was based on paragraph 2 of the Special Rapporteur’s proposal for draft article 8 in his third report.⁴²⁵ Other than a drafting change introduced by rephrasing the beginning of the paragraph to read “The provision of”, the main substantive issue that had arisen pertained to the limitation in the Special Rapporteur’s proposal, according to which such assistance could “only” be provided with the consent of the affected State. In the view of the Drafting Committee, that was not in line with the overall approach of the draft articles, which granted the State the primary, but not exclusive, role in the protection of persons affected by disasters (draft article 9). The Committee had thus excluded such a qualifier on the understanding that the provision of assistance by external actors was to be undertaken, in principle, on the basis of the consent of the affected State, which reflected the legal position in the vast majority of cases. However, the resulting constructive ambiguity left room for the possibility that in some cases, such as when there was no functioning Government to grant consent or where consent was being refused arbitrarily in the face of a manifest need for external assistance, either such consent was to be implied or the lack of consent would not serve as a bar to the provision of such assistance.

24. Paragraph 2 recognized the right of the affected State not to grant consent, subject to the restriction that the withholding of consent could not be undertaken arbitrarily. The Drafting Committee had also considered the possibility of presenting the qualifier as one of unreasonableness, but had settled for arbitrariness. Whether a decision was unreasonable or not implied a subjective analysis, which could amount to second-guessing the decisions of an affected State. Arbitrariness, on the other hand, implied a more objective test. The commentary would discuss the meaning of “arbitrary withholding of consent” in more detail. The Drafting Committee had decided to exclude the reference to the affected State being “unable or unwilling” to give its consent, on the grounds that such situations would amount to the arbitrary denial of consent and thus were already covered in the text.

⁴²⁵ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629.

25. Paragraph 3 established a duty for the affected State to make known its decision regarding offers of assistance. The Drafting Committee had preferred the more general phrase “in accordance with the present draft articles” so as to avoid an interpretation that offers of assistance were dealt with only in draft article 12, as had been proposed in the Special Rapporteur’s text. Instead, such offers were to be analysed in the context of the entire set of draft articles.

26. The Drafting Committee had then considered the question of the nature of the obligation of the affected State. Some members had suggested that emphasis be placed on a speedy response to an offer, through the possible inclusion of the words “without delay”, and that the duty should not be limited to announcing the decision, but should also require that reasons be given when offers of assistance were refused. However, the Committee had not wanted to impose an onerous burden on the affected State at a time of crisis by requiring it to give reasons for its decisions. Instead, it had preferred a more flexible formulation that was designed to strike a balance between the need for responses to be given to offers of assistance and the exigencies of responding to a disaster. That had been done in two ways. First, the obligation applied “whenever possible”, which implied that there might be situations in which responding to an offer might not be feasible. Greater flexibility had also been introduced by adopting a formulation that no longer referred to the authors of the offer. In an earlier version, it had been proposed that the affected State would be required to “notify all concerned”. That had been changed to an obligation to “make its decision regarding the offer known”. Hence, it would be for the affected State to determine the mode of communication. What was decisive was the result, namely that actors extending offers of assistance would learn the decision of the affected State on such offers. While the provision did not require that reasons be given, it was understood that failure to provide a reasoned response in the context of a denial of consent might give rise to a presumption of arbitrariness. That would be explained in the commentary. The title of draft article 11 was “Consent of the affected State to external assistance”.

27. He hoped that the Commission would be in a position to adopt the draft articles as presented.

28. The CHAIRPERSON invited the members of the Commission to adopt the report of the Drafting Committee contained in document A/CN.4/L.794.

Article 10

29. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 10.

It was so decided.

Article 11

30. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 11.

It was so decided.

Draft articles 10 and 11, reproduced in document A/CN.4/L.794, were adopted.

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

CHAPTER VI. *Effects of armed conflicts on treaties* (A/CN.4/L.785 and Add.1–2)

31. The CHAIRPERSON invited the Commission to adopt chapter VI of its report, on the effects of armed conflicts on treaties, starting with the portion of chapter VI contained in document A/CN.4/L.785.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted, subject to the completion of paragraph 7 by the secretariat.

C. Recommendation of the Commission

Paragraph 9

Paragraph 9 was adopted, on the understanding that it would be completed once the Commission decided what it recommended to the General Assembly.

D. Tribute to the Special Rapporteur

Paragraphs 10 and 11

32. Mr. NOLTE was surprised that in paragraph 10, the contribution of the current Special Rapporteur, Mr. Cafilisch, was termed “outstanding”, whereas in paragraph 11, the contribution of the previous Special Rapporteur, Sir Ian Brownlie, was referred to as “valuable”.

33. The CHAIRPERSON recalled that the Commission had already paid tribute to Sir Ian Brownlie⁴²⁶ when he had left his functions as Special Rapporteur.

34. Mr. CANDIOTI suggested that the word “expressed” in paragraph 11 should be replaced by “reiterated”.

Paragraphs 10 and 11, as amended, were adopted.

E. Text of the draft articles on the effects of armed conflicts on treaties (A/CN.4/L.785/Add.1–2)

1. TEXT OF THE DRAFT ARTICLES

35. The CHAIRPERSON recalled that the Commission had already adopted the text of the draft articles on the effects of armed conflicts on treaties, including its annex,⁴²⁷ and that if he heard no objection, he would take it that the Commission wished to adopt document A/CN.4/L.785 as a whole.

Sections A, B, D and E.1, reproduced in document A/CN.4/L.785, as amended, were adopted.

* Resumed from the 3110th meeting.

⁴²⁶ *Yearbook ... 2008*, vol. II (Part Two), p. 45, para. 64. See also *Yearbook ... 2010*, vol. II (Part Two), p. 167, para. 191.

⁴²⁷ See the 3089th meeting above, paras. 89–96.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

PART ONE.

SCOPE AND DEFINITIONS

*Article 1. Scope**Commentary*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

36. Mr. VÁZQUEZ-BERMÚDEZ said that, given that the adoption was on second reading, all references in the commentaries should be to articles rather than draft articles.

37. The CHAIRPERSON said he took it that the Commission wished to adopt the proposal made by Mr. Vázquez-Bermúdez.

It was so decided.

38. Sir Michael WOOD said that the French text was much clearer than the English text; in fact, sometimes a literal translation of the French into English was helpful. He was prepared to make his proposals for drafting changes to the English text available to the secretariat.

39. Mr. NOLTE suggested, for the sake of consistency, to replace the words “internal conflict” by “non-international armed conflict” throughout the commentaries.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

40. Mr. VÁZQUEZ-BERMÚDEZ said that, in the English text, the words “general proposition” in the third sentence should be replaced by “general principle”.

41. Mr. CAFLISCH (Special Rapporteur) said that, in the same sentence of the English text, the words “armed conflicts” should be replaced by “treaties”.

Paragraph (5), as corrected in the English text, was adopted.

The commentary to article 1, as amended, was adopted.

*Article 2. Definitions**Commentary*

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

42. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. NOLTE, said that in the footnote, it would be preferable to delete the reference to the 1985 resolution of

the Institute of International Law⁴²⁸ and to start with the phrase “It should be noted ...”. Given that paragraph (4) referred to the *Tadić* decision, it did not seem logical to begin by a reference to the Institute, since the Commission had not accepted the definition of the words “armed conflict” contained in that resolution.

43. Mr. CAFLISCH (Special Rapporteur), supported by Mr. NOLTE, proposed a restructuring of the footnote, on the understanding that the secretariat would finalize the wording. The footnote could start with a reference to the *Tadić* decision, followed by the Internet address, which was already contained in the text. The relevant part of the decision could then be cited, after which it could be noted that the definition differed from the one used by the Institute of International Law in its 1985 resolution, without saying what the difference was.

Paragraph (4), as amended, was adopted.

Paragraph (5)

44. Mr. CAFLISCH (Special Rapporteur) said that the second sentence posed a problem. It began with the phrase “The formulation of the provision, particularly the reference to”, but the words in quotes that followed were not in the provision in question. To address the problem, it would be preferable for the text to read “The formulation of the provision and the above reference to”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

45. Mr. NOLTE said that, in the second sentence, the words “Civil wars” should be replaced by “Non-international armed conflicts”. They could be retained in the third sentence, because they had been placed in quotation marks.

46. Mr. VÁZQUEZ-BERMÚDEZ said that, in the fourth sentence, it would be preferable to delete the words “if not more than”, which went too far.

Paragraph (8), as amended, was adopted.

The commentary to article 2, as amended, was adopted.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

PART TWO.

PRINCIPLES

CHAPTER I.

OPERATION OF TREATIES IN THE EVENT OF ARMED CONFLICTS

Commentary

47. Mr. VÁZQUEZ-BERMÚDEZ said that the third sentence of the general commentary weakened the assertion in the second. He therefore proposed replacing

⁴²⁸ Institute of International Law, *Yearbook*, vol. 61, vol. II, Session of Helsinki (1985), p. 278 (available from www.idi-ii.org, resolutions).

it by the following sentence: “Continuity therefore may be subject to exceptions, depending on the circumstances of each case.”

48. Mr. CANDIOTI endorsed the proposal by Mr. Vázquez-Bermúdez. In fact, he would be inclined to delete the third sentence entirely.

49. Mr. CAFLISCH (Special Rapporteur), supported by Mr. VASCIANNIE, remained convinced that the second sentence must be retained, because it reflected exactly the sense of the relevant provision.

50. Mr. HMOUD and Sir Michael WOOD stressed that it was not the time to reopen a substantive debate.

51. Mr. SABOIA and Mr. NOLTE said that, like Mr. Candiotti, they were in favour of deleting the third sentence.

52. Mr. CAFLISCH (Special Rapporteur) said that he had no objection to the deletion of the third sentence.

53. The CHAIRPERSON said she took it that the members of the Commission agreed to delete the third sentence of the commentary.

The general commentary to chapter I, as amended, was adopted.

Article 3. General principle

Commentary

Paragraph (1)

54. Mr. VÁZQUEZ-BERMÚDEZ recalled that the principle *pacta sunt servanda* was at the basis of all the draft articles. The Special Rapporteur had referred to that fact in the commentary to article 8, whereas it would be more appropriate to do so in connection with article 3, which established the general principle of the continuity of treaties. He therefore proposed that, in the first sentence, the words “and seeks to preserve the principle *pacta sunt servanda*” should be inserted after “Draft article 3 is of overriding significance”.

55. Mr. CAFLISCH (Special Rapporteur) said that he had sought to strike a balance: the text concerned the general principle of legal stability and the continuity of treaties, but it was also acknowledged that not all treaties necessarily survived. In that sense, article 3 was not always about the principle *pacta sunt servanda*. The reference to that principle in article 8 was in the right place.

56. Mr. HMOUD said that article 4 was also concerned, and he agreed with the Special Rapporteur that article 3 was not.

57. Mr. NOLTE said that the insertion proposed by Mr. Vázquez-Bermúdez actually ran counter to its desired goal. To say that article 3 sought to preserve the principle *pacta sunt servanda* suggested that the article was *lex ferenda*. It would be preferable not to amend the commentary.

58. Mr. CANDIOTI was of the view that the principle *pacta sunt servanda* belonged in article 3 rather than

in article 8, which referred to the capacity of States to conclude agreements, and not the effects of the agreements. However, Mr. Nolte was right; perhaps the wording should be made more categorical by saying that article 3 preserved the principle *pacta sunt servanda*.

59. Mr. CAFLISCH (Special Rapporteur) agreed that paragraph (1) of the commentary to article 8 needed to be amended, but he continued to believe that the reference to the principle *pacta sunt servanda* had no place in article 3.

60. Mr. VÁZQUEZ-BERMÚDEZ reiterated his view that that principle was not relevant for article 8, which, as rightly noted by Mr. Candiotti, concerned the capacity to conclude treaties, and not the obligation to comply with them. He conceded, however, that his proposed wording might weaken the principle. He maintained his position, but in the light of the comments by other speakers, he would not insist on the insertion of the reference in question.

61. Sir Michael WOOD said that, like the Special Rapporteur and Mr. Hmoud, he did not think that such an insertion was appropriate. The Commission should not reopen old debates.

62. The CHAIRPERSON, speaking as a member of the Commission, said that she endorsed the proposal to reformulate the sentence along the lines suggested by Mr. Nolte and Mr. Candiotti, but she took it that the members of the Commission wished to retain paragraph (1) of the commentary as it stood.

Paragraph (1) was adopted as it stood.

Paragraph (2)

63. Sir Michael WOOD suggested the deletion of the phrase “expressing what are substantially British views” in the third sentence.

64. Mr. VÁZQUEZ-BERMÚDEZ said that there was a mistake in the penultimate sentence of the English text: the phrase “compatible with the existence of hostilities” should read “incompatible with the existence of hostilities”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

65. Sir Michael WOOD suggested the deletion of the second sentence, in which it was stated that “[t]he term ‘outbreak’ in article 73 of the Vienna Convention was also not used because it is uncommon to refer to the outbreak of internal armed conflicts”. That might be the case in French, but not in English.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to article 3, as amended, was adopted.

*Article 4. Provisions on the operation of treaties**Commentary*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.**The commentary to article 4 was adopted.**Article 5. Application of rules on treaty interpretation**Commentary*

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

66. Sir Michael WOOD proposed the deletion of the last sentence, which sought to explain that the fact that the Commission did not refer to the Vienna Convention did not mean that it did not think that the Vienna Convention reflected customary international law. The way it was drafted suggested that the Commission left open the question of whether or not the rules on the interpretation of treaties in the Vienna Convention reflected customary international law.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

*Paragraph (4) was adopted with a minor grammatical correction to the English text.**The commentary to article 5, as amended, was adopted.**Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension**Commentary*

Paragraph (1)

67. Mr. VÁZQUEZ-BERMÚDEZ suggested replacing the word “necessarily” in the second sentence by “*ipso facto*” to bring it into line with article 3 and the commentary thereto.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

68. Sir Michael WOOD suggested deleting the word “very” in the penultimate sentence and saying more modestly, as in the French text, that such treaties exhibited a high likelihood of continued applicability.

Paragraph (3), as amended in the English text, was adopted.

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.**Article 7. Continued operation of treaties resulting from their subject matter**Commentary**The commentary to article 7 was adopted.*

CHAPTER II.

OTHER PROVISIONS RELEVANT TO THE OPERATION OF TREATIES

*Article 8. Conclusion of treaties during armed conflict**Commentary*

Paragraph (1)

69. Mr. CAFLISCH (Special Rapporteur) proposed the deletion of the reference to the principle *pacta sunt servanda* and a merging of the first two sentences, which would then read: “Draft article 8 is in line with the basic policy in the present draft articles, which seeks to ensure the legal security and continuity of treaties”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

70. Mr. CAFLISCH (Special Rapporteur) drew attention to two corrections that needed to be made in the French text: the words “*proposition fondamentale*” should be replaced by “*thèse fondamentale*”, and the phrase “*En visant de manière générale le droit international*” should be replaced by “*En se référant de manière générale au droit international*”.

Paragraph (2), as corrected in the French text, was adopted.

Paragraph (3)

71. Mr. CAFLISCH (Special Rapporteur) said that, in the French text, the words “*à des fins déclaratives*” should be replaced by “*pour la clarté de l’exposé*”.

Paragraph (3), as corrected in the French text, was adopted.

Paragraph (4)

72. Mr. CAFLISCH (Special Rapporteur) said that, regarding the quote from Sir Gerald Fitzmaurice, in the French text, the words “*dans le cadre de ses conférences de La Haye*” in the fourth sentence should be corrected to read “*dans le cadre de son cours de La Haye*”.⁴²⁹

Paragraph (4), as corrected in the French text, was adopted.

⁴²⁹ G. G. Fitzmaurice, “The juridical clauses of the peace treaties”, *Recueil des cours de l’Académie de droit international de La Haye*, vol. 73 (1948-II).

Paragraph (5)

73. Mr. CAFLISCH (Special Rapporteur) said that, in the French text, the word “viser” was inappropriate and should be replaced by “parler de”.

Paragraph (5), as corrected in the French text, was adopted.

Paragraph (6)

74. Sir Michael WOOD said that the word “third” in the second line should be deleted.

Paragraph (6), as amended, was adopted.

The commentary to article 8, as amended, was adopted.

Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor drafting change in the English text.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

75. Sir Michael WOOD said that paragraph (6) was unclear. In particular, with regard to the second sentence, he did not see why acknowledgement of receipt of a notification (made by virtue of article 9, paragraph 1) was essential for the right to object to the content of the notification to be triggered (by virtue of paragraph 3). The whole paragraph seemed to suggest that treaty relations were “frozen” or “paralysed”, without actually saying what that meant. If the paragraph was really essential, the Special Rapporteur should provide some clarification on it.

76. Mr. CAFLISCH (Special Rapporteur) stressed that paragraph (6) aimed to contribute to the understanding of article 9, but he would not object if the Commission wished to delete it.

77. The CHAIRPERSON pointed out that the deletion of the paragraph would mean that all the commentary to article 9, paragraph 4, would also be deleted.

78. Mr. SABOIA said that, like Sir Michael, he did not see how acknowledgement of receipt of a notification could have the effect in question. If the second sentence was deleted, the remaining paragraph would be clear.

79. Mr. NOLTE said that perhaps a new wording could be found in informal discussions before the next meeting was held.

80. The CHAIRPERSON proposed that the Commission continue its discussion on paragraph (6) at the next meeting.

It was so decided.

The meeting rose at 1.05 p.m.

3117th MEETING

Thursday, 4 August 2011, at 10 a.m.

*Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)*

Present: Mr. Caflich, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER VI. Effects of armed conflicts on treaties (continued) (A/CN.4/L.785 and Add.1–2)

E. Text of the draft articles on the effects of armed conflicts on treaties (concluded) (A/CN.4/L.785/Add.1–2)

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

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter VI of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.785/Add.1.

Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension (concluded)

Commentary (concluded)

Paragraphs (1) and (2) (concluded)

2. Mr. VÁZQUEZ-BERMÚDEZ said that, if he might be permitted to revert to the commentary to draft article 6, paragraphs (1) and (2), discussed at the previous meeting, he wished to point out that, as currently drafted, the last sentence of paragraph (1) implied that all the criteria which might assist in ascertaining whether the treaty was susceptible to termination, withdrawal or suspension were external to it, which was not the case. He proposed that the last sentence should be redrafted to read: “The draft article highlights certain criteria, including certain criteria external to the treaty...”. In the light of that change to paragraph (1), the words “external to the treaty” should be deleted from the second sentence of paragraph (2).

The additional amendments to paragraphs (1) and (2) were adopted.

The commentary to article 6, as amended, was adopted.

Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation (concluded)

Commentary (concluded)

Paragraph (6) (*concluded*)

3. The CHAIRPERSON recalled that paragraph (6) of the commentary to draft article 9 had been deferred pending some redrafting. She invited the Special Rapporteur to read out the proposed new text.

4. Mr. CAFLISCH (Special Rapporteur) proposed that paragraph (6) read:

“A notification made by a State party under paragraph 1 takes effect when it has been received by the other State party or States parties, unless the notification provides for a subsequent date (para. 2). If no objection is received within a reasonable period of time, the notifying State may take the measure indicated in the notification (para. 3). If an objection is received, the issue will remain open between the States concerned until there is a diplomatic settlement pursuant to paragraph 4.”

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to article 9, as amended, was adopted.

Article 10. Obligations imposed by international law independently of a treaty

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 10 was adopted.

Article 11. Separability of treaty provisions

Commentary

Paragraph (1)

5. Mr. GAJA said that he had concerns about the wording of the second sentence. First of all, it referred to practice recognized by the Commission that was not elaborated on. Furthermore, it was not clear from the phrase “the (negative) effect of an armed conflict on some treaties is only partial” that the separability of treaty provisions could work both ways: in favour of either termination or continuation of the treaty, depending on the circumstances. Since the paragraph would read more clearly without the second sentence, he proposed its deletion.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

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

Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation

Commentary

Paragraph (1)

6. Sir Michael WOOD, referring to the last sentence, proposed that the words “a minimum of good faith must prevail” should be replaced by “the principle of good faith continues to apply”.

7. Mr. CAFLISCH (Special Rapporteur) said that he would prefer to retain the original wording of the sentence, since in times of armed conflict the precepts of good faith were not always borne in mind. In addition, the first sentence should refer to draft article 12, not draft article 11.

Paragraph (1) was adopted with that correction.

Paragraph (2)

8. Mr. CAFLISCH (Special Rapporteur) proposed that, at the beginning of the paragraph, the words “To provide” should be replaced by “To make clear”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

9. Mr. CAFLISCH (Special Rapporteur) proposed that, in the French text, the words “*relativement clairement*” should be replaced by the words “*assez clairement*”.

Paragraph (3) was adopted with that amendment to the French text.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to article 12, as amended, was adopted.

Article 13. Revival or resumption of treaty relations subsequent to an armed conflict

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 13 was adopted.

PART THREE.

MISCELLANEOUS

Article 14. Effect of the exercise of the right to self-defence on a treaty

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

10. Sir Michael WOOD said that the clause in the second sentence “which only applies to States” did not seem necessary and proposed its deletion.

Paragraph (3), as amended, was adopted.

Paragraph (4)

11. Mr. CAFLISCH (Special Rapporteur) proposed the deletion of the whole paragraph, since it was unnecessary and unnecessarily controversial.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to article 14, as amended, was adopted.

Article 15. Prohibition of benefit to an aggressor State

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

12. Mr. VÁZQUEZ-BERMÚDEZ said that the paragraph was too long and proposed that it be divided into two separate paragraphs after the end of the third sentence.

13. Mr. CAFLISCH (Special Rapporteur) endorsed that proposal.

14. The CHAIRPERSON said she took it that the proposal by Mr. Vázquez-Bermúdez was acceptable to the Commission. The subsequent paragraphs would be renumbered accordingly in the final text.

It was so decided.

15. Mr. VÁZQUEZ-BERMÚDEZ said that in the fifth sentence he questioned the appropriateness of the phrase “As a general rule” before the words “it will claim the right anyway”; it was a phrase normally used in the Commission’s texts when formulating a legal rule or principle. He proposed that the sentence begin: “It may happen that the State characterized as an aggressor will claim the right anyway”.

16. Mr. CAFLISCH (Special Rapporteur) said that he favoured the more neutral formulation: “It may claim the right anyway”.

Paragraph (2), as divided and as amended by the Special Rapporteur, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

17. Sir Michael WOOD proposed deleting the mention of Article 2, paragraph 4, with reference to the Charter of the United Nations for the sake of consistency with the text of draft article 15.

Paragraph (4), as amended, was adopted.

Paragraph (5)

18. Mr. CAFLISCH (Special Rapporteur) proposed that the verb “attained” be replaced by “derived”.

Paragraph (5), as amended in the English version, was adopted.

The commentary to article 15, as amended, was adopted.

Article 16. Decisions of the Security Council

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

19. Sir Michael WOOD, referring to the second sentence, proposed that the phrase “duties based on binding decisions by United Nations bodies” be replaced by “obligations flowing from binding decisions”, which was more in keeping with the language used in Article 103 of the Charter of the United Nations.

20. Mr. CAFLISCH (Special Rapporteur) said that he could agree to that proposal, although he saw no need to draw a distinction between duties and obligations.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to article 16, as amended, was adopted.

Article 17. Rights and duties arising from the laws of neutrality

Commentary

Paragraph (1)

21. Mr. CAFLISCH (Special Rapporteur) proposed that, in the second sentence of the French text, the words “*qui visait plus précisément*” be replaced by the words “*qui se référerait plus spécifiquement*”.

Paragraph (1) was adopted with that amendment to the French text.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to article 17, as amended, was adopted.

Article 18. *Other cases of termination, withdrawal or suspension*

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 18 was adopted.

The commentaries to the draft articles on the effects of armed conflicts on treaties, as a whole, as amended, were adopted.

22. The CHAIRPERSON invited the Commission to consider the portion of chapter VI of the draft report contained in document A/CN.4/L.785/Add.2.

ANNEX

INDICATIVE LIST OF TREATIES REFERRED TO IN DRAFT ARTICLE 7

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

23. Mr. VÁZQUEZ-BERMÚDEZ, referring to the first sentence, which began, “The effect of such an indicative list is to create a set of weak and rebuttable presumptions”, proposed deleting the phrase “weak and rebuttable”. Since all presumptions were rebuttable, the use of the adjective was redundant; the adjective “weak” also seemed inappropriate when referring to the types of treaties listed.

24. Mr. CAFLISCH (Special Rapporteur) said that he could agree to the deletion of the adjective “weak”, but not of the adjective “rebuttable”, because there were rebuttable and non-rebuttable presumptions.

25. Mr. HMOUD recalled that the phrase “weak and rebuttable presumptions” came from the first report on the topic and had not previously been contested.

26. Mr. VÁZQUEZ-BERMÚDEZ recalled that his expression of concern about the matter on first reading of the draft articles had given rise to discussion.

27. Mr. CANDIOTI said that, to his recollection, when the matter had been discussed by the Drafting Committee, the intent had not been to establish legal presumptions. He could therefore not accept the idea that the examples of treaties given in the indicative list constituted presumptions.

28. Mr. SABOIA proposed the alternative wording: “a set of presumptions, some of which may be rebuttable”.

29. Mr. CAFLISCH (Special Rapporteur) said that he could not accept that proposal, since it might indicate indecisiveness on the part of the Commission. He stated his preference for his original proposal to delete the words “weak and”.

Paragraph (2) was adopted with the amendment proposed by the Special Rapporteur.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

(a) *Treaties on the law of armed conflict, including treaties on international humanitarian law*

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

30. Sir Michael WOOD said that it was not clear from the statement by the General Counsel of the United States Department of Defense quoted in the second sentence what he was responding to in the phrase “the treaty cannot properly be so construed”.⁴³⁰ It would be helpful if the Special Rapporteur could provide further context to clarify the General Counsel’s opinion.

31. Mr. GAJA said that the General Counsel’s comments concerned the question of whether the Comprehensive Nuclear Test-Ban Treaty was also meant to apply in time of war.

32. Mr. SABOIA said that it would be dangerous to take a position in a commentary on such a sensitive issue, and one which, in any case, was not relevant to the subject under consideration. He therefore proposed that paragraph (6) should be deleted.

33. Mr. CAFLISCH (Special Rapporteur) said that the question of whether a test-ban treaty could be construed as applying in time of war was indeed a delicate issue, like most questions under the topic, but a relevant one. The case of *Karnuth v. United States*, from which the quotation was taken, was a classic in the field. He therefore disagreed with Mr. Saboia’s proposal.

34. Mr. VÁZQUEZ-BERMÚDEZ said that he shared the concerns expressed by Mr. Saboia with regard to the inclusion of the paragraph. Even though the passage at issue was a quotation, it should not be included if the Commission had reservations about it.

35. Mr. VARGAS CARREÑO said that the paragraph raised extremely serious issues. In particular, the presumption in the final sentence that there was no prohibition on the use of nuclear weapons in wartime was highly debatable. He therefore fully supported Mr. Saboia’s proposal to delete the paragraph.

36. Mr. CANDIOTI said that he agreed with the views expressed by Mr. Saboia, Mr. Vargas Carreño and Mr. Vázquez-Bermúdez. The paragraph, which dealt with a delicate issue, was not essential to the argument and should be deleted.

37. Mr. CAFLISCH (Special Rapporteur) said that he was surprised by the reactions to the paragraph, which had not been contested on first reading.

⁴³⁰ M. Whiteman (ed.), *Digest of International Law*, vol. 14, Washington, D.C., Department of State publications, 1970, Response of the General Counsel of the United States Department of Defense to a question from Senator Kuchel during the hearings on the proposed nuclear test ban treaty, p. 510.

38. Sir Michael WOOD said that it was his understanding that the comments quoted in the paragraph concerned the interpretation of the treaty rather than its continuance or termination in the event of armed conflict. That being the case, he supported the deletion of the paragraph.

39. Mr. VASCIANNIE said that the passage quoted in paragraph (6) was meant to illustrate one instance among many of State practice with regard to the principle in question. It might therefore be possible to delete the reference to that particular opinion and to replace it with a less controversial example. Alternatively, he would have no objection to simply deleting the whole paragraph, since it touched on what were apparently contentious issues.

40. Mr. CAFLISCH (Special Rapporteur) said that he was opposed to the deletion of paragraph (6), but if the majority of members decided on that course of action, he would bow to that decision, although he did not agree with it.

41. Mr. SABOIA said that he was concerned not so much by the fact that the paragraph in question referred to the Comprehensive Nuclear Test-Ban Treaty, but by the idea that, in adverting to the opinion of the United States, the Commission might seem to be endorsing it, and that was something with which he could not agree.

42. Mr. MURASE asked for confirmation that the United States had ratified the treaty.

43. Mr. GAJA said that the treaty in question was the Moscow treaty of 1963, properly, the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, which had been signed and ratified by the United States. The quotation had been included, not for the construction that the General Counsel had placed on that particular treaty, but for the general principle he mentioned concerning treaties expressly applicable in time of war. Since the opinion of the General Counsel concerning the manner in which the treaty should be construed reflected the position of only one of the parties, it could be omitted, and its omission would not alter the general flow of the argument in the commentary.

44. Mr. MURASE said that, since the United States had signed and ratified the treaty, paragraph (6) could be retained.

45. Mr. McRAE said that, if the text of that paragraph of the commentary was not a vital part of the commentary and the reason for its inclusion was so unclear that it had to be explained to the members of the Commission, it should be deleted.

46. Mr. PETRIČ said that, since the text in question had reached its second reading and the Commission was taking a position different from that which it had adopted at first reading, an indicative vote should be taken.

47. Sir Michael WOOD suggested, by way of a compromise, deleting the last sentence of the quotation, which was controversial and not relevant to the issue, while retaining the rest of the quotation, which made an

important point concerning the possible application of the rule that war might suspend or annul the operation of treaties between the warring parties.

48. Mr. SABOIA said that he must insist on the deletion of paragraph (6) in its entirety and agreed that a vote should be taken.

An indicative vote was taken by show of hands.

49. The CHAIRPERSON said that, according to the indicative vote, 18 members were in favour of deleting paragraph (6) in its entirety and 2 members were against. While she had not participated in the vote she was also in favour of the deletion of the paragraph.

Paragraph (6) was deleted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

(b) *Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries*

Paragraphs (9) to (15)

Paragraphs (9) to (15) were adopted.

(c) *Multilateral law-making treaties*

Paragraph (16)

50. Sir Michael WOOD said that, in the interests of readability, the opening phrase, "Law-making treaties may be defined as follows" should be replaced with "Law-making treaties have been defined as follows".

Paragraph (16), as amended, was adopted.

Paragraph (17)

51. Mr. CAFLISCH (Special Rapporteur) said that, to align the English text with the French, the word "contour" in the first sentence should be replaced with "definition".

Paragraph (17), with that amendment to the English text, was adopted.

Paragraphs (18) to (20)

Paragraphs (18) to (20) were adopted.

Paragraph (21)

Paragraph (21) was adopted with a minor drafting change.

Paragraph (22)

Paragraph (22) was adopted.

(d) *Treaties on international criminal justice*

Paragraphs (23) to (25)

Paragraphs (23) to (25) were adopted.

Paragraph (26)

52. Sir Michael WOOD said that the final phrase in the last sentence, “and, as such, *must* be regarded as surviving armed conflicts”, should be deleted, since, although the *jus cogens* obligations would, of course, continue to apply, it was not necessarily the case that the treaty as such would survive an armed conflict.

Paragraph (26), as amended, was adopted.

(e) *Treaties of friendship, commerce and navigation and agreements concerning private rights*

Paragraph (27)

Paragraph (27) was adopted with a minor drafting change.

Paragraph (28)

53. Sir Michael WOOD said that in the first sentence the phrase “which put an end to the War of Independence” was inaccurate and should be deleted.

Paragraph (28), as amended, was adopted.

Paragraphs (29) to (47)

Paragraphs (29) to (47) were adopted.

(f) *Treaties for the international protection of human rights*

Paragraph (48)

54. Sir Michael WOOD said that, for the sake of accuracy, the phrase in the third sentence “preceded the emergence of international human rights rules” should be replaced with “preceded the conclusion of international human rights treaties”, since it was the treaties that were relevant in the context.

Paragraph (48), as amended, was adopted.

Paragraph (49)

Paragraph (49) was adopted.

Paragraph (50)

55. Sir Michael WOOD said that the last sentence of the quotation was not essential to the line of argument. Furthermore, contrary to what the sentence stated, it was not the case that all non-derogable human rights provisions codified *jus cogens* norms. He therefore proposed that the last sentence be deleted.

Paragraph (50), as amended, was adopted.

Paragraph (51)

56. Mr. CAFLISCH (Special Rapporteur) said that the word “treaty” should be inserted before “provisions” in the third sentence.

Paragraph (51), as amended, was adopted.

Paragraph (52)

Paragraph (52) was adopted.

(g) *Treaties relating to the international protection of the environment*

Paragraph (53)

Paragraph (53) was adopted.

Paragraph (54)

57. Mr. CAFLISCH (Special Rapporteur) said that the advisory opinion of the ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* should be referred to by its full title.

Paragraph (54), as amended, was adopted.

Paragraphs (55) and (56)

Paragraphs (55) and (56) were adopted.

(h) *Treaties relating to international watercourses and related installations and facilities*

Paragraphs (57) to (59)

Paragraphs (57) to (59) were adopted.

Paragraph (60)

58. Mr. CAFLISCH (Special Rapporteur) said that, in the second sentence, it would be more accurate to refer to “the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) as it relates to the Kiel Canal” rather than “the Treaty of Versailles Relating to the Kiel Canal”. As the paragraph contained no reference to the Convention between Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey respecting the Free Navigation of the Suez Canal (Constantinople Convention), he proposed that one be added.

Paragraph (60), as amended, was adopted.

Paragraphs (61) to (63)

Paragraphs (61) to (63) were adopted.

(i) *Treaties relating to aquifers and related installations and facilities*

Paragraphs (64) to (66)

Paragraphs (64) to (66) were adopted.

(j) *Treaties which are constituent instruments of international organizations*

Paragraphs (67) and (68)

Paragraphs (67) and (68) were adopted.

(k) *Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement*

Paragraphs (69) to (71)

Paragraphs (69) to (71) were adopted.

(l) *Treaties relating to diplomatic and consular relations*

Paragraphs (72) to (77)

Paragraphs (72) to (77) were adopted.

Paragraph (78)

59. Mr. GAJA said that, in the fourth sentence, the identity of “The defendants” in question was unclear.

60. Mr. CAFLISCH (Special Rapporteur) said that the defendants were the Federal Government of the United States. He therefore proposed that, in the fourth sentence, the words “The defendants” be replaced with “The Federal Government”.

Paragraph (78), as amended, was adopted.

The commentary to the annex containing the indicative list of treaties referred to in draft article 7, as amended, was adopted.

C. Recommendation of the Commission (continued)

61. The CHAIRPERSON recalled that the Commission had left uncompleted paragraph 9 in document A/CN.4/L.785 concerning its recommendation to the General Assembly with respect to the draft articles. The Special Rapporteur’s proposal for the recommendation was contained in paragraph 15 of the note on the recommendation to be made to the General Assembly about the draft articles on the effects of armed conflicts on treaties (A/CN.4/644).

62. Mr. CAFLISCH (Special Rapporteur) said that in his note he suggested that the Commission should not propose to the General Assembly the immediate convening of a diplomatic conference by the General Assembly. His position was dictated by concern about what might ensue if such a conference failed, or if too few States ratified the treaty produced by it. He realized that the Commission’s principal responsibility was to prepare the texts of treaties to promote the progressive development and codification of international law. He also acknowledged that the Commission must not allow itself to be discouraged by the difficulties sometimes encountered in its work on progressive development and codification when it submitted proposals to the General Assembly. If the majority of members disagreed with the suggestions contained in his note and decided to suggest to the General Assembly that it should contemplate the convening of a diplomatic conference in the near future, he would, however, go along with that decision. In any case, the final decision on that matter lay with the General Assembly.

63. Mr. DUGARD wondered whether, as the Special Rapporteur was not advocating the convocation of a diplomatic conference at that stage, there was not another avenue open to the Commission, namely the drafting of a convention by the Sixth Committee, since there had been a precedent for that step. The convocation of a diplomatic conference was a major undertaking, but it might be possible for the Sixth Committee itself to convert the draft articles into a convention.

64. Mr. CAFLISCH (Special Rapporteur) said that that manner of proceeding was quite possible, because that was how the United Nations Convention on Jurisdictional Immunities of States and Their Property and the

Convention on the Law of the Non-Navigational Uses of International Watercourses had been adopted.

65. Mr. CANDIOTI said that he supported the prudent approach outlined in the Special Rapporteur’s note, because at the sixty-fifth session of the Sixth Committee one delegation had even suggested that the topic was not suitable for codification and should be dropped. The proposal made in paragraph 15 of the note was therefore wise. It was regrettable that the suggestion which he had made the previous year, that a preamble should be appended to the draft articles, had been rejected, because a preamble could shed light on the reasons behind the Commission’s work.

66. Sir Michael WOOD said that he agreed with the need for some degree of caution. In principle, the suggestion made in paragraph 15 was appropriate, but the Commission should look at the exact wording of the recommendation that it had made to the General Assembly on the draft articles on responsibility of States for internationally wrongful acts,⁴³¹ because it had not gone quite as far as subparagraph (ii) of paragraph 15. It was not for the Commission to say whether the General Assembly should convene a conference, or whether the Sixth Committee should turn the draft articles into a convention.

67. Mr. PETRIČ said that he agreed with Mr. Candiotti that, given the sensitive and far-reaching nature of the topic, the draft articles required a preamble explaining their purpose. He also agreed with the proposals made in paragraph 15 of the note, possibly amended along the lines suggested by Sir Michael.

68. Mr. CAFLISCH (Special Rapporteur) said that, while he had no objection to the inclusion of a preamble, time was running short and a preamble would have to be drafted, discussed, referred to the Drafting Committee and debated again before it could be adopted. On the other hand, it would be very easy to refine the proposals contained in paragraph 15 of his note.

69. Sir Michael WOOD said that, although he had no objection in principle to the inclusion of a preamble, he shared the Special Rapporteur’s view that the process would take some time and he also feared that it would reopen the debate on some of the provisions. In practical terms, it was therefore a little late to consider a preamble.

70. The CHAIRPERSON suggested that the Commission should defer consideration of its recommendation and that, in the meantime, members should reflect on appropriate wording for subparagraph (ii) of the proposal contained in paragraph 15 of the Special Rapporteur’s note (A/CN.4/644).

The meeting rose at 11.30 a.m.

⁴³¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., para. 73.

3118th MEETING

Friday, 5 August 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON
(Vice-Chairperson)

Later: Mr. Bernd H. NIEHAUS (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

In the absence of the Chairperson, Ms. Jacobsson, Vice-Chairperson, took the Chair.

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

CHAPTER VI. *Effects of armed conflicts on treaties (concluded)* (A/CN.4/L.785 and Add.1–2)

C. Recommendation of the Commission (concluded)

1. The CHAIRPERSON reminded Commission members that paragraph 9 of document A/CN.4/L.785 had been held in abeyance so that the Special Rapporteur could make a proposal on it.

2. Mr. CAFLISCH (Special Rapporteur) said that, in the light of the discussion at the previous meeting concerning the recommendation that the Commission wished to make to the General Assembly in transmitting to it the draft articles on the effects of armed conflicts on treaties, he was proposing the following text, which repeated almost word for word the recommendation accompanying the draft articles on the law of transboundary aquifers:⁴³²

“At its 3118th meeting, held on 5 August 2011, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly:

“(a) to take note of the draft articles on the effects of armed conflicts on treaties in a resolution, and to annex them to the resolution;

“(b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.”

The text of paragraph 9, as proposed by the Special Rapporteur, was adopted.

Section C, as amended, was adopted.

Chapter VI of the report of the International Law Commission, as a whole, as amended, was adopted.

CHAPTER V. *Responsibility of international organizations (A/CN.4/L.784 and Add.1–2)*

3. The CHAIRPERSON invited the members of the Commission to adopt chapter V of the draft report paragraph by paragraph, starting with the portion of the chapter contained in document A/CN.4/L.784.

A. Introduction

B. Consideration of the topic at the present session

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Sections A and B were adopted.

C. Recommendation of the Commission

D. Tribute to the Special Rapporteur

Paragraphs 9 and 10

4. Mr. GAJA (Special Rapporteur) said that the blanks left in paragraphs 9 and 10 could be filled in once he had held brief discussions with members of the Commission. He therefore proposed to leave the paragraphs as they were for the moment.

It was so decided.

5. The CHAIRPERSON suggested that section E of the document be adopted as a single unit, as it contained the entire text of the draft articles on the responsibility of international organizations.

E. Text of the draft articles on the responsibility of international organizations

1. TEXT OF THE DRAFT ARTICLES

Section E.1, contained in document A/CN.4/L.784, was adopted.

6. The CHAIRPERSON invited the members of the Commission to begin their consideration of the portion of chapter V of the draft report contained in documents A/CN.4/L.784/Add.1–2.

2. TEXT OF THE DRAFT ARTICLES AND THE COMMENTARIES THERETO (A/CN.4/L.784/Add.1–2)

Paragraph 1

Paragraph 1 was adopted.

General commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

7. Mr. McRAE said that the final sentences in the paragraph were not very clear.

8. Mr. GAJA (Special Rapporteur) said that the fourth and fifth sentences should be joined by a comma, followed by the word “because”. In the last sentence, the phrase

⁴³² *Yearbook ... 2008*, vol. II (Part Two), p. 19, para. 49.

“It is not characterized as wrongful because” should be replaced with the word “However”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

9. Mr. GAJA (Special Rapporteur) said that in order to be precise, the word “only” in the penultimate sentence should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

10. Mr. VÁZQUEZ-BERMÚDEZ said that one of the major differences between States and international organizations was that the latter did not possess general competence. He thus proposed that the beginning of the second sentence of paragraph (7) be reworded to read: “In contrast with States, they do not possess a general competence and have been”.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The general commentary, as amended, was adopted.

11. The CHAIRPERSON invited the members of the Commission to begin their consideration of the commentaries to the articles on the responsibility of international organizations, reproduced in document A/CN.4/L.784/Add.2.

PART ONE.

INTRODUCTION

Article 1. Scope of the present draft articles

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

Paragraph (10)

12. Sir Michael WOOD proposed that, for clarity and concision, the third and fourth sentences of paragraph (10) should be combined to read: “Although the articles on the responsibility of States for internationally wrongful acts do not mention international organizations when considering circumstances precluding wrongfulness, the content of international responsibility or the invocation of the international responsibility of a State, they may be applied by analogy also to the relation between a responsible State and an international organization.”

Paragraph (10), as amended, was adopted.

The commentary to article 1, as amended, was adopted.

Article 2. Use of terms

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

13. Mr. VÁZQUEZ-BERMÚDEZ said that the seventh sentence of paragraph (3) was not very clear and could be improved, including by giving examples.

14. Mr. GAJA (Special Rapporteur) said that in the seventh sentence the words “have been established by State organs” should be replaced with “have been established with the participation of State organs” and the remaining words deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

Paragraph (10)

15. Sir Michael WOOD said that in the English text, the first sentence of paragraph (10) was very awkward. He proposed to rework it later together with the Special Rapporteur.

It was so decided.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

Paragraph (14)

16. Mr. DUGARD said that the first footnote to the paragraph should refer to the last footnote to paragraph (4) of the commentary and not to the following footnote.

17. Mr. GAJA (Special Rapporteur) said that the footnote to paragraph (13) should refer to the penultimate footnote to paragraph (4) of the commentary. He would inform the secretariat about such errors so that the necessary corrections could be made.

Paragraph (14) was adopted with those corrections.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

18. Sir Michael WOOD proposed that in the fourth sentence of paragraph (16), the words “such instruments as” be inserted after “include” so as not to give the impression that the list was exhaustive.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21)

Paragraphs (17) to (21) were adopted.

Paragraph (22)

19. Sir Michael WOOD said that the final sentence was problematic because of its *a contrario* implications for the corresponding article in the Commission's text on State responsibility for internationally wrongful acts.⁴³³ In the commentary to the article on State responsibility, the word "includes" had been used to reflect the fact that State organs could be defined not only by law but also by practice. That, of course, did not apply to international organizations, as an organization's rules by definition included its established practice. Probably the simplest solution would be to delete the sentence.

20. Mr. McRAE said that he was not opposed to amending the sentence but would prefer that it not be deleted, since the subject had been discussed in plenary.

21. Sir Michael WOOD proposed that the sentence begin with the words "Subparagraph (c) leaves", with everything before those words to be deleted.

Paragraph (22), as amended, was adopted.

Paragraphs (23) to (27)

Paragraphs (23) to (27) were adopted.

The commentary to article 2, as amended, was adopted.

PART TWO.

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I.

GENERAL PRINCIPLES

Commentary

22. Sir Michael WOOD said that the paragraph was superfluous and proposed that it be deleted.

23. Mr. GAJA (Special Rapporteur) said that the introductory paragraph served a purpose but that he was not opposed to deleting it.

24. The CHAIRPERSON said that if she heard no objection, she would take it that the Commission wished to delete paragraph (1).

It was so decided.

Article 3. Responsibility of an international organization for its internationally wrongful acts

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to article 3 was adopted.

Article 4. Elements of an internationally wrongful act of an international organization

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 4 was adopted.

Article 5. Characterization of an act of an international organization as internationally wrongful

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 5 was adopted.

CHAPTER II.

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

25. Mr. McRAE said that the beginning of the first sentence was meaningful only for those Commission members who had been present at the second reading to which it referred. He proposed that it should be deleted, so that the sentence would read: "The current draft only provides positive criteria of attribution."

26. Mr. GAJA (Special Rapporteur) said that he agreed that the reference to the second reading could be deleted but would prefer to keep the rest of the opening sentence.

27. Mr. McRAE added that in the English text, the words "the current draft" should be replaced with "the present draft articles", and in the second sentence, the words "the present articles" should be replaced with "they".

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to chapter II, as amended, was adopted.

Article 6. Conduct of organs or agents of an international organization

Commentary

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to article 6 was adopted.

⁴³³ General Assembly resolution 56/83 of 12 December 2001, annex, art. 4, para. 2. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

Commentary

Paragraph (1)

28. Mr. McRAE said that in the English text, the word “lending” should be replaced, in paragraph (1) and throughout, by the word “secondment”.

Paragraph (1) was adopted with that amendment to the English text.

Paragraphs (2) to (11)

Paragraphs (2) to (11) were adopted.

Paragraph (12)

29. Sir Michael WOOD said that in the fifth sentence, the words “The majority opinions appeared to endorse the views expressed ...” suggested a lack of real support for those views.

30. Mr. GAJA (Special Rapporteur) said that he would propose more appropriate wording at a later stage.

Paragraph (12) was adopted, subject to subsequent amendment by the Special Rapporteur.

Paragraph (12 bis)

31. Mr. GAJA (Special Rapporteur) proposed the insertion of a paragraph (12 bis), to read:

“After the judgment of the House of Lords in the *Al-Jedda* case, an application was made by the same person to the European Court of Human Rights. In *Al-Jedda v. the United Kingdom*, this Court quoted several texts concerning attribution, including the article (identical to the present article) which had been adopted by the Commission at first reading and some paragraphs of the commentary thereto. The Court considered that ‘the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of foreign troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations’. The Court unanimously concluded that the applicant’s detention had to be attributed to the respondent State.”

32. Sir Michael WOOD suggested replacing the word “judgment” at the start of the first sentence with the word “decision” and the words “the same person” with “Mr. Al-Jedda”.

Paragraph (12 bis), as amended, was adopted.

Paragraph (13)

33. Mr. GAJA (Special Rapporteur) proposed replacing the beginning of the first sentence with the following phrase: “The question of attribution was also considered in a judgment of the District Court of The Hague”, with the rest of the sentence to remain unchanged. To reflect

the further action taken on the case in July 2011, he also proposed that at the end of the paragraph, the following text be inserted:

“On appeal from the judgment of the District Court, the Court of Appeal of The Hague referred to the draft article (identical to the present article) which had been adopted by the Commission at first reading. The Court applied the criterion of ‘effective control’ to the circumstances of the case and reached the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica which had led to the killing of three Bosnian Muslim men after they had been evicted from the compound of Dutchbat.”^[X]

The text of footnote [X] would read:

“*Nuhanović v. Netherlands*, Appeal judgment of 5 July 2011, The Hague Court of Appeal, Civil Law Section, paras. 5.8 and 5.9 (available from <http://zoeken.rechtspraak.nl>). The Court argued that the Netherlands had been able to prevent the removal of the victims. When giving a wide meaning to the concept of ‘effective control’ so as to include also the ability to prevent, the Court followed the approach taken by T. Dannenbaum, ‘Translating the standard of effective control into a system of effective accountability: how liability should be apportioned for violations of human rights by Member State troop contingents serving as United Nations peacekeepers’, *Harvard International Law Journal*, vol. 51, No. 1 (Winter 2010), p. 113, at p. 157. The Court considered the possibility of a dual attribution of conduct to the State of origin and the United Nations. This solution had been advocated by C. Leck, ‘International responsibility in United Nations peacekeeping operations: command and control arrangements and the attribution of conduct’, *Melbourne Journal of International Law*, vol. 10 (2009), p. 346, at pp. 362–364.”

Paragraph (13), as amended, was adopted.

The commentary to article 7, as amended, was adopted.

Mr. Niehaus (Vice-Chairperson) took the Chair.

Article 8. Excess of authority or contravention of instructions

Commentary

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

The commentary to article 8 was adopted.

Article 9. Conduct acknowledged and adopted by an international organization as its own

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 9 was adopted.

CHAPTER III.

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.**The commentary to chapter III was adopted.*Article 10. *Existence of a breach of an international obligation**Commentary*

Paragraphs (1) to (11)

*Paragraphs (1) to (11) were adopted.**The commentary to article 10 was adopted.*Article 11. *International obligation in force for an international organization**Commentary**The commentary to article 11 was adopted.*Article 12. *Extension in time of the breach of an international obligation**Commentary**The commentary to article 12 was adopted.*Article 13. *Breach consisting of a composite act**Commentary**The commentary to article 13 was adopted.*

CHAPTER IV.

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Commentary

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.**The commentary to chapter IV was adopted.*Article 14. *Aid or assistance in the commission of an internationally wrongful act**Commentary*

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.**The commentary to article 14 was adopted.*Article 15. *Direction and control exercised over the commission of an internationally wrongful act**Commentary*

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.**The commentary to article 15 was adopted.*Article 16. *Coercion of a State or another international organization**Commentary*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.**The commentary to article 16 was adopted.*Article 17. *Circumvention of an international obligation through decisions and authorizations addressed to members**Commentary*

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

34. Mr. McRAE suggested that the verb “elude” be replaced with “avoid”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (12)

Paragraphs (5) to (12) were adopted.

Paragraph (13)

35. Mr. DUGARD asked whether the source of the quotation appearing in the paragraph could be given, since the statement was an important one.

36. Mr. GAJA (Special Rapporteur) said that the quotation was from a letter that had not been published and was thus very difficult to find. The document in question had probably been supplied by the Office of Legal Affairs.

37. The CHAIRPERSON said he took it that the Special Rapporteur would try to find the source so that it might be cited in the paragraph.

*It was so decided.**Paragraph (13) was adopted, subject to possible subsequent amendment.*

Paragraphs (14) and (15)

*Paragraphs (14) and (15) were adopted.**The commentary to article 17, as amended and subject to possible subsequent amendment, was adopted.*Article 18. *Responsibility of an international organization member of another international organization**Commentary*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.**The commentary to article 18 was adopted.*Article 19. *Effect of this Chapter**Commentary**The commentary to article 19 was adopted.*

CHAPTER V.

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.**The commentary to chapter V was adopted.*

Article 20. Consent

Commentary

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.**The commentary to article 20 was adopted.*

Article 21. Self-defence

Commentary

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.**The commentary to article 21 was adopted.*

Article 22. Countermeasures

Commentary

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.**The commentary to article 22 was adopted.*

Article 23. Force majeure

Commentary

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.**The commentary to article 23 was adopted.*

Article 24. Distress

Commentary

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.**The commentary to article 24 was adopted.*

Article 25. Necessity

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

38. Mr. McRAE suggested that the conditions set by article 25 should be termed to apply “by analogy” rather than “*per se*”.

39. Mr. GAJA (Special Rapporteur) said that the expression “*per se*” was indeed not suitable and it should be replaced.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.**The commentary to article 25, as amended, was adopted.*

Article 26. Compliance with peremptory norms

Commentary

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.**The commentary to article 26 was adopted.*

Article 27. Consequences of invoking a circumstance precluding wrongfulness

Commentary

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.**The commentary to article 27 was adopted.*

PART THREE.

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Commentary

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.**The commentary to Part Three was adopted.*

CHAPTER I.

GENERAL PRINCIPLES

Article 28. Legal consequences of an internationally wrongful act

*Commentary**The commentary to article 28 was adopted.*

Article 29. Continued duty of performance

Commentary

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.**The commentary to article 29 was adopted.*

Article 30. Cessation and non-repetition

Commentary

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.**The commentary to article 30 was adopted.*

*Article 31. Reparation**Commentary*

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

The commentary to article 31 was adopted.

*Article 32. Relevance of the rules of the organization**Commentary*

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 32 was adopted.

*Article 33. Scope of international obligations set out in this Part**Commentary*

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 33 was adopted.

CHAPTER II.

REPARATION FOR INJURY

*Article 34. Forms of reparation**Commentary*

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 34 was adopted.

*Article 35. Restitution**Commentary*

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 35 was adopted.

*Article 36. Compensation**Commentary*

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 36 was adopted.

*Article 37. Satisfaction**Commentary*

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 37 was adopted.

*Article 38. Interest**Commentary*

The commentary to article 38 was adopted.

*Article 39. Contribution to the injury**Commentary*

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 39 was adopted.

*Article 40. Ensuring the fulfilment of the obligation to make reparation**Commentary*

Paragraph (1)

Paragraph (1) was adopted, subject to minor editorial amendments to the English text.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

The commentary to article 40 was adopted.

CHAPTER III.

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY
NORMS OF GENERAL INTERNATIONAL LAW*Article 41. Application of this Chapter**Commentary*

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 41 was adopted.

*Article 42. Particular consequences of a serious breach of an
obligation under this Chapter**Commentary*

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

The commentary to article 42 was adopted.

PART FOUR.

THE IMPLEMENTATION OF THE INTERNATIONAL RESPON-
SIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I.

INVOCATION OF THE RESPONSIBILITY OF AN INTER-
NATIONAL ORGANIZATION*Article 43. Invocation of responsibility by an injured State or
international organization**Commentary*

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 43 was adopted.

Article 44. Notice of claim by an injured State or international organization

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 44 was adopted.

Article 45. Admissibility of claims

Commentary

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to article 45 was adopted.

Article 46. Loss of the right to invoke responsibility

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 46 was adopted.

Article 47. Plurality of injured States or international organizations

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 47 was adopted.

Article 48. Responsibility of an international organization and one or more States or international organizations

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 48 was adopted.

Article 49. Invocation of responsibility by a State or an international organization other than an injured State or international organization

Commentary

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to article 49 was adopted.

Article 50. Scope of this Chapter

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 50 was adopted.

CHAPTER II.

COUNTERMEASURES

Article 51. Object and limits of countermeasures

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 51 was adopted.

Article 52. Conditions for taking countermeasures by members of an international organization

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to article 52 was adopted.

Article 53. Obligations not affected by countermeasures

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

40. Mr. VASCIANNIE proposed that in the final sentence, the phrase “also in view of the difficulty of determining which human rights should be regarded as fundamental” be deleted.

Paragraph (3), as amended, was adopted.

The commentary to article 53, as amended, was adopted.

Article 54. Proportionality of countermeasures

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 54 was adopted.

Article 55. Conditions relating to resort to countermeasures

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 55 was adopted.

Article 56. Termination of countermeasures

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 56 was adopted.

Article 57. Measures taken by States or international organizations other than an injured State or international organization

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 57 was adopted.

PART FIVE.

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE CONDUCT OF AN INTERNATIONAL ORGANIZATION

General commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to Part Five was adopted.

Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to article 58 was adopted.

Article 59. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 59 was adopted.

Article 60. Coercion of an international organization by a State

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 60 was adopted.

Article 61. Circumvention of international obligations of a State member of an international organization

Commentary

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

The commentary to article 61 was adopted.

Article 62. Responsibility of a State member of an international organization for an internationally wrongful act of that organization

Commentary

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to article 62 was adopted.

Article 63. Effect of this Part

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 63 was adopted.

PART SIX.

GENERAL PROVISIONS

Article 64. Lex specialis

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

The commentary to article 64 was adopted.

Article 65. Questions of international responsibility not regulated by these articles

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to article 65 was adopted.

Article 66. Individual responsibility

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 66 was adopted.

Article 67. Charter of the United Nations

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 67 was adopted.

Section E.2, contained in documents A/CN.4/L.784/Add.1–2, as a whole, as amended, was adopted.

The meeting rose at 12.50 p.m.

3119th MEETING

Monday, 8 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Treaties over time (A/CN.4/638, sect. G)

[Agenda item 9]

REPORT BY THE STUDY GROUP

1. Mr. NOLTE (Chairperson of the Study Group on treaties over time) recalled that the Study Group on treaties over time had been established by the Commission at its sixty-first session⁴³⁴ and had been reconstituted at its sixty-second⁴³⁵ and sixty-third sessions.⁴³⁶ At the current session, it had held five meetings, on 25 May, 13, 21 and 27 July and 2 August 2011.

2. As had been agreed the previous year, the Study Group had pursued its work on its Chairperson's introductory report on the relevant case law of the ICJ and arbitral tribunals of *ad hoc* jurisdiction.⁴³⁷ Members had accordingly discussed the section on possible modification of a treaty by subsequent agreements and practice, and the relationship of subsequent agreements and practice, on the one hand, and formal amendment procedures, on the other. The Study Group, acting on a proposal from its Chairperson, had considered that no conclusion should be drawn, at that stage, on the matters covered in the introductory report.

3. The Study Group had also had before it a second report by its Chairperson and two informal papers presented by Mr. Murase and Mr. Petrič. The Chairperson's second report was concerned with case law under certain international economic regimes (the WTO dispute settlement system, the Iran–United States Claims Tribunal, the tribunals set up by ICSID and the tribunals set up under the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America), international human rights regimes (the European Court of Human Rights, the Inter-American Court of Human Rights and the Human Rights Committee) and other regimes (the International Tribunal for the Law of the Sea, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the Court of

Justice of the European Union). The report explained why it had covered those regimes in preference to others.

4. The Study Group had considered the 20 general conclusions contained in the second report. Discussions had focused on reliance by adjudicatory bodies under special regimes on the general rules of treaty interpretation; the extent to which the special nature of certain treaties, notably human rights treaties and treaties in the field of international criminal law, might affect the approach of the relevant adjudicatory bodies to treaty interpretation; the different emphasis which adjudicatory bodies placed on various means of treaty interpretation (taking, for example, more text-oriented or more purpose-oriented approaches to treaty interpretation rather than more conventional approaches); general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role attached by various adjudicatory bodies to subsequent practice as one of the means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time at which a practice might be regarded as subsequent; possible authors of relevant subsequent practice; and evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. The Study Group had had time to discuss only 11 of the above-mentioned conclusions. In the light of those discussions, the Chairperson had formulated the following nine preliminary conclusions:

“1. *General rule of treaty interpretation*

“The provisions contained in article 31 of the 1969 Vienna Convention on the Law of Treaties, regarded either as an applicable treaty provision or as a reflection of customary international law, were recognized by the adjudicatory bodies which had been reviewed as the general rule on the interpretation of the treaties that they applied.

“2. *Approaches to interpretation*

“Regardless of their recognition of the general rule set forth in article 31 of the 1969 Vienna Convention as the basis for the interpretation of treaties, different adjudicatory bodies had put varying amounts of emphasis on different means of interpretation depending on the context. Three broad approaches could be distinguished:

“The conventional approach: Like the International Court of Justice, most adjudicatory bodies (the Iran–United States Claims Tribunal, the tribunals set up by the International Centre for the Settlement of Investment Disputes, the International Tribunal for the Law of the Sea and international criminal courts and tribunals) typically took into account all the means of interpretation mentioned in article 31 of the 1969 Vienna Convention without making more or less use of certain means of interpretation.

“The text-oriented approach: Panel reports within the framework of the General Agreement on Tariffs and Trade and reports of the Appellate Body of the World Trade Organization (WTO) had in many cases put a certain emphasis on the text of the treaty (the ordinary or special meaning of the terms of the agreement) and had been reluctant to emphasize purposive interpretation.

⁴³⁴ *Yearbook ... 2009*, vol. II (Part Two), p. 148, para. 217.

⁴³⁵ *Yearbook ... 2010*, vol. II (Part Two), p. 194, para. 345.

⁴³⁶ *Ibid.*, p. 195, para. 353, and *Yearbook ... 2011*, vol. II (Part Two), para. 334.

⁴³⁷ *Yearbook ... 2010*, vol. II (Part Two), p. 194, paras. 348–351.

That approach seemed to be dictated, *inter alia*, by a need for certainty and the technical nature of many provisions in WTO-related agreements.

“The purpose-oriented approach: The regional human rights courts and the Human Rights Committee established under the International Covenant on Civil and Political Rights had frequently emphasized the object and purpose of the text. That approach seemed to stem from the character of substantive provisions of human rights treaties, which dealt with the personal rights of individuals in an evolving society.

“The reason some adjudicatory bodies often put a certain emphasis on the text of a treaty while others looked more at its object and purpose lay not only in the subject matter of the treaty obligations concerned, but also in their drafting and other factors, including possibly the age of the treaty regime and the procedure followed by the adjudicatory body. While it was unnecessary to determine the exact degree to which such factors influenced the interpretative approach of the adjudicatory body in question, it was useful to bear in mind those different broad approaches when assessing the role which subsequent agreements and subsequent practice played for different adjudicatory bodies.

“3. *Interpretation of treaties concerning human rights and international criminal law*

“The European Court of Human Rights and the Inter-American Court of Human Rights emphasized the special nature of the human rights treaties which they applied and affirmed that that special nature affected their approach to interpretation. The International Criminal Court, the International Tribunal for the former Yugoslavia and the International Tribunal for Rwanda applied special rules of interpretation derived from general principles of criminal law and human rights law. However, neither the regional human rights courts nor the international criminal courts and tribunals called into question the applicability of the general rule contained in article 31 of the 1969 Vienna Convention as a basis for their treaty interpretation. The other adjudicatory bodies reviewed did not claim that the particular treaty they applied justified a special approach to its interpretation.

“4. *Recognition in principle of subsequent agreements and practice as a means of interpretation*

“All the adjudicatory bodies reviewed recognized that subsequent agreements and subsequent practice in the sense of article 31, paragraphs 3 (a) and 3 (b), of the 1969 Vienna Convention were a means of interpretation they should take into account when they interpreted and applied treaties.

“5. *Concept of subsequent practice as a means of interpretation*

“Most adjudicatory bodies reviewed had not defined the concept of subsequent practice. The definition given by the WTO Appellate Body (“a concordant, common and consistent” sequence of acts or pronouncements

which is sufficient to establish a discernable pattern implying the agreements of the parties [to the treaty] regarding its interpretation⁴³⁸) combined the element of practice (‘sequence of acts or pronouncements’) with the requirement of agreement (reflected by the words ‘concordant, common’) as laid down in article 31, paragraph 3 (a) and 3 (b), of the 1969 Vienna Convention (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed had, however, also used the concept of practice as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).

“6. *Identification of the role of a subsequent agreement or practice as a means of interpretation*

“Like other means of interpretation, subsequent agreements and subsequent practice were usually just one among several means of interpretation used by adjudicatory bodies in reaching a particular decision. It was therefore rare for adjudicatory bodies to state that a particular subsequent practice or subsequent agreement had decisively influenced the final decision. It was, however, often possible to ascertain whether a particular subsequent agreement or subsequent practice had played a major or a minor role in the reasoning underlying a particular decision.

“Most adjudicatory bodies made use of subsequent practice as a means of interpretation. Subsequent practice was less important for adjudicatory bodies that were either more text-oriented (such as the WTO Appellate Body) or more purpose-oriented (such as the Inter-American Court of Human Rights). The European Court of Human Rights placed more emphasis on subsequent practice in that it referred to the common legal standards of Council of Europe member States.

“7. *Evolutionary interpretation and subsequent practice*

“Evolutionary interpretation was a form of purpose-oriented interpretation. Evolutionary interpretation could be guided by subsequent practice in both a narrow and a broad sense. The text-oriented WTO Appellate Body had only occasionally expressly engaged in evolutionary interpretation. Among the human rights treaty bodies, the European Court of Human Rights had frequently employed an evolutionary interpretation that had been explicitly guided by subsequent practice, whereas the Inter-American Court of Human Rights and the Human Rights Committee had hardly ever relied on subsequent practice. The reason for that might be that the European Court of Human Rights could rely on a fairly similar level of restrictions on human rights among Council of Europe member States. The International Tribunal for the Law of the Sea seemed to engage in evolutionary interpretation along the lines of some of the jurisprudence of the International Court of Justice.

⁴³⁸ See *Japan—Taxes on Alcoholic Beverages*, AB-1996-2, Report of the WTO Appellate Body (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), 1 November 1996, p. 13, referring to, *inter alia*, I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press, 1984, p. 137.

“8. *Rare invocation of subsequent agreements*

“The adjudicatory bodies reviewed had rarely relied on subsequent agreements in the narrow sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention. That might be due, in part, to the character of certain treaty obligations, especially those under human rights treaties, substantial parts of which might not lend themselves to subsequent agreements among Governments.

“Some decisions which plenary organs or States parties might take in accordance with a treaty, such as the adoption of the Elements of Crimes pursuant to article 9 of the Rome Statute of the International Criminal Court, or the 2001 ‘Notes of interpretation of certain Chapter 11 provisions’ in the context of the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America,⁴³⁹ if adopted unanimously might have an effect similar to that of subsequent agreements in the sense of article 31, paragraph 3 (a), of the 1969 Vienna Convention.

“9. *Possible authors of relevant subsequent practice*

“Relevant subsequent practice could consist of acts of all State organs (executive, legislative or judicial) that could be attributed to a State for the purpose of treaty interpretation. Such practice might, under certain circumstances, even include ‘social practice’ insofar as it was reflected in State practice.”

5. The Study Group recommended that the text of those preliminary conclusions be reproduced in the chapter of the Commission’s report that related to treaties over time. The Study Group regarded those conclusions as being of a preliminary nature, as they would have to be revisited and expanded in the light of other reports on additional aspects of the topic and the discussions thereon.

6. The Study Group had also discussed future work on the topic. It expected to complete its discussion of the Chairperson’s second report during the Commission’s sixty-fourth session (2012). Thereafter it would analyse the practice of States that was unrelated to judicial and quasi-judicial proceedings on the basis of a report on that subject. The Study Group expected that its work on the topic would be concluded in the next quinquennium, as envisaged, and that it would result in conclusions based on a repertory of practice. The possibility of modifying its working method by having a Special Rapporteur on the topic appointed by the Commission could be considered at the next session by the newly elected members.

7. At its meeting on 2 August 2011, the Study Group had also examined the possibility of reiterating the request for information from States that had been included in chapter III of the Commission’s report on the work of its sixty-second session.⁴⁴⁰ It had generally been

felt that it would be useful to have more information on instances of subsequent practice and agreement that had not been the subject of judicial or quasi-judicial rulings by an international body. The Study Group therefore recommended that the Commission include a section requesting information on that subject in chapter III of its report on the work of its sixty-third session.

8. He hoped that the Commission would be in a position to take note of the report and to approve the two above-mentioned recommendations.

9. The CHAIRPERSON said that he took it that the Commission wished to take note of the progress report of the Study Group on treaties over time.

It was so decided.

**The most-favoured-nation clause
(A/CN.4/638, sect. H)**

[Agenda item 10]

REPORT BY THE STUDY GROUP

10. Mr. PERERA (Co-Chairperson of the Study Group on the most-favoured-nation clause) said that the Study Group, chaired by Mr. McRae and himself, had been reconstituted at the current session and had held four meetings on 1 June, 20 July and 4 August 2011.

11. In an effort to pinpoint the normative content of most-favoured-nation clauses in the field of investment and to analyse case law, including the role of arbitrators, factors explaining different approaches to interpreting most-favoured-nation provisions, divergences and the steps taken by States in response to the case law, the Study Group had examined an informal document that had identified the arbitrators and counsel in investment cases involving most-favoured-nation clauses and the type of most-favoured-nation provisions that had been interpreted. It had also had before it an informal working paper prepared by Mr. McRae, in which he had attempted to ascertain the factors which tribunals had taken into account when reaching their decisions, in order to determine whether they shed any light on divergences in case law. The objective had been to discover which categories of factors had been invoked and to assess their relative significance for the interpretation and application of most-favoured-nation clauses. The various uses for which these clauses had been invoked in investment disputes had been investigated, especially the use of such clauses to obtain a substantive benefit provided for in a bilateral investment treaty between the respondent State and a third State, as well as the use of these clauses to obtain more favourable dispute settlement provisions than those set forth in the bilateral investment agreement under which the claim had been brought.

12. The working paper had also examined the considerations that had played a part in investment tribunals’ decisions and had focused on the source of the right to most-favoured-nation treatment, as well as its scope. It had been noted, with regard to scope, that investment tribunals had framed the application of the

⁴³⁹ North American Free Trade Agreement, Free Trade Commission, “Notes of interpretation of certain Chapter 11 provisions”, 31 July 2001 (available from www.sice.oas.org/TPD/NAFTA/Commission/CH11und erstanding_e.asp).

⁴⁴⁰ *Yearbook ... 2010*, vol. II (Part Two), p. 16, paras. 26–28.

ejusdem generis principle in many ways and that in some cases different approaches had been taken even within the same decision.

13. Those approaches had included: (a) drawing a distinction between substance and procedure (jurisdiction); (b) adopting a treaty interpretation approach, either interpreting most-favoured-nation provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (c) adopting a conflict-of-treaty-provisions approach, in which tribunals took into account the fact that the matter whose incorporation in the treaty was being sought had already been covered in a different way by the basic treaty itself; and (d) examining the practice of the parties in order to ascertain their intention with regard to the scope of the most-favoured-nation clause.

14. The working paper had further considered whether the type of claim being made had had any influence on the willingness of tribunals to incorporate other provisions by means of a most-favoured-nation clause, and it had discussed limits to the application of the clause, including the public policy exceptions set out in the *Maffezini* case.

15. In the main, the working paper had concluded that an examination of the decisions of investment tribunals had not revealed a consistent approach in the reasoning of the tribunals which had either permitted or rejected the use of the most-favoured-nation clause as a means of incorporating dispute settlement provisions in a basic treaty. The first step in deciding whether such a clause could be used to that end was to decide, explicitly or implicitly, whether in principle these clauses covered dispute settlement provisions. The second step was to interpret the most-favoured-nation clause in question to see whether in fact it applied to dispute settlement provisions. Those approaches were not always explicit. In some cases, tribunals, apparently ignoring the first step, had said that their approach was one of treaty interpretation.

16. The Study Group had held a wide-ranging discussion on the basis of the working paper and a set of questions which had been prepared in order to provide an overview of the issues that might require consideration by the Study Group. Those questions had ranged from strictly legal considerations to wider aspects of policy and had included the issue of whether a liberal interpretation of the scope of most-favoured-nation clauses could potentially upset the overall equilibrium of an investment agreement that sought to strike a balance between the protection of the investor and its investment and a host State's discretion to formulate policy.

17. It was the Study Group's general understanding that the source of the right to most-favoured-nation treatment was the basic treaty, not a third-party treaty. Such clauses were no exception to the privity rule in treaty interpretation. It had also been recognized that the key question in decisions in investment cases was how to determine the scope of the right to most-favoured-nation treatment, in other words whether it expressly or implicitly fell within the limits of the subject matter of the clause.

18. In that connection, the Study Group had examined the ways in which the *ejusdem generis* question had been framed, especially when that had been done through the invocation of the distinction between substantive and procedural (jurisdictional) provisions. When a most-favoured-nation clause expressly included or excluded dispute settlement procedures, there was obviously no need for further interpretation. It was needed, however, when the parties' intention with regard to the applicability of the most-favoured-nation clause to a dispute settlement mechanism was not expressly stated, or could not be clearly ascertained. That was often the case with bilateral investment treaties that had open-textured provisions.

19. The Study Group had taken note of other recent developments, including the issuance of the UNCTAD publication *Most-Favoured-Nation Treatment*⁴⁴¹ in the Series on Issues in International Investment Agreements II, which had shown that, after the *Maffezini* case, when States entered into investment agreements they tended to state expressly whether the most-favoured-nation clause applied to dispute settlement procedures.

20. The Study Group had considered the recent decision in the case concerning *Impregilo S.p.A. v. Argentine Republic*, in particular the concurring and dissenting opinion of arbitrator Brigitte Stern, who had argued, *inter alia*, that a most-favoured-nation clause could not apply to dispute settlement for a core reason intimately linked with the essence of international law: there was no automatic assimilation of substantive rights and the jurisdictional means to enforce them, since there was a difference between the qualifying conditions for access to the substantive rights and the qualifying conditions for access to the jurisdictional means (para. 56). It had also been noted that legal writers' opinions differed as to the correct approach. Some commentators contended that there was no convincing reason to distinguish between substantive provisions and dispute settlement provisions, while others viewed the interpretation of most-favoured-nation provisions as a jurisdictional matter, where the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.

21. It had been recognized that the various decisions implied a philosophical position on whether most-favoured-nation clauses in principle covered dispute settlement provisions. One scenario proceeded on the assumption that such clauses could include procedural rights, while the other assumed that they could not. It had been noted that, on the whole, the conundrum arose from the fact that tribunals had no uniform and systematic approach to interpretation. For that reason, it was hard to draw any general conclusions about interpretative approaches in decisions on investment cases. One of the challenges facing the Study Group was to arrive at an assessment that might flesh out an underlying theoretical framework to explicate the reasoning in those decisions.

22. In that connection, it had also been noted that the concurring and dissenting opinion in *Impregilo S.p.A. v.*

⁴⁴¹ UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD/DIAE/IA/2010/1, United Nations publication (Sales No. 10.II.D.19), Geneva, 2010.

Argentine Republic offered a possible framework for finding ways of approaching the *ejusdem generis* question, for example by first examining whether the fundamental preconditions for invocation of access to the rights granted in the bilateral investment treaty (namely the conditions *ratione personae*, *ratione materiae* and *ratione temporis*) had been satisfied. In that regard, it had been recalled that article 14 of the 1978 draft articles on most-favoured-nation clauses had provided that the exercise of rights arising under such a clause for the beneficiary State, or for persons or things in a determined relationship with that State, was subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause, or otherwise agreed between the granting State and the beneficiary State.⁴⁴² In other words, in addition to a two-step process consisting in first deciding whether in principle these clauses covered dispute settlement provisions and then embarking on the interpretation of the most-favoured-nation provision in question to see whether it applied in fact to dispute settlement provisions, there was a prior step, which had possibly been overlooked in the case law and the purpose of which was to determine who was entitled to benefit and whether the preconditions for access had been fulfilled.

23. The Study Group had deemed it advisable to review the various approaches taken and to draw attention to the strengths and weaknesses of each approach. It had been noted that the treaty interpretation approach might be a misnomer, since the whole process involved treaty interpretation. The general point of departure would be the 1969 Vienna Convention, supplemented by any principles which might be deduced from practice in the investment area. It had been noted, however, that the 1969 Vienna Convention did not appear to support reference to the other treaty-making practice of the parties to the bilateral investment treaty, in respect of which a most-favoured-nation claim had been made, as a means of ascertaining the parties' intention with regard to the scope of the most-favoured-nation clause.

24. As far as its future programme of work was concerned, the Study Group had again reaffirmed the need to study further the question of most-favoured-nation treatment in relation to trade in services and to investment agreements, as well as the relationship between such treatment, fair and equitable treatment and national treatment standards. It had also been suggested that there was a need to investigate other areas of international law in order to discover whether the application of most-favoured-nation treatment there might afford some useful insights.

25. The Study Group's work could possibly be completed in 2013. The aim should be to ensure greater coherence in the approaches taken in arbitral decisions in order to prevent the fragmentation of international law. The Study Group could thus contribute to greater certainty and stability in the field of investment law. The outcome of its work should be of practical utility to those involved in the investment field and to policymakers. The Study Group did not intend to prepare any draft articles, or to revise the 1978 draft articles. Instead, under the guidance

of its Co-Chairpersons, it would draw up a draft report describing the general background, analysing case law in various contexts, drawing attention to any issues that had arisen and to trends in practice and, where appropriate, making recommendations and suggesting model clauses.

26. He hoped that the Commission would be in a position to take note of the Study Group's progress report.

27. The CHAIRPERSON said that he took it that the Commission wished to take note of the progress report of the Study Group on the most-favoured-nation clause.

It was so decided.

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

CHAPTER V. *Responsibility of international organizations (concluded)* (A/CN.4/L.784 and Add.1-2)

C. Recommendation of the Commission (concluded)

28. The CHAIRPERSON recalled that, at its 3118th meeting, paragraph 9 of section C of this chapter, contained in document A/CN.4/L.784, concerning the Commission's recommendation to the General Assembly, had been left in abeyance. He invited the Special Rapporteur to inform the Commission of his proposal with regard to that paragraph.

29. Mr. GAJA (Special Rapporteur) said that it would be wise for the Commission to adopt a paragraph similar to that which it had adopted with respect to chapter VI on the effects of armed conflicts on treaties (A/CN.4/L.785) and which in turn had been modelled on its recommendation to the General Assembly concerning the draft articles on responsibility of States for internationally wrongful acts.⁴⁴³

30. He therefore proposed that the single paragraph of section C read:

“The Commission recommends to the General Assembly (a) that it take note of the draft articles on responsibility of international organizations in a resolution and that it annex them to the resolution, and (b) that it consider at a later stage the elaboration of a convention on the basis of the draft articles.”

31. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 9 of document A/CN.4/L.784 as proposed by the Special Rapporteur.

It was so decided.

Section C was adopted.

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

The meeting rose at 10.50 a.m.

⁴⁴² *Yearbook ... 1978*, vol. II (Part Two), p. 39.

⁴⁴³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 25, para. 73.

3120th MEETING

Monday, 8 August 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/638, sect. J, A/CN.4/L.796⁴⁴⁴)

[Agenda item 11]

REPORT OF THE PLANNING GROUP

1. Ms. JACOBSSON (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.796), said that the Group had held two meetings. It had considered section J of the topical summary of the discussions held in the Sixth Committee of the General Assembly at its sixty-fifth session, entitled “Other decisions and conclusions of the Commission” (A/CN.4/638); the proposed strategic framework for the period 2012–2013⁴⁴⁵ covering “Programme 6: Legal affairs”; General Assembly resolution 65/26 of 6 December 2010, on the report of the International Law Commission on the work of its sixty-second session, in particular paragraphs 7, 8 and 13 to 21;⁴⁴⁶ and chapter XIII, section A.3, of the report of the Commission on the work of its sixty-first session⁴⁴⁷ concerning the consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels.

2. The report of the Planning Group was organized to reflect the outcome of discussions on the items before the Group. In 2011, the Group had focused mainly on two issues: working methods and the long-term programme of work.

3. The Planning Group had reconstituted the Working Group on the long-term programme of work under the Chairpersonship of Mr. Candiotti. The Planning Group had decided to recommend the addition of five topics to the Commission’s long-term programme of work. During the current quinquennium, the Commission had already included two new topics on its agenda. The Working Group’s proposal was described in greater detail in the report of the Planning Group.

4. The Planning Group had also established a Working Group on methods of work, under the Chairpersonship of

Mr. Hassouna, to consider how the Commission’s working methods should be revised, supplemented or, if necessary, fully applied, taking into account the Commission’s relevant past decisions.

5. The Working Group had submitted a report which the Planning Group had adopted on 3 August 2011. The report covered several issues concerning special rapporteurs, study groups, the Drafting Committee, publications and relations between the Commission and the Sixth Committee. The report had been incorporated into the report of the Planning Group that was now before the Commission. Once the recommendations had been approved by the Commission, they would be included in its report to the General Assembly.

6. In response to General Assembly resolution 65/32 of 6 December 2010, the Planning Group had decided to prepare a revised section on the rule of law.

7. It was her understanding that, if approved by the Commission as was customary, the Planning Group’s recommendations would be incorporated, with any needed adjustments, into the chapter of the Commission’s report entitled “Other decisions and conclusions of the Commission”.

8. The CHAIRPERSON invited the members of the Commission to begin their consideration, paragraph by paragraph, of the report of the Planning Group.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 3

9. Mr. MURASE said that the second topic should simply be termed “Protection of the atmosphere”.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

2. METHODS OF WORK OF THE COMMISSION

Paragraphs 8 to 26

Paragraphs 8 to 26 were adopted.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 65/32 OF 6 DECEMBER 2010 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 27 to 33

Paragraphs 27 to 33 were adopted.

4. HONORARIA

Paragraph 34

Paragraph 34 was adopted.

⁴⁴⁴ Mimeographed; available from the Commission’s website.

⁴⁴⁵ A/65/6 (Prog. 6).

⁴⁴⁶ *Yearbook ... 2010*, vol. II (Part Two).

⁴⁴⁷ *Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 231.

5. ASSISTANCE TO SPECIAL RAPPORTEURS

Paragraph 35

Paragraph 35 was adopted.

6. ATTENDANCE OF THE GENERAL ASSEMBLY BY SPECIAL RAPPORTEURS DURING THE CONSIDERATION OF THE COMMISSION'S REPORT

Paragraph 36

Paragraph 36 was adopted.

7. DOCUMENTATION AND PUBLICATIONS

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

10. Mr. VÁZQUEZ BERMÚDEZ, supported by Ms. ESCOBAR HERNÁNDEZ, proposed that the words “in all the official languages of the United Nations” be inserted in the fifth sentence, before the phrase “makes ... known”.

Paragraph 38, as amended, was adopted.

Paragraphs 39 to 43

Paragraphs 39 to 43 were adopted.

Paragraph 44

11. Sir Michael WOOD proposed that in the third sentence, the adjective “domestic”, preceding the words “courts and tribunals”, be deleted.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 47

*Paragraphs 45 to 47 were adopted.***B. Date and place of the sixty-fourth session of the Commission**

Paragraph 48

Paragraph 48 was adopted.

Paragraph 49

12. Mr. VASCIANNIE noted that the split session was mentioned only in the final sentence of the paragraph, and therefore of the document, and only in relation to the upcoming 2012 session. Given its importance, he proposed that the subject should be mentioned earlier in the text, with an emphasis on the fact that the remark was valid in general, not just for the year 2012.

13. Mr. GAJA suggested that the following sentence be inserted at the end of paragraph 49: “Earlier split sessions give sufficient time for the translation into all the official languages of the commentaries on the texts adopted in the first part of the session.”

14. Mr. PELLET said that he supported Mr. Gaja's proposal and proposed that the words “preparation and” should be inserted between the words “the” and “translation”.

15. Mr. NOLTE, noting that paragraph 49 dealt with two different issues, namely the duration of the session and the fact that it was split into two parts, suggested dividing the paragraph in two and creating a paragraph 50 that would start with the final sentence of what was now paragraph 49.

16. Mr. DUGARD said that he agreed with Mr. Gaja and Mr. Pellet that the need to retain the split-session format should be emphasized, especially since the Commission's members had many outside obligations.

17. Sir Michael WOOD said that, while he supported Mr. Gaja's proposal, there were additional arguments in favour of retaining the split-session format, and they should be mentioned. He therefore proposed that paragraph 49 should consist of just one sentence—the current first one—and that paragraph 50 should begin with the current second sentence of paragraph 49, which would start with the words “In that regard, the Commission recalls its decision of 2000”.⁴⁴⁸

18. The CHAIRPERSON, speaking as a member of the Commission, proposed that after the first sentence of the current paragraph 49, a sentence be inserted, emphasizing the fact that the proposed duration of the 2012 session—nine weeks—was valid only for 2012, as with the start of a new quinquennium the newly appointed special rapporteurs would not have much material to present. The idea was to ensure that the Commission was not pressured to keep holding shorter sessions in later years.

19. Mr. MELESCANU, supporting Mr. Vasciannie's proposal, said that the arguments in favour of retaining a split session should be presented at the start of the document, in section A, and that only paragraph 48, concerning the date and place of the sixty-fourth session, should be retained in section B.

20. Mr. NOLTE said that perhaps, on an exceptional basis, the order of sections A and B could be reversed.

21. Sir Michael WOOD said that he would prefer not to change the current order, which had long been established, and suggested adding to section A a new paragraph 3 emphasizing the importance of split sessions.

22. Ms. JACOBSSON (Chairperson of the Planning Group) expressed support for the suggestions about emphasizing the need to hold split sessions.

23. Mr. NOLTE proposed that the issue of a split session should be mentioned both in a new paragraph 3 and in section B, where such matters were usually covered, with a cross reference between the two.

24. Mr. WISNUMURTI said that the issue merited special attention and that he supported the insertion of a new paragraph 3. However, he thought that the exceptional nature of the nine-week session instituted in 2012 must be emphasized, as must the reasons for the decision.

25. Sir Michael WOOD said that the key sentence of paragraph 49, in which the Commission recalled its

⁴⁴⁸ *Yearbook ... 2000*, vol. II (Part Two), p. 132, para. 735.

decision of 2000, cited in the last footnote of the document, could form the basis of a new paragraph 3. One approach might be to indicate that the Planning Group had felt that the length of sessions and split sessions were of particular importance and had recalled the discussions on the subject in 2000. The Commission's decision could then be cited in the paragraph itself rather than in a footnote, thereby highlighting it.

26. The CHAIRPERSON said he took it that the members of the Commission wished to rework paragraph 49 and to include a new paragraph 3 in the *chapeau* of section A. He proposed that the redrafting be done by the Chairperson of the Planning Group and the secretariat of the Commission on the basis of proposals that members would submit in writing.

It was so decided.

Paragraph 49, as amended, was adopted.

The report of the Planning Group (A/CN.4/L.796), as a whole, was adopted.

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

CHAPTER IV. Reservations to treaties (continued)* (A/CN.4/L.783 and Add.1–8)

27. The CHAIRPERSON invited the Commission to resume its consideration of Part 2 of chapter IV of its report, on reservations to treaties, beginning with the commentaries to the guidelines contained in document A/CN.4/L.783/Add.4. He recalled that only a few paragraphs remained to be adopted.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)*

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)*

(b) *Text of the guidelines and the commentaries thereto* (continued)* (A/CN.4/L.783/Add.4–5)

2.1.5 *Communication of reservations* (concluded)**

Commentary (concluded)**

Paragraph (28) (concluded)**

28. Mr. NOLTE recalled his proposal to delete the first half of the penultimate sentence, so that the sentence read: “The Commission decided not to devote a specific guideline [to it].” He suggested also that the second part of the final sentence be deleted, as it did not really seem useful. It seemed sufficient to say that the Commission “felt that this same rule applies to reservations to constituent instruments *stricto sensu*”.

29. Mr. PELLET (Special Rapporteur) said that he accepted the first proposal but not the second. The final sentence served the purpose of stating that the same rule was applied to treaties that set up deliberative bodies with

secretariats, even if they were not necessarily constituent instruments of international organizations. Without that sentence, the paragraph would serve no purpose.

30. The CHAIRPERSON said he took it that the Commission agreed to delete only the first part of the penultimate sentence.

Paragraph (28), as amended, was adopted.

The commentary to guideline 2.1.5, as amended, was adopted.

2.3 *Late formulation of reservations* (concluded)**

Commentary (concluded)**

Paragraph (10) (concluded)**

31. Mr. NOLTE said that it was actually the footnote citing Horn⁴⁴⁹ that posed problems for him, specifically the final phrase, which read “but the practice also applies in the case of treaties that do not include a withdrawal clause” and referred readers to paragraph (13) of the commentary. That implied that even if a treaty had no withdrawal clause, withdrawal nevertheless remained an option if the purpose was to formulate a reservation that would otherwise be late. The Commission could suggest nothing of the sort. That part of the footnote should thus be deleted.

32. Mr. PELLET (Special Rapporteur) agreed that the wording posed problems. It was not true that a party remained always at liberty to accede anew to the same treaty, and that needed to be stated in the footnote in question. The author's observations on the issue were interesting and should be retained, but the implication that the practice “always” applied was debatable and the Commission should disassociate itself from it. The simplest solution would be a phrase like “It is doubtful that this is always the case”, with no mention of the Convention providing a Uniform Law for Cheques or cross reference to paragraph (13), which dealt with other matters.

Paragraph (10), as amended, was adopted.

Paragraphs (13) and (14)

33. Mr. PELLET (Special Rapporteur) said that the amendment to the above-mentioned footnote took care of the issues raised in connection with paragraphs (13) and (14).

Paragraphs (13) and (14) were adopted.

The commentary to guideline 2.3, as amended, was adopted.

2.3.3 *Limits to the possibility of excluding or modifying the legal effect of a treaty by means other than reservations* (concluded)***

Commentary (concluded)***

Paragraph (6) (concluded)***

⁴⁴⁹ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (1988), p. 43. For the discussion of this issue, see the 3109th meeting above, paras. 62–69.

*** Resumed from the 3110th meeting.

* Resumed from the 3110th meeting.

** Resumed from the 3109th meeting.

34. Mr. PELLET (Special Rapporteur) said that after much hesitation, he would agree to delete the paragraph, as Mr. Nolte had requested.

It was so decided.

The commentary to guideline 2.3.3, as amended, was adopted.

2.8.1 *Forms of acceptance of reservations* (concluded)

Commentary (concluded)

Paragraph (2) (concluded)

35. Mr. GAJA said that with the Special Rapporteur's permission, he wished to revisit the paragraph, as he had been absent when it had been adopted.⁴⁵⁰ He proposed that the words "with regard to permissible reservations" be inserted at the start of the second sentence, immediately followed by a footnote indicator for the following new footnote: "When a reservation is not permissible, acceptance does not affect the permissibility of the reservation; see guideline 3.3.3. It would therefore make little sense to draw a presumption of acceptance from the absence of any objection." The clarification was needed because the 1969 Vienna Convention, in article 20 (para. 5), stated that a reservation was considered to have been accepted when 12 months had elapsed (so-called tacit acceptance); for impermissible reservations, however, that could not be the case. An acceptance that had no consequences could not be considered a tacit acceptance and it might even serve as a disincentive to the late formulation of an objection after the 12-month period had elapsed.

36. Mr. NOLTE asked whether that concerned only individual acceptance or also collective acceptance. The commentary to guideline 3.3.3 made a distinction in that regard and the Commission indicated there that it was not taking a position on the issue of whether collective acceptance was possible.

37. Mr. GAJA said that it would be difficult to conclude that acceptance was unanimous when all the parties did not react to a given impermissible reservation. If, on the other hand, there was some kind of positive acceptance then the situation was different and could be said to result in an amendment to the treaty. But mere silence, even if it lasted 12 months, could not have so radical an effect as to render permissible a reservation that was impermissible.

38. Mr. NOLTE said that the commentary to guideline 3.3.3, especially paragraphs (10) to (13), indicated that the question remained open: collective silence could, in certain cases, result in the acceptance of an impermissible reservation, although the Commission had not taken a position on the question. Perhaps that commentary should be amended, given the elements that Mr. Gaja was proposing to add to the commentary to draft guideline 2.8.1.

39. Mr. GAJA said that it probably should. He added that his proposal reflected the approach that States often used when reacting to an impermissible reservation after the 12-month period.

40. Mr. NOLTE emphasized that the two issues were closely linked and that it would be preferable first to examine the commentary to draft guideline 3.3.3 so as not to prejudge the issues covered there.

41. Mr. PELLET (Special Rapporteur) said that the points were actually not related and that it would be better not to introduce into the commentary to a guideline in Part 2 of the Guide elements relating to Part 3. He himself had always stressed the need to keep separate issues relating to the formulation, permissibility and effects of reservations. In any case, Mr. Nolte need not worry, since the footnote proposed by Mr. Gaja would be understood as being "without prejudice" to what was stated in the commentary to guideline 3.3.3.

42. Mr. NOLTE said that with an explicit clarification to that effect, he could accept the addition proposed by Mr. Gaja.

Paragraph (2), as amended by Mr. Gaja and Mr. Pellet, supported by Mr. Nolte, was adopted.

43. The CHAIRPERSON invited the Commission to begin its consideration of Part 3 of the Guide to Practice, contained in document A/CN.4/L.783/Add.5.

3. *Permissibility of reservations and interpretative declarations* (A/CN.4/L.783/Add.5)

General commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

44. Mr. NOLTE proposed that, to explain more clearly why the Commission had decided to use the term "permissibility" in English and not "validity", the words "offers the advantage that it does not prejudge" be replaced with "would have had the advantage of not leading to mistaken conclusions as to the position of the Commission with regard to".

45. Mr. PELLET (Special Rapporteur) said he supported that proposal and that the words "in French" should be inserted after the words "opted for" in the first sentence.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

46. Mr. NOLTE proposed that the word "French" should be inserted before the word "term" to make it clear that the issue was purely a linguistic one.

Paragraph (5), as amended, was adopted.

Paragraph (6)

47. Mr. NOLTE proposed that paragraph (6) of the commentary to draft guideline 3.3.2 (Non-permissibility of reservations and international responsibility), which better explained the Commission's choice of terms, be

⁴⁵⁰ See the 3110th meeting above, para. 82.

transposed to the first bullet point. He further proposed that the second bullet point be amended to indicate that the terms used made it possible not to take a position in the doctrinal controversy between the proponents of permissibility and those of opposability.

48. Mr. PELLET (Special Rapporteur) said that he endorsed Mr. Nolte's first proposal but that a new text would have to be drafted to replace paragraph (6) of the commentary to draft guideline 3.3.2. Regarding Mr. Nolte's second proposal, he said that the problem seemed to be solely one of translation into English.

Paragraph (6), as amended, was adopted on the understanding that the English text would be reworded.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

49. Mr. NOLTE proposed that, in the English version, the words "A special section will be devoted" should be replaced with "An additional section is devoted". The section was additional, not special, and it was preferable to use the present indicative throughout the paragraph.

It was so decided.

Paragraph (8), as amended in the English version, was adopted.

The general commentary to Part 3, as amended, was adopted.

3.1 Permissible reservations

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

50. Sir Michael WOOD proposed that in the English text, the word "power" be replaced with "right" and that the word should be used throughout as the translation of the word "*faculté*".

It was so decided.

Paragraph (4) was adopted with that amendment to the English text.

Paragraph (5)

51. Mr. PELLET (Special Rapporteur) proposed that the opening phrase be amended to read: "Although the view has sometimes been expressed that it was excessive to speak of a 'right to reservations', the Convention proceeds from the principle that there is a presumption in favour of their permissibility." He further proposed that the final sentence be amended to read: "It should, however, be noted that by using the verb 'may', the introductory clause of article 19 recognizes that States have a right, but it is only the right to 'formulate' reservations", so as to reflect the Commission's latest thinking on the issue.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraph (6)

52. Mr. NOLTE said that the first two sentences could be misleading and proposed that they be reworded to read: "The words 'formulate' and 'formulation' were carefully chosen. They indicate that formulation is not sufficient of itself." Similarly, the second and third sentences should be combined to read: "They indicate that a 'formulated' reservation is not 'made' and does not produce any effect, merely by virtue of such a statement."

It was so decided.

53. Sir Michael WOOD said that at the end of the second proposal, the words "merely by virtue of such a statement", which made no sense, should be amended. He did not have any specific wording to suggest, however.

54. Mr. McRAE, responding to Sir Michael's comments, suggested that at the end of the second proposal, the word "statement" be replaced with "formulation".

It was so decided.

55. Mr. HUANG said that the fourth sentence of the paragraph should be deleted. It invited confusion by referring to "China", since at the time of the United Nations Conference on the Law of Treaties, the People's Republic of China had not yet been a member of the United Nations. Furthermore, his country had later acceded to the 1969 Vienna Convention as a new State party, not as a successor State to the purported "Republic of China". The sentence was unacceptable.

56. Mr. PELLET (Special Rapporteur), supported by Mr. NOLTE, strongly protested a deletion that would amount to rewriting history. At the time of the United Nations Conference on the Law of Treaties, the entity that was now Taiwan Province of China had been called "China" at the United Nations.

57. Sir Michael WOOD said that the sentence in question was of some legal significance and should thus be retained. To respond to Mr. Huang's concern, he proposed that the words "by China" in the fourth sentence and the words "explanations by China" in parentheses in the relevant footnote should be deleted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

58. Mr. PELLET (Special Rapporteur) said that the words "of freedom" in the first sentence should be replaced with "of the right", in keeping with what the Commission had just decided on the subject.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

59. Mr. NOLTE proposed that in the second sentence, the words “places more emphasis on”, which were vague, should be replaced with the words “deals with”.

Paragraph (10), as amended, was adopted.

The commentary to guideline 3.1, as amended, was adopted.

3.1.1 *Reservations prohibited by the treaty*

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

60. Mr. PELLET (Special Rapporteur) said that for the sake of clarity, the word “he”, at the end of the third footnote to the paragraph, should be replaced by “Yasseen”.

Paragraph (5) was adopted with that amendment to the footnote.

Paragraph (6)

61. Mr. McRAE said that in the English version of the first sentence, the word “discussion” should be replaced with “question”, which was more idiomatic.

Paragraph (6) was adopted with that amendment to the English text.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

62. Sir Michael WOOD said that in the second sentence, the words “in their *travaux préparatoires*” should be replaced with “while they were being drafted”.

63. Mr. PELLET (Special Rapporteur) said that in the French version the words “*travaux préparatoires*”, which were usually translated as “drafting history”, should be retained.

Paragraph (11) was adopted with that amendment to the English text.

Paragraph (12)

Paragraph (12) was adopted.

The commentary to guideline 3.1.1, as amended, was adopted.

3.1.2 *Definition of specified reservations*

Commentary

Paragraph (1)

64. Mr. PELLET (Special Rapporteur) said that in the footnote to the paragraph, again for the sake of clarity, “this word” should be replaced by “the word ‘made’”.

Paragraph (1) was adopted with that amendment to the footnote.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

65. Mr. McRAE said that the expression “Eastern countries” in the paragraph’s second sentence presumably referred to the countries of Eastern Europe: that needed to be specified.

66. Mr. NOLTE, supported by Mr. PELLET (Special Rapporteur), said that at the time in question, the socialist countries, and not only those in Eastern Europe, had been referred to in that way.

67. Mr. PETRIČ said that Yugoslavia had not participated in the “effort” referred to in the sentence. He therefore proposed that the words “Eastern countries” should be replaced with “some Eastern countries”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

Paragraph (11)

68. Mr. McRAE said he was surprised to see that the first footnote to the paragraph referred to a scholarly article, when in the English text the sentence containing the footnote indicator started with the words “Some reserving States thought”.

69. Mr. PELLET (Special Rapporteur) said that there was a problem with the translation. The French original did not refer to “reserving States”, and the English should be aligned with the French. However, at the end of the preceding sentence, the phrase “and divided the Commission, whose members advocated different positions” should be deleted, in keeping with the Commission’s decision not to mention in the commentaries any disagreements between members.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

The commentary to guideline 3.1.2, as amended, was adopted.

3.1.3 *Permissibility of reservations not prohibited by the treaty*

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

70. Sir Michael WOOD said that, for the sake of clarity, the word “Vienna” should be inserted before “Convention” in the paragraph’s final sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

71. Mr. PELLET (Special Rapporteur) said that after the word “above” at the end of the first footnote to the paragraph, a semicolon and the words “see also paragraphs (4) to (7) of the general introduction to the Guide to Practice” should be inserted. It was in those paragraphs that the Commission discussed and explained its choice of the French terms “*licéité*” and “*validité*”.

Paragraph (4) was adopted with that amendment to the footnote.

Paragraph (5)

72. Mr. PELLET (Special Rapporteur) proposed that, to avoid confusion, in the French version, the words “*de l’article 19*” be inserted after “*alinéa c*”.

Paragraph (5), as amended in the French version, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

73. Mr. NOLTE proposed that the words “would leave the treaty bereft of substance” at the end of the paragraph should be replaced with “would be incompatible with the object and purpose of the treaty”, an even stronger exception to the principle of the validity of reservations authorized by the treaty, as was shown in the paragraph that followed.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

The commentary to guideline 3.1.3, as amended, was adopted.

3.1.4 *Permissibility of specified reservations*

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

74. Sir Michael WOOD said that in the second sentence of the English text, the words “favoured by the majority of Commission members” should be replaced by an accurate rendering of the corresponding French phrase, “*retenue par la Commission*”.

75. The CHAIRPERSON said that the secretariat would take care of it.

On that understanding, paragraph (2) was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The commentary to guideline 3.1.4, subject to an amendment to paragraph (2), was adopted.

3.1.5 *Incompatibility of a reservation with the object and purpose of the treaty*

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

76. Sir Michael WOOD said that in the English version of the first bullet point, the word “respect” should be replaced with “comply with”.

Paragraph (2) was adopted with that amendment to the English text.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

77. Mr. NOLTE said that the remark at the beginning of the final sentence that the Special Rapporteur had probably shown “tactical caution” was pure speculation and did not belong in a commentary.

78. Mr. PELLET (Special Rapporteur) proposed that the opening phrase of the sentence in question be deleted, so that it began “However, the self-same Special Rapporteur’s ‘conversion’”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (13)

Paragraphs (5) to (13) were adopted.

Paragraph (14)

79. Mr. NOLTE said that it seemed to him inaccurate to assert, as did the first sentence of subparagraph (14) (i), that “[t]he term ‘essential element’ is to be understood in relation to the object of the reservation as formulated by the author”. He proposed that the phrase be deleted and that the sentence read: “The term ‘essential element’ is not necessarily limited to a specific provision.”

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

The commentary to guideline 3.1.5, as amended, was adopted.

The meeting rose at 6 p.m.

3121st MEETING

Tuesday, 9 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.783 and Add.1-8)

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)

(b) *Text of the guidelines and the commentaries thereto* (continued) (A/CN.4/L.783/Add.5)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.783/Add.5.

3.1.5.1 *Determination of the object and purpose of the treaty*

2. Mr. NOLTE said that, in the second sentence of the guideline, the expression “where appropriate” implied that the subsequent practice of the parties was not on the same level as the preparatory work of the treaty and the circumstances of its conclusion in determining the object and purpose of the treaty. The word order of that sentence was inconsistent with that of the clause in paragraph (6) of the commentary that mentioned the same three factors: “taking into account practice and, where appropriate, the preparatory work of the treaty and the ‘circumstances of its conclusion’”. The word order of that clause was consistent with article 32 of the 1969 Vienna Convention, according to which the preparatory work of a treaty, unlike subsequent practice, was considered to be a supplementary means of interpretation.

3. Although in paragraph (7) the Special Rapporteur made the point, with which he agreed, that the preparatory work of a treaty was of greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions, it did not follow that the subsequent practice was less important than the preparatory work.

4. As a solution, he proposed deleting the words “where appropriate” in the text of the guideline, which would place the preparatory work and the subsequent practice on the same level.

5. Mr. SABOIA, supported by Mr. HMOUD and the CHAIRPERSON, said that it was preferable to align the text of the commentary with that of the guideline rather than the other way around, since the text of the guidelines had already been agreed in the Working Group on reservations to treaties following lengthy analysis and discussion.

Guideline 3.1.5.1 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

6. The CHAIRPERSON, responding to the point raised by Mr. Nolte concerning the inconsistency between the text of the guideline and paragraph (6) of the commentary, suggested that the position of the words “practice” [*de la pratique*] and “the preparatory work of the treaty” [*des travaux préparatoires*] should be reversed.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

7. Sir Michael WOOD proposed that, in the final sentence of the English text, the word “correctly” be deleted, as it did not seem appropriate that the Commission should pass judgment on the objection of Luxembourg to the reservation in question.

8. Mr. PELLET (Special Rapporteur) said that, in any case, there was no word in the French text that corresponded in meaning to the English word “correctly”.

Paragraph (10) was adopted with that amendment to the English text.

Paragraph (11)

Paragraph (11) was adopted.

9. The CHAIRPERSON, responding to a general comment from Sir Michael that, in the English text, there were a number of instances in which the text of guidelines that were quoted in the commentaries differed from the definitive text, said that the secretariat would ensure that the definitive version of the guidelines was accurately reproduced throughout the Guide to Practice.

The commentary to guideline 3.1.5.1, as amended, was adopted.

3.1.5.2 *Vague or general reservations*

Guideline 3.1.5.2 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

10. Mr. HMOUD, referring to the last footnote to the paragraph, said that, for the sake of accuracy, the phrase “many Islamic States” should be replaced with “some Islamic States”.

Paragraph (7), with that amendment to the footnote, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

The commentary to guideline 3.1.5.2, as amended, was adopted.

3.1.5.3 *Reservations to a provision reflecting a customary rule*

Guideline 3.1.5.3 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

11. Mr. GAJA said that, in the second bullet point, the phrase “as of right” was a mistranslation of the French “*comme étant le droit*” and should be replaced with “as law”, as in the cited Article 38 of the Statute of the International Court of Justice.

Paragraph (7) was adopted with that amendment to the English text.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

Paragraph (12)

12. Sir Michael WOOD proposed that, in the second sentence, the portion of the text in brackets that read “which are, moreover, to a great extent codifiers of existing law” be deleted. That was an incorrect statement, as human rights treaties might or might not be codifiers of existing law, and, in fact, they often developed the law in a very significant way. For similar reasons, he proposed to delete the expression in brackets in the second sentence of the second footnote to the paragraph.

13. Mr. PELLET (Special Rapporteur) said that he did not agree with the substance of Sir Michael’s proposal, but he could agree with the deletion of the text in question.

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (18)

Paragraphs (13) to (18) were adopted.

Paragraph (19)

14. Mr. NOLTE proposed the deletion, in the first sentence, of the clause “particularly since it is unacceptable that a persistent objector should be able to thwart such

a norm”, as he found it to be superfluous. Although the clause was plausible, the Commission should not make such a broad statement in the limited context of the law on reservations to treaties if it was not necessary, but rather should consider dealing with it under a suggested new topic entitled “Formation and evidence of customary international law”.

15. Mr. PELLET (Special Rapporteur) said that he disagreed with Mr. Nolte’s assessment of that part of the text of the guideline as superfluous or debatable. That a persistent objector could not, through a reservation, thwart a rule of *jus cogens* was indisputable; there was thus no reason why the Commission should refrain from saying so. Moreover, making the point that reservations to a *jus cogens* norm by a persistent objector were particularly unacceptable did, in fact, add something to the text.

16. Sir Michael WOOD, referring to the first footnote to the paragraph, proposed the deletion of the example of the reservation formulated by Myanmar on its accession to the Convention on the rights of the child, since it was unclear how that example related to the prohibition against the formulation of a reservation to a peremptory norm of international law.

17. Mr. PELLET (Special Rapporteur) said that he disagreed with the substance of Sir Michael’s point, but acknowledged that the reason for including the example was not self-evident. He could agree to its deletion, but noted that another example would have to be found.

Paragraph (19), with that amendment to the footnote, was adopted.

Paragraphs (20) to (22)

Paragraphs (20) to (22) were adopted.

The commentary to guideline 3.1.5.3, as amended, was adopted.

3.1.5.4 *Reservations to provisions concerning rights from which no derogation is permissible under any circumstances*

Guideline 3.1.5.4 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 3.1.5.4 was adopted.

3.1.5.5 *Reservations relating to internal law*

18. Mr. NOLTE, referring to what he considered to be an inconsistency between guidelines 3.1.5.5 and 3.1.5, proposed that, in guideline 3.1.5.5, the phrase “nor its general tenor” be replaced by “that is necessary to its general tenor” for the sake of consistency with the master formulation contained in guideline 3.1.5, which was reproduced in a number of other guidelines and which read: “an essential element of the treaty that is necessary to its general tenor”.

19. Mr. PELLET (Special Rapporteur) said that he was not convinced that the text of guideline 3.1.5.5 reflected an inconsistency, nor did he consider Mr. Nolte's point important enough to justify amending the guideline. However, he would leave the matter to the discretion of the Commission.

20. After a discussion in which Mr. MELESCANU, Mr. NOLTE, Mr. PETRIČ, Sir Michael WOOD, Mr. SABOIA and Mr. PELLET took part, the CHAIRPERSON said he took it that the Commission wished to allow members to propose amendments to the text of the guidelines when they concerned questions of substance that might have significant effects on the quality of the text, but that amendments concerning their form would be conveyed directly to the secretariat and would not be raised during the debate in plenary.

It was so decided.

Guideline 3.1.5.5 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 3.1.5.5 was adopted.

3.1.5.6 *Reservations to treaties containing numerous interdependent rights and obligations*

Guideline 3.1.5.6 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

21. Mr. NOLTE proposed that the words "a bundle of obligations" should be replaced by the words "bundles of obligations", which made more sense in the context.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to guideline 3.1.5.6, as amended, was adopted.

3.1.5.7 *Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty*

Guideline 3.1.5.7 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

22. Mr. McRAE said that in the second sentence of the English text it was not clear from the phrase "which had

held that" whether the reference was to the Democratic Republic of the Congo or the International Court of Justice. In the former case, the phrase should be "which had claimed that" or similar wording aligned with the French text.

Paragraph (2) was adopted on the understanding that the English text would be aligned with the French.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor editorial correction to the French text.

The commentary to guideline 3.1.5.7, as amended, was adopted.

3.2 *Assessment of the permissibility of a reservation*

Guideline 3.2 was adopted.

Commentary

Paragraph (1)

23. Sir Michael WOOD said that the second sentence would make better sense with the deletion of "in particular and" before "including".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editorial correction to the antepenultimate footnote in the English text.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

24. Mr. McRAE questioned the need for the last bullet point and proposed its deletion, not least because it was not clear from the text which human rights activists were compounding a contentious debate that was nevertheless largely artificial.

25. Mr. PELLET (Special Rapporteur) said that he was in favour of retaining the bullet point since it was a statement of fact: the human rights activists had focused on a problem that, in his view, did not really exist.

26. Sir Michael WOOD endorsed Mr. McRae's proposal concerning the last bullet point. Referring to the expression in the penultimate bullet point "some States have even denied that the bodies in question have any jurisdiction in the matter", he queried the appropriateness of the word "even" and proposed its deletion.

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

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

27. Sir Michael WOOD questioned the need for the words “more particularly human rights treaties” in the first sentence and proposed their deletion.

28. Mr. McRAE, referring to the phrase in the third bullet point, “including jurisdictional or arbitral methods”, proposed that, in the English text, the word “jurisdictional” be replaced by “judicial”. He further proposed that similar references that appeared elsewhere in the English text should be checked and amended, as necessary.

29. Mr. PELLET (Special Rapporteur), while endorsing Mr. McRae’s proposal concerning the English text, said that the term “*juridictionnel*” should be retained in the French text.

30. Mr. CAFLISCH said that, since in French the term “*juridictionnel*” applied to permanent courts or arbitral methods, the equivalent phrase in the French text “*y compris juridictionnels et arbitraux*” should read either “*y compris juridictionnels*” or “*y compris judiciaires ou arbitraux*”; his preference was for the latter.

31. The CHAIRPERSON said he took it that the proposals made by Sir Michael, Mr. McRae and Mr. Caflich were acceptable to the Commission.

It was so decided.

Paragraph (11), as amended, was adopted.

Paragraph (12)

32. Mr. NOLTE questioned the appropriateness of the expression “no doubt” in the second sentence.

33. Mr. PELLET (Special Rapporteur) proposed, for the sake of accuracy, that the expression should be replaced by the word “probably” in the English text.

Paragraph (12) was adopted with that amendment to the English text.

Paragraph (13)

34. Mr. NOLTE, referring to the phrase in the penultimate sentence “which is intended to ensure compliance with the treaty by the parties”, proposed the addition of the word “continuously” in order to emphasize the importance of treaty bodies monitoring compliance by States parties after the expiration of the 12-month period in question.

35. Mr. McRAE, referring to the phrase in the same sentence “the relevant texts currently in force”, proposed that, for the sake of clarity, the word “texts” should be replaced by the word “treaties” in the English text.

Paragraph (13), as amended, was adopted.

Paragraph (14)

36. Sir Michael WOOD, referring to the statement in the last sentence “it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties”, said that the phrase “guardians of treaties” was unnecessary and slightly contentious and should therefore be deleted.

37. Mr. PELLET (Special Rapporteur), supported by Mr. SABOIA, said that, while some States might not like the fact that treaty monitoring bodies were referred to as “guardians of treaties”, it was in fact the role they played, and the phrase expressed the essence of the sentence.

38. Sir Michael WOOD said he wished to have it placed on record that he was in disagreement with Mr. Pellet on that point.

Paragraph (14) was adopted.

Paragraph (15)

Paragraph (15) was adopted.

The commentary to guideline 3.2, as amended, was adopted.

3.2.1 *Competence of the treaty monitoring bodies to assess the permissibility of reservations*

Guideline 3.2.1 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 3.2.1 was adopted.

3.2.2 *Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations*

Guideline 3.2.2 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 3.2.2 was adopted.

3.2.3 *Consideration of the assessments of treaty monitoring bodies*

Guideline 3.2.3 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

39. Mr. McRAE proposed that the words “there should be reciprocity, and”, which implied that the monitoring bodies were on an equal footing with States, be deleted. Monitoring bodies should, of course, take account of the positions expressed by States and international

organizations with respect to a reservation, irrespective of whether there was reciprocity.

Paragraph (4), as amended, was adopted.

The commentary to guideline 3.2.3, as amended, was adopted.

3.2.4 *Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body*

Guideline 3.2.4 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 3.2.4 was adopted.

3.2.5 *Competence of dispute settlement bodies to assess the permissibility of reservations*

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 3.2.5 was adopted.

3.3 *Consequences of the non-permissibility of a reservation*

3.3.1 *Irrelevance of distinction among the grounds for non-permissibility*

Guideline 3.3.1 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

40. Mr. NOLTE questioned the accuracy of the clause in the first sentence which read “Moreover, nothing, either in the text of article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases”. While it was true that there was nothing said along those lines in article 19 of the 1969 and 1986 Vienna Conventions, the bullet points in paragraph (3) of the commentary did suggest that such a distinction had been contemplated in the *travaux préparatoires*. That was confirmed by the statement by Sir Humphrey Waldock⁴⁵¹ quoted in paragraph (3) of the commentary to guideline 3.3.3. He therefore proposed that the first sentence be redrafted to begin: “Nothing in the text of article 19 gives grounds”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

⁴⁵¹ *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 25th meeting, 16 April 1968, p. 144, para. 2.*

Paragraph (8)

41. Mr. NOLTE proposed, for the sake of consistency with the amendment to paragraph (4), the deletion of the phrase “or in the *travaux préparatoires* for the Conventions”.

Paragraph (8), as amended, was adopted.

The commentary to guideline 3.3.1, as amended, was adopted.

3.3.2 *Non-permissibility of reservations and international responsibility*

Guideline 3.3.2 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraphs (5) and (6)

42. Mr. PELLET (Special Rapporteur) recalled the decision taken by the Commission at an earlier meeting to transpose the contents of paragraph (6) to the general commentary to Part 3. He proposed that a footnote be inserted at the end of paragraph (5) referring readers to paragraph (6) of the general commentary for the related terminology problems.

Paragraph (5), as supplemented with a footnote, was adopted.

Paragraph (6) was deleted.

The commentary to guideline 3.3.2, as amended, was adopted.

3.3.3 *Absence of effect of individual acceptance of a reservation on the permissibility of the reservation*

Guideline 3.3.3 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

43. Mr. NOLTE questioned the appropriateness of the word “nullity” and proposed that it should be replaced by the word “impermissibility”, since the issue being discussed was the acceptance of an impermissible reservation.

Paragraph (6), as amended, was adopted.

Paragraph (7)

44. Mr. NOLTE said that, for similar reasons, the words “the nullity of” should be deleted from the first sentence.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

45. Mr. NOLTE said that the statement “silence on the part of a State party does not mean that it is taking a position as to the permissibility of a reservation” needed to be qualified. He therefore proposed the insertion of the word “necessarily” before the word “mean”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

46. Mr. NOLTE proposed that the words “amendment of treaties” be replaced by the words “amendment or modification of treaties”, which would be more in keeping with the 1969 and 1986 Vienna Conventions.

Paragraph (13), as amended, was adopted.

The commentary to guideline 3.3.3, as amended, was adopted.

3.4 *Permissibility of reactions to reservations*

Commentary

Paragraph (1)

47. Mr. NOLTE said that, in the final sentence, the word “may” should be replaced with “should” for the sake of consistency with the commentary to guideline 3.2.3 regarding the need to take account of the positions of States and international organizations. The current wording suggested that the same weight was not given to all points of view.

48. Mr. PELLET (Special Rapporteur) said that the Commission should not give the impression that monitoring bodies were bound by the positions of States and international organizations. There was a need for caution in that regard.

49. Sir Michael WOOD said that he agreed with the Special Rapporteur. It would be prudent to retain the word “may”.

50. Mr. PELLET (Special Rapporteur) said that the opening phrase of the final sentence, which currently read “The fact remains, however, that acceptances and objections provide a means” [*Il n’en reste pas moins que les acceptations et les objections constituent un moyen*], should be reworded to read “Acceptances and objections, however, provide a means” [*Les acceptations et les objections constituent pendant un moyen*].

Paragraph (1), as amended by the Special Rapporteur, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to section 3.4, as amended, was adopted.

3.4.1 *Permissibility of the acceptance of a reservation*

Guideline 3.4.1 was adopted.

Commentary

51. The CHAIRPERSON suggested that, in view of the need to correct the numbering of the paragraphs in the French text, the Commission should adopt the paragraphs as numbered in the English version.

It was so decided.

Paragraph (1)

Paragraph (1) was adopted with an editorial correction to the English text.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

The commentary to guideline 3.4.1, as amended, was adopted.

3.4.2 *Permissibility of an objection to a reservation*

Guideline 3.4.2 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. NOLTE said that, for the sake of accuracy and readability, in the second sentence the word “certain” should be inserted before the phrase “reservations to the 1969 Vienna Convention itself”.

53. Mr. HUANG said that he wished to draw attention to a factual error in information relating to China in the second footnote to the paragraph. China had formulated a reservation to article 66 of the 1969 Vienna Convention on becoming a party to the Convention in 1997 and that reservation had not been withdrawn. Upon accession to the Convention, China had made a declaration stating that signature to the Convention by the Taiwan authorities in 1970 in the name of China was illegal and therefore null and void.⁴⁵² Accordingly, he proposed that the information on China be deleted from the footnote.

54. Mr. NOLTE said that it was necessary to clarify whether the reference to China related to a reservation made before 1971 or not. If the reservation had been formulated by the People’s Republic of China, then the reference was correct. The following sentence relating to the withdrawal of reservations did not mention China.

55. The CHAIRPERSON suggested that the facts relating to the reference to China in the above-mentioned footnote be verified.

Paragraph (2), as amended by Mr. Nolte, was adopted, subject to factual verification regarding the second footnote to the paragraph.

⁴⁵² *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. XXIII.1.

Paragraphs (3) to (19)

Paragraphs (3) to (19) were adopted.

The commentary to guideline 3.4.2, as amended and subject to the factual verification regarding the footnote to paragraph (2), was adopted.

3.5 *Permissibility of an interpretative declaration*

Guideline 3.5 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

56. Sir Michael WOOD questioned the relevance of the reference, at the end of the paragraph, to the third draft agreement for the Free Trade Area of the Americas⁴⁵³ of November 2003.

57. Mr. PELLET (Special Rapporteur) said that the importance of the reference lay in the fact that it was the only multilateral treaty which illustrated the possibility of prohibiting interpretative declarations.

58. The CHAIRPERSON, speaking as a member of the Commission, suggested that, since the agreement in question had not been adopted, the reference to it should be moved to the last footnote to the paragraph.

Paragraph (5), as amended, including the amendment to the last footnote, was adopted.

Paragraphs (6) to (14)

Paragraphs (6) to (14) were adopted.

Paragraph (15)

59. Mr. NOLTE said that the citation from the opinion of the Permanent Court of International Justice in the *Jaworzina* case did not seem to support the assertion at the beginning of the paragraph that the value of an interpretation was assessed on the basis, not of its content, but of its authority. He therefore proposed that the paragraph be deleted.

60. Mr. McRAE said that perhaps the point of the quotation was that it suggested that an opinion formulated after the drafting of an agreement did not have the same authority as one expressed at the time of drafting.

61. Mr. PELLET (Special Rapporteur) said that, on reflection, he agreed that the quotation appeared to contradict the point being made earlier in the paragraph. It would therefore be wiser to delete the paragraph.

Paragraph (15) was deleted.

⁴⁵³ Third draft agreement on the Free Trade Area of the Americas, document FTAA.TNC/w/133/Rev.3, 21 November 2003 (available from www.ftaa-alca.org/FTAADraft03/Index_e.asp), chap. XXIV, art. 4.

Paragraphs (16) and (17)

Paragraphs (16) and (17) were adopted.

The commentary to guideline 3.5, as amended, was adopted.

3.5.1 *Permissibility of an interpretative declaration which is in fact a reservation*

Guideline 3.5.1 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 3.5.1 was adopted.

3.6 *Permissibility of reactions to interpretative declarations*

Guideline 3.6 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 3.6 was adopted.

62. The CHAIRPERSON invited the members of the Commission to consider the portion of the Guide to Practice contained in document A/CN.4/L.783/Add.6.

4. *Legal effects of reservations and interpretative declarations (A/CN.4/L.783/Add.6)*

Commentary

Paragraphs (1) to (21)

Paragraphs (1) to (21) were adopted.

The commentary to Part 4 of the Guide to Practice was adopted.

4.1 *Establishment of a reservation with regard to another State or international organization*

63. Ms. ESCOBAR HERNÁNDEZ, referring to guideline 4.1 and to other guidelines where reference was made to the “establishment of a reservation” or to an “established reservation”, said that in the Spanish text, those terms were inconsistent with the language of the Spanish version of the 1969 Vienna Convention. In 2010, the Spanish-speaking members of the Commission had drafted a footnote to that guideline, and she proposed that this footnote be reintroduced.

64. Mr. PELLET (Special Rapporteur) said that, while he understood the concerns of Ms. Escobar Hernández, he wondered why the Spanish text could not simply be brought into line with the language of the Vienna Convention.

65. After a discussion in which Ms. ESCOBAR HERNÁNDEZ, Mr. PELLET (Special Rapporteur) and Mr. CANDIOTI took part, the latter made the suggestion,

endorsed by Mr. VÁZQUEZ-BERMÚDEZ, that the Spanish-speaking members of the Commission clarify the issue of how best to make the Guide to Practice easier to understand for Spanish-speaking users.

It was so decided.

Guideline 4.1 was adopted, subject to clarification of the Spanish text.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

66. Mr. PELLET (Special Rapporteur) said that the footnote to the paragraph should be corrected to read “Paragraph 3 of article 21 does not refer to the validity of a reservation.” [*Le paragraphe 3 de l’article 21 ne se réfère pas à la validité de la réserve*].

Paragraph (2) was adopted with that amendment to the footnote.

Paragraphs (3) to (10)

Paragraphs (3) to (10) were adopted.

Paragraph (11)

67. Mr. NOLTE said that, in the first footnote to the paragraph, the phrase in brackets, “Validity of reservations and interpretative declarations”, should be corrected to read “Permissibility of reservations and interpretative declarations”.

Paragraph (11) was adopted with that correction to the first footnote to the paragraph.

Paragraph (12)

68. Mr. PELLET (Special Rapporteur) said that, in the light of the discussion at the previous meeting on guideline 3.3.3, the phrase in the third sentence which stated “except for the possibility that they might decide by common agreement to ‘permit’ the reservation” should be replaced with “except for the remaining uncertainty about the possibility that they could decide by common agreement to ‘permit’ the reservation” [*sous réserve de l’incertitude qui demeure quant à la possibilité qu’ils décident d’un common accord de ‘valider’ la réserve*].

69. Mr. NOLTE said that the expression “objectively valid” in the fourth sentence was not used in other contexts; the adverb “objectively” should therefore be deleted.

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (16)

Paragraphs (13) to (16) were adopted.

Paragraph (17)

70. Sir Michael WOOD suggested deleting, in the final sentence, the phrase “which covers the effects

of reservations on treaty relations between the other contracting States and contracting organizations”, because the preceding sentence made it clear that reservations had no such legal effects. If the last part of the final sentence were retained it would be confusing, because it really ought to say “which covers the fact that reservations have no effect on treaty relations between the other contracting States and contracting organizations”.

Paragraph (17), as amended, was adopted.

The commentary to guideline 4.1, as amended, was adopted.

4.1.1 *Establishment of a reservation expressly authorized by a treaty*

Guideline 4.1.1 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

71. Mr. NOLTE said that the third sentence, “To accept this way of looking at things would render the Vienna regime utterly meaningless”, was ambiguous. In order to dispel that ambiguity, the phrase “To accept this way of looking at things” should be replaced with “To accept an unlimited right to formulate reservations under such circumstances”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

72. Mr. NOLTE said that, in the penultimate sentence, the phrase “any reservation so formulated is necessarily valid” should be replaced with “any reservation so formulated is necessarily permissible”, since the reference in the related footnote referred to guideline 3.1.4 (Permissibility of specified reservations).

73. Mr. PELLET (Special Rapporteur) said that time could be saved by English-speaking members giving the secretariat a list of places in the text where “valid” should be altered to “permissible”.

74. Mr. NOLTE said that the problem was that the substitution of terms could not be mechanical. In the English text the term “validity” covered situations involving both substantive permissibility and procedural validity. In some places it was therefore appropriate to speak of “validity”, while in others, when only substantive issues were concerned, the term “permissibility” should be used.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (14)

Paragraphs (7) to (14) were adopted.

Paragraph (15)

75. Sir Michael WOOD said that the paragraph in question said in effect that if a particular reservation

fell under article 20, paragraph 1, of the 1986 Vienna Convention, no objection could be made to that reservation. The penultimate sentence drew attention to the fact that an amendment proposed by France at the United Nations Conference on the Law of Treaties,⁴⁵⁴ which had expressed exactly the same idea, had not been adopted by the Drafting Committee. The last footnote to the paragraph indicated that Pierre-Henri Imbert had concluded that the States represented at the Conference had rejected that amendment because they had not wished to restrict the right to object to expressly authorized reservations.⁴⁵⁵ The inclusion of that footnote was rather misleading because it suggested that the Commission agreed with the position expressed therein. He therefore proposed that the footnote be deleted. Alternatively, the Commission could delete the whole sentence that referred to the French amendment. Mention of the latter concerned only a detail of the *travaux préparatoires* and added nothing to the rationale of the paragraph.

76. Mr. NOLTE said that the key issue was whether parties to a treaty intended to exclude the possibility of making objections when they accepted that expressly authorized reservations could be made. Perhaps the Commission should be more flexible and should not state categorically that objections were excluded if there was a possibility of formulating an expressly authorized reservation, since in theory it was conceivable that the parties had not wished to reject that possibility. The Special Rapporteur had rightly emphasized that objections could be formulated without furnishing any reasons.

77. Mr. PELLET (Special Rapporteur) said that clearly the position of the Commission was diametrically opposed to that of Mr. Imbert, but it would be unfortunate to excise any reference to the amendment by France, because it had existed. The footnote in question could simply state: “*Contra*: Pierre-Henri Imbert, see footnote XXX above, p. 55”. Although Imbert was an authority on the subject of reservations to treaties, the Special Rapporteur would not personally be opposed to the deletion of the footnote.

78. Sir Michael WOOD said that the meaning of such an abbreviated footnote would be obscure. For that reason, he would prefer the deletion of the footnote.

79. Mr. NOLTE said that two of the sources underpinning the paragraph pointed to the fact that the existence of an expressly authorized reservation did not necessarily rule out the possibility of making objections; the rejection of the amendment by France and the citation of an authoritative academic source both argued for that position. The Commission should therefore allow for the possibility of objections being formulated even to expressly authorized reservations.

80. Mr. GAJA said that Mr. Nolte seemed to be suggesting that States might make objections even when

the parties to a treaty had explicitly stated therein that a certain reservation could be made. He himself would not wish to encourage them to do so; there was no reason why they should be allowed to have second thoughts about whether a reservation expressly authorized under a treaty could be made. Perhaps the amendment by France had not been adopted because it had been regarded as superfluous; its rejection did not necessarily indicate that the United Nations Conference on the Law of Treaties wanted to allow States to have second thoughts. He considered that the Commission would be on firm ground if it deleted the footnote in question.

Paragraph (15) was adopted with the deletion of the last footnote to the paragraph.

The meeting rose at 1 p.m.

3122nd MEETING

Tuesday, 9 August 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IX. Protection of persons in the event of disasters (A/CN.4/L.788 and Add.1–2)

1. The CHAIRPERSON invited the Commission to begin its consideration of chapter IX of its report, on protection of persons in the event of disasters, contained in document A/CN.4/L.788 and Add.1–2.

A. Introduction

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 7 to 9

Paragraphs 7 to 9 were adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted, subject to the insertion of the dates and numbers of the meetings.

⁴⁵⁴ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), document A/CONF.39/C.1/L.169, p. 137.*

⁴⁵⁵ P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 55.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FOURTH REPORT

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

2. SUMMARY OF THE DEBATE ON DRAFT ARTICLE 12

Paragraph 15

2. Mr. VASCIANNIE asked why only the debate on draft article 12 was summarized.

3. The CHAIRPERSON recalled that draft articles 10 and 11 had already been adopted. It was the practice of the Commission not to summarize debates on draft articles that it had already adopted in the same year with the commentaries thereto.

4. Mr. MIKULKA (Secretary to the Commission) explained that, in order not to undermine the importance of the commentaries, the Commission considered it preferable to submit them to the Sixth Committee without the summary of the debates to which they had given rise, bearing in mind also that those debates were reflected in the commentaries.

5. Sir Michael WOOD suggested, to simplify the reading for those who were not familiar with that practice, the insertion of a footnote that might read, for example, that “in accordance with the long-standing practice of the Commission, the present report does not contain a summary of the debate on draft articles 10 and 11, because the Commission has adopted the commentaries thereto this year”, followed by a reference to the paragraphs in which those commentaries were reproduced.

6. Mr. CANDIOTI also suggested stating that the debates were duly reflected in the summary records of the meeting.

7. Mr. WISNUMURTI approved the proposed solution, but he regretted that practice. Draft articles 10 and 11 had given rise to lively debate, which the Sixth Committee should be aware of.

8. Mr. PELLET said that the practice, which he personally approved, was justified by the fact that the debates, and in particular the minority views, were in principle reflected in the commentaries submitted on first reading. However, that was not at all the case for draft articles 10 and 11. A reading of the relevant commentaries, which were contained in document A/CN.4/L.788/Add.2, gave the impression that the Commission had been unanimous on their subject, yet members had expressed very divergent views. Mr. Vasciannie and Mr. Wisnumurti were right to think that something important would be concealed from the Sixth Committee if that controversy was not reflected. He supported Sir Michael’s proposal to explain the Commission’s practice, but it would be preferable to do so in a paragraph rather than in a footnote.

9. Mr. PETRIČ said that the situation was exceptional: it was very unusual for the Drafting Committee to put aside a sole draft article. Draft article 12 had given rise not only to a very lively debate in plenary, but also to lengthy

discussions in the Drafting Committee. That needed to be reflected. Draft articles 10 and 11, which had been adopted, represented what had been said, even if some did not always see their comments reproduced. He endorsed the idea of explaining the Commission’s practice. However, it would be difficult to alter the commentaries in the absence of the Special Rapporteur.

10. Mr. VASCIANNIE expressed appreciation for those explanations, but believed that in the current case the rule was not justified. He suggested adding a paragraph to summarize the debate; the summary provided by the Chairperson of the Drafting Committee, which captured the essence of the debate, could be used for that purpose.

11. Mr. NOLTE said that he agreed with Mr. Petrič and Mr. Vasciannie, but thought that the Commission should also look at what had been done in the past. Other debates in the Commission had also been characterized by considerable differences of opinion, and it would be interesting to learn to what extent the controversy had been reflected in the commentaries.

12. Mr. McRAE said he failed to see how the differing views in the commentaries could be reflected if everything that had been said was attributed to “the Commission”. After all, the summary of the debates made it clear that “some members” had expressed one opinion or another.

13. Sir Michael WOOD said that the commentaries on first reading reflected the debate, whereas at the stage of second reading, it was the position of the Commission that was expressed. He endorsed the proposal to add an explanatory paragraph together with a reference to the summary records, which was very important. It should perhaps be specified that the summary records were available from the Commission’s website. However, it was not helpful to reproduce the summary of the Chairperson of the Drafting Committee, because that had been another debate. Nor did he think it wise to depart from the Commission’s practice, because that would set a precedent. Members who believed that their views had not been sufficiently reflected could point that out to the Special Rapporteur when the commentaries were considered.

14. The CHAIRPERSON said he took it that the Commission agreed to add a new paragraph, which would be drafted by the secretariat in line with the proposals by Mr. Candiotti, Mr. Pellet and Sir Michael. It would, however, be preferable not to refer to the summary records, which reflected all the debates and not only those concerning draft articles 10 and 11.

Paragraph 15 was adopted, on the understanding that it would be followed by a new paragraph.

Paragraphs 16 to 19

Paragraphs 16 to 19 were adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

Paragraph 23

15. Mr. GAJA said that the words “draft articles 10 to 12” should be replaced by “draft article 12”, because the summary of the debate only concerned that draft article.

It was so decided.

Paragraph 23, as amended, was adopted.

Section B, as amended and subject to the addition of a new paragraph, was adopted.

16. The CHAIRPERSON invited the Commission to begin its consideration of document A/CN.4/L.788/Add.1, which contained the commentaries to draft articles 6 to 9 on protection of persons in the event of disasters already provisionally adopted by the Commission.

C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted by the Commission at its sixty-third session

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO

Article 6. Humanitarian principles in disaster response

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 6 was adopted.

Article 7. Human dignity

Commentary

Paragraph (1)

17. Following an exchange of views in which Mr. McRAE, Mr. NOLTE and Sir Michael WOOD took part, the CHAIRPERSON said he took it that the Commission wished to delete the word “central” in the first sentence and to replace the words “a guiding principle” in the third sentence by “the guiding principle”.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

18. The CHAIRPERSON suggested that the word “traduisent” in the third sentence of the French text should be replaced by “dénotent”.

It was so decided.

Paragraph (6), as amended in the French text, was adopted.

The commentary to article 7, as amended, was adopted.

Article 8. Human rights

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

19. Sir Michael WOOD suggested, for greater clarity in the English text, that the words “maintained by way of” in the first sentence should be replaced by “reflected in”.

Paragraph (2), as amended in the English text, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The commentary to article 8, as amended, was adopted.

Article 9. Role of the affected State

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. NOLTE proposed the insertion, in the footnote, of a reference to the decision of the Permanent Court of Arbitration rendered on 4 April 1928 by Max Huber in the dispute between the United States and the Netherlands concerning the sovereignty of the Island of Palmas, in which it was stated that “[t]erritorial sovereignty ... has as corollary a duty: the obligation to protect within the territory the rights of other States” (p. 839 of the award in *Island of Palmas*).

21. Sir Michael WOOD suggested replacing the words “which has the right to non-intervention” in the fourth sentence by “which benefits from the principle of non-intervention”.

22. Mr. GAJA said that the last sentence was controversial and should be deleted.

These proposals were accepted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

23. Sir Michael WOOD proposed replacing the word “concepts” in the second sentence by “principles”.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to article 9, as amended, was adopted.

24. The CHAIRPERSON invited the Commission to begin its consideration of the rest of the section reproduced in document A/CN.4/L.788/Add.2, which contained the commentaries to draft articles 10 and 11 on protection of persons in the event of disasters already provisionally adopted by the Commission.

Article 10. Duty of the affected State to seek assistance

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

25. Mr. GAJA proposed the insertion, at the beginning of the third sentence, of the words “While this may occur also in the absence of any disaster,” to make it clear that it was not the disaster that triggered the international obligations of States towards individuals.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

26. Mr. GAJA said that the quotation from the General Assembly resolution in the second sentence of paragraph (8) could be deleted, because it also appeared in paragraph (2) of the commentary to article 11, where it was better placed.

27. Mr. NOLTE said that he endorsed Mr. Gaja’s proposal, but pointed out that it would then be necessary to delete the word “further” in the next sentence.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Article 11. Consent of the affected State to external assistance

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

28. Mr. GAJA said that paragraph (8) of the commentary to article 11 said the same thing, and said it better. He therefore suggested the deletion of paragraph (6).

Paragraph (6) was deleted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

29. Mr. GAJA said that he did not understand the last sentence and wondered whether there would be any harm in deleting it.

30. Sir Michael WOOD agreed that the sentence was unclear, and he was surprised by the words “positive consent” in the English text, which suggested that there might also be “negative consent”. He therefore supported Mr. Gaja’s proposal to delete the sentence.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.783 and Add.1–8)

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)

(b) *Text of the guidelines and the commentaries thereto (continued) (A/CN.4/L.783/Add.6)*

31. The CHAIRPERSON invited the Commission to resume its consideration of the portion of the Guide to Practice contained in document A/CN.4/L.783/Add.6 and recalled that it had completed its consideration of the commentary to guideline 4.1.1.

4.1.2 *Establishment of a reservation to a treaty which has to be applied in its entirety*

Guideline 4.1.2 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

32. Mr. NOLTE suggested the deletion of the words “which has long been practised” in the first sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

33. Sir Michael WOOD said that the quotation in the fourth sentence did not correspond to the text of the guideline and did not shed any light on the matter. He therefore proposed that the rest of the paragraph, from the fourth sentence on, be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

34. Mr. PELLET (Special Rapporteur) said that, in the first sentence, the word “intrinsicly” should be deleted.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (13)

Paragraphs (7) to (13) were adopted.

The commentary to guideline 4.1.2, as amended, was adopted.

4.1.3 *Establishment of a reservation to a constituent instrument of an international organization*

Guideline 4.1.3 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

35. Sir Michael WOOD said that, in conformity with the decision taken by the Commission in that regard, the footnote should be deleted, because it merely reproduced the guideline.

Paragraph (2) was adopted with the deletion of the footnote.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to guideline 4.1.3, as amended, was adopted.

4.2 *Effects of an established reservation*

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to section 4.2 was adopted.

4.2.1 *Status of the author of an established reservation*

Guideline 4.2.1 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

36. Sir Michael WOOD, supported by Mr. PELLET (Special Rapporteur), said that he did not understand the paragraph. It went without saying that the author of the reservation became a party to the treaty when the treaty entered into force for it. He therefore proposed the deletion of the paragraph.

Paragraph (4) was deleted.

Paragraph (5)

37. Mr. PELLET (Special Rapporteur) said that, since paragraph (4) had been deleted, the word “However” at the beginning of paragraph (5) would also have to be deleted.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

38. Mr. NOLTE, referring to the first sentence, said that the Commission had not been of the view that application of article 20, paragraph 4 (c), of the Vienna Conventions was hesitant, but that it was inconsistent. The text should be amended accordingly.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

Paragraph (14)

39. Sir Michael WOOD said that the words “for this reason” at the end of the paragraph were obscure and should be replaced by the phrase “by virtue of its instrument expressing consent to be bound”.

Paragraph (14), as amended, was adopted.

The commentary to guideline 4.2.1, as amended, was adopted.

4.2.2 *Effect of the establishment of a reservation on the entry into force of a treaty*

Guideline 4.2.2 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 4.2.2 was adopted.

4.2.3 *Effect of the establishment of a reservation on the status of the author as a party to the treaty*

Guideline 4.2.3 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 4.2.3 was adopted.

4.2.4 *Effect of an established reservation on treaty relations*

Guideline 4.2.4 was adopted.

Commentary

Paragraphs (1) to (21)

Paragraphs (1) to (21) were adopted.

Paragraphs (22) and (23)

40. Mr. GAJA said that he had problems with the examples cited in paragraphs (22) and (23). At issue were reservations that modified the obligations initially provided for under the treaty not only by removing some aspects of those obligations, but also by adding new ones. However, when the Commission had discussed

guideline 1.1 (Definition of reservations), it had considered that this type of unilateral declaration should not be considered to be a reservation.

41. Mr. PELLET (Special Rapporteur) said that he would address that question in greater detail and return to it at the next meeting.

The adoption of paragraphs (22) and (23) was deferred.

Paragraphs (24) to (32)

Paragraphs (24) to (32) were adopted.

Paragraph (33)

42. Mr. PELLET (Special Rapporteur) said that, in the French text, the words “*en effet*” in the third sentence of the first footnote to the paragraph should be deleted.

Paragraph (33), as amended, was adopted.

Paragraph (34)

Paragraph (34) was adopted.

4.2.5 *Non-reciprocal application of obligations to which a reservation relates*

Guideline 4.2.5 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

43. Mr. PELLET (Special Rapporteur) said that, in the first sentence, the words “may appear” should be replaced by “seems”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (12)

Paragraphs (6) to (12) were adopted.

The commentary to guideline 4.2.5, as amended, was adopted.

4.2.6 *Interpretation of reservations*

Guideline 4.2.6 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraphs (8) and (9)

44. Mr. PELLET (Special Rapporteur) said that paragraphs (8) and (9) should be merged.

Paragraphs (8) and (9), as amended, were adopted.

Paragraph (10)

45. Sir Michael WOOD pointed out that the English text had three bullet points, whereas the French text had four.

Paragraph (10) was adopted, subject to drafting corrections to be made to the English text.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

Paragraph (14)

46. Sir Michael WOOD said that the word “all” in the first sentence should be deleted. As currently formulated, the sentence implied that most reservations should be interpreted restrictively.

47. Mr. PELLET (Special Rapporteur) said that he was not very enthusiastic about that proposal, because the fact of the matter was that it could not be excluded that some reservations must be interpreted restrictively.

48. Sir Michael WOOD suggested that the sentence could be recast to read: “However, this does not mean that, as a general rule, reservations should be interpreted restrictively.”

49. Mr. McRAE proposed replacing the words “such a principle of interpretation” in the second sentence, which were unclear, by “a principle of restrictive interpretation”.

50. Mr. NOLTE said that it would be preferable to say “a principle of restrictive interpretation of reservations”.

51. Sir Michael WOOD proposed redrafting paragraph (14) to read: “However, this does not mean that, as a general rule, reservations should be interpreted restrictively. The International Court of Justice has not generally referred to a restrictive interpretation in its interpretation of reservations.”

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

52. Mr. NOLTE said that, in the first sentence, the word “consubstantiality” was unusual and should be replaced by “interdependence”.

53. Sir Michael WOOD agreed that the word “consobstantiality” was strange in such a context, at any rate in English, and he suggested replacing it by “substantive link” in order to retain the idea of a substantive connection.

54. The CHAIRPERSON announced that the rest of paragraph (16) would be considered at the next meeting. He invited the Commission to turn to paragraph (2) of the commentary to guideline 3.4.2, contained in document A/CN.4/L.783/Add.5, in which a point concerning the second footnote to the paragraph had been left in abeyance at the previous meeting (para. 55).

3.4.2 *Permissibility of an objection to a reservation (concluded)**

Commentary (concluded) (A/CN.4/L.783/Add.5)*

Paragraph (2) *(concluded)**

55. Mr. PELLET (Special Rapporteur) said that, upon verification, and as assumed by Mr. Nolte, it had in fact been the People's Republic of China that had formulated a reservation to article 66 of the 1969 Vienna Convention. He failed to see why any change needed to be made to the footnote in question.

56. Mr. HUANG thanked the Special Rapporteur for that explanation, but wished to reiterate that the word "China" employed indiscriminately in the Special Rapporteur's report to designate both the People's Republic of China and the so-called "Republic of China" was misleading. There was only one China, and the name "China" must only designate the People's Republic of China. Therefore, all references in the report to the name "China" which referred to the so-called "Republic of China" should be deleted.

57. The CHAIRPERSON said that, as had already been stressed at the previous meeting, that was not a purely technical question. Moreover, the Special Rapporteur could not be instructed to carry out that task. On the other hand, whenever Mr. Huang considered that the problem arose, he was free to intervene to formulate a proposal. In any event, the Special Rapporteur's explanation showed that the problem did not arise for the footnote being discussed. If he heard no objection, he would take it that the Commission wished to adopt the footnote as it stood.

It was so decided.

The commentary to guideline 3.4.2, as amended, was adopted.

The meeting rose at 6 p.m.

3123rd MEETING

Wednesday, 10 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. *Reservations to treaties (continued) (A/CN.4/L.783 and Add.1-8)*

F. *Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)*

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (*continued*)

(b) *Text of the guidelines and the commentaries thereto (continued) (A/CN.4/L.783/Add.6)*

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter IV of the draft report and drew attention to Part 4 of the Guide to Practice contained in document A/CN.4/L.783/Add.6.

4.3 *Effect of an objection to a valid reservation*

Guideline 4.3 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. NOLTE said that the statement in the last sentence that reservations were consubstantial with the State's consent to be bound by the treaty should be amended in accordance with the formulation adopted for the first sentence of paragraph (16) of the commentary to guideline 4.2.6.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to guideline 4.3, as amended, was adopted.

4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*

Guideline 4.3.1 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

3. Mr. NOLTE said that since in the first sentence the word "objection" was described as "simple", for the sake of clarity and consistency, the second sentence should be redrafted to read: "This, in fact, is one of the fundamental differences between a simple objection and acceptance, one which, along with other considerations, means that such an objection is not 'tantamount to acceptance' ...".

Paragraph (3), as amended, was adopted.

* Resumed from the 3121st meeting, paragraph 55.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 4.3.1, as amended, was adopted.

4.3.2 *Effect of an objection to a reservation that is formulated late*

Guideline 4.3.2 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 4.3.2 was adopted.

4.3.3 *Entry into force of the treaty between the author of a reservation and the author of an objection*

Guideline 4.3.3 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 4.3.3 was adopted.

4.3.4 *Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*

Guideline 4.3.4 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to guideline 4.3.4 was adopted.

4.3.5 *Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect*

Guideline 4.3.5 was adopted.

Commentary

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to guideline 4.3.5 was adopted.

4.3.6 *Effect of an objection on treaty relations*

Guideline 4.3.6 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

Paragraphs (10) and (11)

4. Mr. NOLTE said that it was not clear from paragraph (11) as currently drafted what was meant by “the episode”; it might be understood as referring to the “few unfortunate changes which the Conference fairly quickly

reconsidered” mentioned in paragraph (10). For the sake of simplicity and clarity, he proposed that the two paragraphs be merged. The new paragraph should begin: “During the debate of the United Nations Conference on the Law of Treaties on what would become article 21, paragraph 3, an episode occurred, which is relevant for understanding this article. The Conference Drafting Committee ...”

5. Mr. PELLET (Special Rapporteur) said that his preference was to retain the whole of paragraph (10); otherwise the reference to the unfortunate changes would be lost. By way of solution, he proposed that the first sentence of paragraph (11) be redrafted to begin: “An episode which occurred at that time is relevant, however, for understanding ...” [*Un épisode qui s’est produit à cette occasion n’est cependant pas sans intérêt pour comprendre ...*].

6. The CHAIRPERSON said he would take it that Mr. Pellet’s proposal concerning paragraphs (10) and (11) was acceptable to the Commission.

Paragraph (10) was adopted.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

Paragraph (14)

7. Mr. NOLTE queried the appropriateness of the adjective “true” in the phrase “the Commission restores the true meaning and effects of objections” and proposed that it be replaced by the word “original”.

8. Mr. PELLET (Special Rapporteur) said that the word “true” was an accurate translation of the word used in the French text “*véritable*”. He did not understand what Mr. Nolte meant, since the use of the word “original” would require there to be some form of comparison.

9. Mr. NOLTE said that the expression “true meaning” implied that there was one set definition of objections and acceptances; however, during the United Nations Conference on the Law of Treaties, States had been free to define those terms as they had wished. Various definitions had been proposed and accepted, but in the end, the original definition had been restored.

10. Mr. PELLET (Special Rapporteur) said that paragraph (14) described a situation where the Conference had at one time agreed on a definition that did not make sense (objection means acceptance), but had subsequently reverted to a more reasonable definition (objection means objection).

Paragraph (14) was adopted.

Paragraphs (15) to (40)

Paragraphs (15) to (40) were adopted.

Paragraph (41)

11. Mr. NOLTE said that although the paragraph concerned modifying reservations, it did not provide any

examples of them, unlike the preceding paragraphs which gave examples of excluding reservations. He therefore proposed that a footnote be added to the paragraph, which should read: “Examples of modifying reservations can be found in paragraphs (20) to (23) of the commentary to guideline 4.2.4.”

Paragraph (41), supplemented by that footnote, was adopted.

Paragraph (42)

Paragraph (42) was adopted.

Paragraph (43)

12. Mr. PELLET (Special Rapporteur) said that the words “declarations ‘with intermediate effect’” [*déclarations “à effet intermédiaire”*] should read “objections ‘with intermediate effect’” [*objections “à effet intermédiaire”*].

Paragraph (43), as amended, was adopted.

The commentary to guideline 4.3.6, as amended, was adopted.

4.3.7 *Effect of an objection on provisions other than those to which the reservation relates*

Guideline 4.3.7 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

13. Mr. NOLTE, referring to the phrase in the penultimate sentence “set of interrelated provisions”, proposed the insertion of the word “closely” before the word “interrelated”, which better captured the idea of the close link between the set of provisions in question.

14. Mr. PELLET (Special Rapporteur) said that the addition of the word “closely” would be going further than the French text, which used the word “*connexes*”.

15. Mr. McRAE proposed, by way of a solution, that the word “interrelated” be replaced by the word “connected” in the English text.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

16. Mr. NOLTE proposed that the words “specific link” be amended to read “sufficient link”, in line with the wording of guideline 3.4.2.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

The commentary to guideline 4.3.7, as amended, was adopted.

4.3.8 *Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation*

Guideline 4.3.8 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

17. Mr. NOLTE said that paragraph (2) referred to an objection raised by Sweden to a reservation formulated by El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities. The reservation in question was vague. Sweden considered that it did not specify the extent of the derogation from the Convention and that it was null and void. Paragraph (3) referred to the objection as having “super-maximum” effect. While he did not question the substance of the point being made by the Special Rapporteur, he wondered whether a better example could be found. In that connection, he drew attention to paragraph (11) of the commentary to guideline 3.1.5.2 which, with regard to vague reservations, stated, *inter alia*, that they raised particular problems and that it was difficult to maintain that they were invalid *ipso jure*. The case of vague reservations was thus perhaps not as clear-cut as it appeared in paragraphs (2) and (3). He therefore proposed that a decision on the paragraphs be deferred until a better example of an objection to a vague reservation was found.

18. Mr. PELLET (Special Rapporteur) said that he doubted whether another example would make much of a difference; however, he would have no problem if Mr. Nolte wished to look for one. The issue at stake was not whether the reservation was null and void, but whether it was considered to be null and void by the objecting State and what the latter considered to be the consequences of its objection. However, in most cases, objections with super-maximum effect or purported to have super-maximum effect related to vague reservations.

19. Mr. NOLTE said that, in the light of Mr. Pellet’s comments, he would not need to look for another example. However, he proposed that the first sentence of paragraph (3) be amended to read: “Regardless of the consequence of such an objection with a purported super-maximum effect in the case of an invalid reservation” That would make it clear that it was not as obvious as the Government of Sweden alleged that in respect of vague reservations objections had a super-maximum effect. It would also be more consistent with paragraph (11) of the commentary to guideline 3.1.5.2.

20. The CHAIRPERSON said he would take it that the Commission wished to adopt paragraph (2) as it stood and paragraph (3), as amended by Mr. Nolte.

Paragraph (2) was adopted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 4.3.8, as amended, was adopted.

4.4 *Effect of a reservation on rights and obligations independent of the treaty*

4.4.1 *Absence of effect on rights and obligations under other treaties*

Guideline 4.4.1 was adopted.

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to guideline 4.4.1 was adopted.

4.4.2 *Absence of effect on rights and obligations under customary international law*

Guideline 4.4.2 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 4.4.2 was adopted.

4.4.3 *Absence of effect on a peremptory norm of general international law (jus cogens)*

Guideline 4.4.3 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

21. Mr. NOLTE, referring to the phrase in the last sentence “doubtless the notion of *jus cogens* will continue to evolve”, proposed the deletion of the words “the notion of”.

22. Mr. PELLET (Special Rapporteur) proposed instead that the words “the notion of” be replaced by “the rules of” [*les règles de*].

Paragraph (3) was adopted with the latter amendment.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted with a minor editorial amendment to the French text.

The commentary to guideline 4.4.3, as amended, was adopted.

4.5 *Consequences of an invalid reservation*

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

23. Mr. NOLTE said that in the first line the word “objection” should be replaced with “reservation”.

24. Mr. McRAE said that, for the sake of clarity, it would be better to reword the phrase “the effect of an objection” to read “this effect of a reservation”.

25. Mr. PELLET (Special Rapporteur) said that, on reflection, he considered it wiser to retain “objection”, so as to avoid a possible contradiction between the first and second sentences.

26. Mr. GAJA said that the solution might be to delete the words “the effect of” in the first sentence.

27. Mr. PELLET (Special Rapporteur) said that he agreed with the substance of Mr. Gaja’s proposal, but thought that, in the interests of readability, the position of the words “at that time” [*alors*] should be changed and the first sentence should be reworded to read: “It is also clear from this formula that an objection—which was also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of the International Court of Justice—was envisaged at that time only in the case of reservations incompatible (or deemed incompatible) with the object and purpose of the treaty” [*Il ressort également de cette formule que l’on n’envisageait alors une objection – elle aussi soumise à la condition de la compatibilité avec l’objet et le but conformément à l’avis consultatif de la Cour internationale de Justice – que pour le cas des réserves contraires (ou considérées comme contraires) à l’objet et au but du traité*].

28. Mr. McRAE said that in the final sentence, the phrase “and would remain so to the adoption of the Vienna Convention” seemed unclear and should perhaps be deleted. He supposed it to mean that even the adoption of the Vienna Convention did not resolve the question of impermissible reservations.

29. Mr. PELLET (Special Rapporteur) said that he was not in favour of deleting the phrase. Instead, he proposed that the end of the last sentence be amended by placing a full stop after “of the Commission and the Conference” and by starting a new sentence which would read: “The Vienna Convention makes no reference to the question” [*La Convention de Vienne ne fait aucune mention de la question*].

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (12)

Paragraphs (9) to (12) were adopted.

Paragraph (13)

30. Mr. NOLTE said that, in the final sentence, the phrase “It is, however, clear” was too strong and somewhat

misleading; it would be more appropriate to reword the first part of the sentence to read: "It seems, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of the rules adopted at the conclusion of their work".

Paragraph (13), as amended, was adopted.

Paragraphs (14) to (20)

Paragraphs (14) to (20) were adopted.

The commentary to section 4.5, as amended, was adopted.

4.5.1 Nullity of an invalid reservation

Guideline 4.5.1 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Paragraph (4) was adopted with a minor editorial correction to the English text.

Paragraph (5)

31. Mr. NOLTE said that he was concerned about the way the phrase "valeur juridique" had been translated in the English text. He wondered whether "legal force" might be a more appropriate translation than "legal value", which appeared twice in the paragraph.

32. After a discussion in which Sir Michael WOOD, Mr. McRAE, Mr. PELLET (Special Rapporteur) and Mr. GAJA took part, the CHAIRPERSON said that he took it that the Commission wished to replace the expression "legal value" with "legal effect".

Paragraph (5) was adopted with that amendment to the English text and with a minor editorial correction to the French text.

Paragraph (6)

33. Mr. McRAE said that the order of the last part of the final sentence should be reversed so as to read: "this would contradict guideline 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility of the reservation) and deprive article 19 of any substance".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

34. Mr. PELLET (Special Rapporteur) said that, in the second sentence of the first footnote to paragraph (7), the reference to "paragraph (3)" should be replaced with "paragraph (4)".

35. Mr. NOLTE said that, in the interests of readability and clarity, the last sentence of paragraph (7) should be moved to the beginning of paragraph (8).

Paragraphs (7) and (8), as amended, were adopted.

Paragraphs (9) to (14)

Paragraphs (9) to (14) were adopted.

Ms. Jacobsson (Vice-Chairperson) took the Chair.

Paragraph (15)

36. Mr. PETRIČ said that he was concerned that on several occasions, including in paragraph (15), references had been made to "Eastern countries" and "Western States". Such terminology belonged to an earlier age and was no longer relevant.

37. Mr. PELLET (Special Rapporteur) said that he agreed with Mr. Petrič as far as the current situation in Europe was concerned. It would, however, be absurd to delete all reference to the difficulties that had arisen in the past on account of the presence of two political blocs within Europe. It would be tantamount to rewriting history to ignore their former existence and to talk about the past as if the current situation had obtained in those days.

38. Mr. PETRIČ said that he was not advocating the rewriting of history, but he still took issue with the term "Eastern countries" because it was ambiguous. Perhaps the expression "Eastern bloc countries" would be a clearer reference to the historical context. It would be helpful if the secretariat could decide on more suitable language at the final editing stage.

39. Mr. PELLET (Special Rapporteur) said that he could not agree with that terminology, since at the time of the United Nations Conference on the Law of Treaties there would have been an outcry if the States in question had been described as "Eastern bloc countries".

40. Mr. HUANG said that Mr. Petrič had made an important point. In the second decade of the twenty-first century some colleagues were still displaying the cold war mindset of the 1970s and 1980s of the previous century. In the context of reservations to treaties, a distinction should be drawn, not between Eastern and Western countries, but between countries that had entered reservations or objections. If the Commission's text reflected antiquated ideology, it would not be widely accepted by the international community. The Commission should keep up with the times.

41. Mr. McRAE noted that, in some places, there were references to "Eastern countries" and in others to "Eastern European countries". It would therefore be advisable to ensure greater consistency in the text's terminology.

Paragraph (15) was adopted.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

42. Mr. NOLTE said that, in the first sentence, the approach taken in the objection by Belgium⁴⁵⁶ to the reservations of the United Arab Republic and the Kingdom

⁴⁵⁶ *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. III.3.

of Cambodia to the Vienna Convention on Diplomatic Relations was described as “somewhat unusual”. The text of the corresponding footnote, however, gave further examples which were in line with the type of objection that Belgium had formulated. Recently, the United States had also made a similar objection to reservations formulated by Pakistan upon ratification of the International Covenant on Civil and Political Rights. In its objection of 29 June 2011, the United States had stated that it “considers the totality of Pakistan’s reservations to be incompatible with the object and purpose of the Covenant. This objection does not constitute an obstacle to the entry into force of the Covenant between the United States and Pakistan, and the aforementioned articles shall apply between our two states, except to the extent of Pakistan’s reservations”.⁴⁵⁷ That example, together with the examples quoted in the above-mentioned footnote, clearly demonstrated that the approach taken in the objection by Belgium was not unusual. He therefore proposed that the words “which is somewhat unusual” be deleted and that the content of the footnote be moved to the following footnote. He also proposed that the above-quoted objection by the United States to the reservation by Pakistan be included in the footnote.

43. The recent wave of objections against the reservations formulated by Pakistan upon ratification of the International Covenant on Civil and Political Rights seemed to demonstrate that the approach taken by Belgium was the rule rather than the exception. Of the 24 mostly Western States that had so far formulated objections against the reservations by Pakistan on the ground that those reservations were incompatible with the object and purpose of the treaty, only 7 had said that they regarded the reservations as invalid with the effect that the treaty applied in its entirety between the reserving and the objecting State. On the other hand, 17 States had limited themselves to saying that they considered the reservation by Pakistan to be incompatible with the object and purpose of the treaty, but that that would not prevent the entry into force of the treaty between Pakistan and the objecting State. Although those States had not referred to article 21, paragraph 3, of the 1969 Vienna Convention on the law of treaties as clearly as had the United States, it was reasonable to assume that many of those States presumed that their objection would have the effect explicitly described in the objection by the United States. In fact, the recent wave of reactions by States to the reservations by Pakistan was particularly significant for the purpose of the project, as those reactions had been formulated on the basis of or with awareness of the Commission’s draft guidelines. Thus, recent practice with respect to the reservations by Pakistan upon its ratification of the Covenant was an additional reason why the words “which is somewhat unusual” should be deleted.

44. In response to queries by Mr. Pellet (Special Rapporteur) and Mr. Hmoud, Mr. NOLTE explained that, in addition to that deletion, he proposed consolidating the two footnotes and adding a reference to the objection by the United States to the footnote, without commenting on it.

Paragraph (17), as amended and with an amendment to the related footnote, was adopted.

Mr. Kamto resumed the Chair.

⁴⁵⁷ *Ibid.*, chap. IV.4.

Paragraph (18)

45. Mr. NOLTE said that in paragraph (18) the same issue arose as in paragraph (13) of the commentary to section 4.5. In the second sentence, “it is clear” should be replaced with “it seems clear”.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Paragraph (21)

46. Mr. PETRIČ again emphasized the need for consistency in terminology with reference to Eastern European countries.

47. Mr. PELLET (Special Rapporteur) said that, on a sensitive issue, the secretariat should not be expected to select terminology. Mr. Petrič should make it clear what terms he wished the Commission to use in each case.

Paragraph (21) was adopted.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

48. Mr. GAJA said that the phrase “and even some international organizations” should be replaced with “and also the European Union”.

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (26)

Paragraphs (24) to (26) were adopted.

Paragraph (27)

Paragraph (27) was adopted with a minor editorial correction to the English text.

Paragraph (28)

Paragraph (28) was adopted.

Paragraph (29)

49. Mr. GAJA said that, in the penultimate sentence, in the phrase “nullity is not a subjective or relative matter, but can and must be determined objectively”, “can and must” should be altered to “should”, because in most cases nullity could not be determined objectively.

50. Mr. PELLET (Special Rapporteur) said that the phrase “whenever possible” [*autant que faire se peut*] should be added.

Paragraph (29), as amended, was adopted.

The commentary to guideline 4.5.1, as amended, was adopted.

4.5.2 *Reactions to a reservation considered invalid*

Guideline 4.5.2 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

51. Mr. NOLTE said that, since the paragraph described the wide variety of legal effects which could be produced by objections to reservations, the footnote to the paragraph should include the example of reactions to the reservation by Pakistan to which he had adverted in connection with the footnote to paragraph (17) of the commentary to guideline 4.5.1, since it was the most recent, broadly based example of diverse objections with many different effects.

Paragraph (3) was adopted with that amendment to the footnote.

Paragraph (4)

Paragraph (4) was adopted with a minor editorial correction to the French text.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

52. Mr. NOLTE queried the advisability of quoting the same statement by Sweden in the commentary to two succeeding guidelines. He therefore suggested deleting paragraph (7).

53. Ms. JACOBSSON emphasized that whenever the statement of one of the Nordic countries was quoted, it was important to ascertain whether that country was speaking only for itself or also on behalf of the Nordic countries.

Paragraph (7) was deleted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

54. Mr. PELLET (Special Rapporteur) said that the reference to the second footnote should be moved to the end of the quotation, since the phrase “including, of course, on the issue of reservations” reflected the Commission’s opinion and was not part of the decision in question.

55. Mr. NOLTE objected to the expression “marginal existence” and said that “scarcity” might be more suitable.

56. Mr. McRAE said that the phrase “there is no point in obsessing about” was very colourful but possibly not the most appropriate turn of phrase. It would make sense to say “this is all the more important because of the scarcity of bodies”.

57. Mr. PELLET (Special Rapporteur) said that the French expression “*il ne faut pas se laisser obnubiler*” would be rendered more accurately in that context by the phrase “there is no need to focus on”.

58. The CHAIRPERSON noted that the phrase would then read “there is no need to focus on the scarcity of bodies”.

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (15)

Paragraphs (12) to (15) were adopted.

The commentary to guideline 4.5.2, as amended, was adopted.

4.5.3 *Status of the author of an invalid reservation in relation to the treaty*

59. Mr. NOLTE said that paragraph 3 of the guideline had been inserted and adopted during the first part of the current session after a somewhat hasty discussion in the Working Group on reservations to treaties. While he did not wish to call into question the substance of paragraph 3, its current formulation was somewhat misleading and might have unintended consequences. It seemed to suggest that the expression of the intention not to be bound by a treaty without the benefit of the reservation would produce an effect at the moment that intention was declared. Such an expression of intention would presumably have a similar effect to withdrawal from the treaty, thus an *ex nunc* effect. He doubted whether that was really the Commission’s intent, as it would signify that the State which had formulated the invalid reservation would be bound by the treaty until, but not after, it had expressed its contrary intention. That would raise serious problems of legal certainty. He supposed that when the Commission had drafted paragraph 3, it had taken the view that the declaration by a State of its intention not to be bound by the treaty without the benefit of the reservation was meant to clarify the original intention of the author of the reservation. If that was the case, paragraph 3 should be recast to read:

“Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may declare at any time that it was its intention not to be bound by the treaty without the benefit of the reservation.”

60. Mr. PELLET (Special Rapporteur) said that Mr. Nolte had touched on a substantive problem because paragraph 3 did not indicate the point in time at which a State’s expression, or declaration, of its intention produced its effects. That was a lacuna in the guideline as a whole. He was unsure that the guideline’s meaning was that attributed to it by Mr. Nolte. While he was rather reluctant to amend a guideline which contained such a substantial lacuna, he had nothing against replacing “express” with “declare”. He would, however, like to hear what other members thought on the matter. Mr. Nolte’s arguments regarding an *ex nunc* or *ex tunc* effect were unconvincing and the wording which he had proposed might not solve the real problem, which was that of knowing when the expression of intention produced its effects. Rather than

amending paragraph 3, it might be better to explain in one or two additional paragraphs in the commentary that the point in time was not specified in paragraph 3 and to indicate what approach the Commission deemed most appropriate. The terms *ex nunc* or *ex tunc* were rather obscure. It would be wise to hold that a State's intention not to be bound by a treaty without the benefit of its reservation did not have retroactive effects, because acting as if a situation that had been regarded as established had never existed might entail endless difficulties.

61. Mr. HMOUD said that he supported the Special Rapporteur's proposal on the whole, although he considered that the Commission should not decide at the last minute the point in time at which the expression of intention produced its effects. That was a very important issue and the text as it stood was sufficient. Perhaps, as the Special Rapporteur had said, it should be made clear that the issue was still undecided. To say that all the effects of a reservation which was found to be incompatible with the object and purpose of a treaty were non-existent meant that whatever had gone before would have no legal effect. That assumption would create many problems. If the State in question indicated that it did not intend to be bound without the benefit of its reservation, that expression of intention would have the same effect as withdrawal. Although the 1969 Vienna Convention had made no provision for such a situation, the Commission could engage in an exercise *de lege ferenda* in that regard.

62. Mr. PELLET (Special Rapporteur) said that he had formerly been against the position proposed by Mr. Hmoud, because he had been sceptical about its compatibility with the 1969 Vienna Convention but, in view of the debates in the Sixth Committee at the sixty-fifth session of the General Assembly, it appeared to be a good compromise. The adoption of Mr. Nolte's position might give rise to practical problems, since it was tantamount to saying that a State's participation in a treaty was erased retrospectively. In theory that might be a neat solution, but in practice the problems which it would pose would be of such magnitude that it would be better to consider that the State's participation would end as from the time of its expression of intention. The Commission should not be reluctant to engage in an exercise *de lege ferenda*. It would be better to leave the text as it stood and to explain in the commentary that the Commission had not specified the point in time at which the expression of intention produced its effects, because that was still a matter *de lege ferenda* and it was necessary to determine how that issue would be dealt with in practice.

63. Mr. MELESCANU endorsed Mr. Hmoud's position and said that if the Commission really wanted to include a *lex ferenda* provision in the Guide to Practice, it would have to base itself on an analysis of State and international practice. At the current stage in its work that was impossible. While the solution proposed by the Special Rapporteur was not ideal, it was the best that could be achieved in the circumstances. Perhaps Mr. Nolte's concerns could be addressed in the commentary.

64. Sir Michael WOOD said that it would be difficult for the Commission to specify more precisely the point in time at which the expression of the intention

not to be bound by the treaty without the benefit of the reservation produced its effects. He supported the Special Rapporteur's proposal to indicate in the commentary that the Commission acknowledged that there was an issue and that it had not dealt with it fully. Another reason for taking that approach was that the point in time might actually vary, depending on the particular circumstances in each case. The new commentary could therefore indicate that the question would be resolved on a case-by-case basis and in the light of practice.

65. Mr. NOLTE said that he, too, agreed with the Special Rapporteur's proposal, given that the aim of his own proposal had been to highlight the issue and to preempt accusations that the Commission had overlooked it. However, since there might be cause for the Commission to reflect on the text of the guideline in the light of the Special Rapporteur's new formulation, the Commission could wait to see the proposed text before deciding whether to amend the guideline. It was important for the issue to be resolved as appropriately as possible, since it could potentially be identified as a core issue of the Guide to Practice.

66. Mr. SABOIA said that the Commission could not afford to wait until it had reviewed the Special Rapporteur's proposed additions to the commentary before deciding how to proceed. Instead, it should adopt his proposal to leave the text of the guideline intact, since that was the proposal that had been supported by the majority of Commission members.

67. Mr. FOMBA said that the Commission had a fairly clear idea of the nature and content of the paragraph that should be added to the commentary. It should therefore not wait to see the new paragraph before adopting guideline 4.5.3.

68. Mr. PELLET (Special Rapporteur) said that he proposed to base the new commentary on the existing guideline, as it would be more difficult to draft the commentary if there was the possibility that the Commission might subsequently amend the guideline. The new paragraphs could explain that paragraph 3 deliberately left open the question of the precise point in time at which the expression of the intention not to be bound by the treaty without the benefit of the reservation produced its effects. They could describe the implications of a State's expression of its intention either to be bound by the treaty or not to be bound by the treaty without the benefit of the reservation, and indicate that the Commission wished to allow for the development of practice in that area. The new commentary could also mention Sir Michael's point that solutions to the question might vary depending on the particular circumstances in each case.

69. Mr. GAJA said that the Commission might wish to consider adding yet another paragraph to the commentary, as there was currently no explanation regarding paragraph 4, which recommended that, if a treaty monitoring body expressed the view that a reservation was invalid and the reserving State or international organization intended not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of 12 months from

the date at which the treaty monitoring body had made its assessment. The new commentary should explain how the Commission understood paragraph 4 in the context of guideline 3.2.3, which dealt with the recommendation that States and international organizations that had formulated a reservation to a treaty establishing a treaty monitoring body should give consideration to that body's assessment of the permissibility of the reservation. While guideline 3.2.3 did not give the assessments of treaty monitoring bodies any more effect than that which existed under the treaty they monitored, paragraph 4 of guideline 4.5.3 went further and seemed to imply that, even if the assessment of the permissibility of a reservation of a treaty monitoring body was not binding on a reserving State, the deadline set out in paragraph 4 should nevertheless apply. While he had no objection to the Commission taking that extra step, he did find it necessary to explain it in the commentary.

70. Sir Michael WOOD agreed that an explanation of paragraph 4 was necessary but added that it should be based on the principle that the powers of a treaty monitoring body were no more than those it had been granted under the treaty it monitored. If such powers did not include deciding with binding effect whether a reservation was valid or invalid, the commentary relating to paragraph 4 should reflect that.

71. The CHAIRPERSON said he took it that the Commission wished the Special Rapporteur to draft an additional paragraph or paragraphs to the commentary to guideline 4.5.3 relating to the issue raised by Mr. Nolte and based on suggestions made notably by Mr. Hmoud and Sir Michael. The proposed new commentary would indicate that the Commission had deliberately left the issue open-ended, considering it to be *de lege ferenda*, thereby sending a signal to the Sixth Committee that the Commission was fully aware of the issue and leaving room for researchers interested in the Commission's work to explore it further. The issue raised by Mr. Gaja regarding paragraph 4 would be dealt with in a similar fashion, based on suggestions made by Mr. Gaja and Sir Michael.

It was so decided.

Guideline 4.5.3 was adopted.

Commentary

Paragraphs (1) to (17)

Paragraphs (1) to (17) were adopted.

Paragraph (18)

72. Mr. HUANG said that the overall commentary to guideline 4.5.3, which contained a record number of paragraphs, was too lengthy, and that consideration should be given to condensing it from 50 to 10 paragraphs. However, given that there was not much time left before the end of the session, he would not insist on that point.

73. As to paragraph (18), he flatly objected to its inclusion in the commentary. He also objected to several footnotes in the draft report that contained references to reservations formulated by "China" that were no doubt references to the Republic of China and not to the People's

Republic of China. The Commission could either consider each of the footnotes in question individually or it could request that the secretariat deal with them according to principles agreed in advance.

74. In the antepenultimate footnote to paragraph (3) of the commentary to guideline 3.2, he proposed simply to delete the reference to "China", as it obviously did not refer to the People's Republic of China. For the following footnotes: (a) the second footnote to paragraph (5) of the commentary to guideline 2.5.6, (b) the penultimate footnote to paragraph (7) of the commentary to guideline 2.6.6, (c) the penultimate footnote to paragraph (7) of the commentary to guideline 2.8.2 and (d) the first footnote to paragraph (3) of the commentary to guideline 2.8.11, which also contained references to "China", the Commission could agree that references to reservations attributed to "China" that were made by the People's Republic of China should be retained in the footnotes, while those referring to reservations made by the Republic of China should be deleted.

75. Sir Michael WOOD said that he did not see how the Commission could accept the option simply to delete all references that did not suit one member of the Commission. It was up to the Commission as a whole to decide whether or not to review portions of the Guide to Practice that it had already adopted. Since it would be difficult to resolve all the issues raised by Mr. Huang in the time remaining, he proposed that one member of the Commission might place on record his or her views on the matter.

76. Mr. DUGARD said that, although the footnote references related to the statements of a former Government of China, the present Government was bound by them unless it had repudiated them. It was unclear whether the People's Republic of China had actually repudiated the statements to which Mr. Huang took exception; if it had not, he did not see how the Commission could amend those statements.

77. Mr. McRAE, supported by Mr. HMOUD and Mr. SABOIA, agreed that the Commission could not merely delete the references to China to which Mr. Huang objected. Since Mr. Huang had previously expressed approval for the solution found in the first footnote to paragraph (18) of the present commentary, which contained a declaration by the People's Republic of China denouncing as illegal and therefore null and void the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide by the Taiwan authorities in the name of China, the Commission could perhaps follow that model for the other references to reservations attributed to the Republic of China. For the sake of simplicity, the relevant references to "China" could be replaced with "the Republic of China" and a footnote added containing a cross reference to the first footnote to paragraph (18) of the present commentary.

78. The CHAIRPERSON, responding to Mr. Dugard's earlier statement, said that it was not simply a matter of reappraising a situation following a change of government but also involved the relationship between the People's Republic of China and Taiwan Province of China, which had previously referred to itself as "the Republic of China".

79. Mr. HUANG said that the final sentence of the first footnote to paragraph (18) expressed the consistent position of the Chinese Government with regard to all conventions signed by the Taiwanese authorities in the name of China, namely that they were illegal and therefore null and void. It was a position that had been acknowledged and respected by all Member States of the United Nations. Thus, from a purely legal standpoint, it did not make sense for the Commission to cite such a reservation. It was incomprehensible how such a simple issue could become so complicated. If the Commission insisted on including that reference in the Guide to Practice, he would be compelled to object to the Guide to Practice as a whole.

80. The CHAIRPERSON asked whether Mr. McRae's proposal might address Mr. Huang's concerns.

81. Mr. HUANG said that there were enough examples of reservations that the Commission could use without having to resort to an invalid one to which a member of the Commission was opposed.

82. Mr. PELLET (Special Rapporteur) said that Mr. Huang's comments appeared to be those of a representative of the People's Republic of China; if so, he was addressing the wrong forum. Even though Mr. Huang had previously accepted paragraph (18) because its first footnote clarified the reference in the paragraph to the Republic of China, if Mr. Huang was no longer in favour of retaining paragraph (18), the Commission could, in that particular case, amend it without misrepresenting the historical truth, since it was possible to find other pertinent examples.

83. However, with regard to the remaining references, he was of the opinion that one should not attempt to rewrite history. When conducting a scientific study in a forum composed of independent experts, one could not pretend that nothing had happened prior to the restoration of the lawful rights of the People's Republic of China. While he himself was among those who entertained no doubts that there was only one China, as far as the *travaux préparatoires* were concerned, he was strongly opposed to ignoring the existence of the Republic of China prior to 1971, when, in actuality, a representative of Chinese Taipei had taken a position, which, at the time, had been attributed to China.

84. He could agree to the method proposed by Mr. McRae, even though it was common knowledge that, before 1971, China had been represented in the United Nations by an illegitimate Government. Nonetheless, if the Commission wished to highlight that fact each time it referred to the Republic of China, he would not be opposed. It was a reasonable solution, and the Commission should be able to adopt it by consensus.

85. Mr. HUANG said that there were three principles that should guide the Commission in dealing with the issue he had raised. The first was that there was only one China. The second was that any reservation made by the People's Republic of China was acceptable for inclusion in the Guide to Practice. The third was that issues relating to one China or to Taiwan Province of China posed a serious political problem. On that basis, he could propose two

solutions. First, when a list of countries included China, the Commission should delete the reference to "China". That would pose no problem to the Guide to Practice or to the paragraph in question. Secondly, when a reference mentioned only China, he could agree to the inclusion of a footnote, similar to the first footnote to paragraph (18). However, he could not agree to the inclusion of cross references throughout the Guide to Practice that pointed to one exceptional case.

86. Mr. HMOUD, raising a point of order, said that he wished to inform the new members of the Commission that, according to the statute of the International Law Commission, they served on that body as independent experts. Although many members of the Commission might be ambassadors of their States of origin, in plenary sittings of the Commission, they were required to speak in their personal capacity and should not make any references that implied otherwise.

87. The CHAIRPERSON suggested that the Commission should defer consideration of the matter raised by Mr. Huang.

The meeting rose at 1 p.m.

3124th MEETING

Wednesday, 10 August 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflich, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.783 and Add.1–8)

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)

(b) *Text of the guidelines and the commentaries thereto* (continued) (A/CN.4/L.783/Add.6–7)

1. The CHAIRPERSON invited the Commission to continue its consideration of Part 4 of the Guide to Practice on Reservations to Treaties, contained in document A/CN.4/L.783/Add.6.

4.5.3 *Status of the author of an invalid reservation in relation to the treaty* (continued)

Commentary (continued)

Paragraph (18) (continued)

2. The CHAIRPERSON suggested that the adoption of the paragraph be deferred until a solution was found to the problem raised at the previous meeting that was acceptable to all. The Commission should not give the impression that it was divided on the question.

It was so decided.

Paragraph (19)

3. Mr. NOLTE noted that the paragraph cited the views expressed during a debate in the Sixth Committee in 2005. It would also be useful to refer, for example in a footnote, to the equally lively debate in the Sixth Committee on the same question in 2010.

4. Mr. PELLET (Special Rapporteur) endorsed Mr. Nolte's proposal. Instead of a footnote, however, he suggested the insertion of a new paragraph, in which the debate would be briefly summarized. The point was not to enter into the details, but merely to say that the debate had been repeated, with very divided views, which had led the Commission to seek a compromise solution.

5. Sir Michael WOOD said that the sentence following the question asked of Member States in 2005 should specify that the views expressed by several members of the Sixth Committee had been those of 2005; that sentence and the following one should be put in the past tense. The new paragraph should be inserted after paragraph (20), since the latter also concerned the 2005 debate.

Paragraph (19), as amended, was adopted.

Paragraph (20)

Paragraph (20) was adopted, on the understanding that it would be followed by a paragraph (20 bis).

Paragraphs (21) to (29)

Paragraphs (21) to (29) were adopted.

Paragraph (30)

6. Mr. NOLTE said that the paragraph might be read as confirming the conclusions—referred to in paragraph (29)—of the Working Group on reservations established to examine the practice of human rights treaty bodies, which stated in its recommendation No. 7 that the State which formulated an invalid reservation remained a party to the treaty without the benefit of the reservation “unless its contrary intention is incontrovertibly established”.⁴⁵⁸ He recalled that it had been decided not to use the word “incontrovertibly” in the guideline under consideration.

7. Mr. PELLET (Special Rapporteur) agreed and proposed that the following phrase be inserted in

the second sentence: “although the Commission has deliberately omitted the word ‘incontrovertibly’, which in its view imposes too strict a criterion”.

Paragraph (30), as amended, was adopted.

Paragraphs (31) to (36)

Paragraphs (31) to (36) were adopted.

Paragraph (37)

8. Mr. PELLET (Special Rapporteur) proposed the insertion of the following sentence in the second footnote to the paragraph: “‘Inadmissibility’ means ‘non-permissibility’, see paragraphs 4 to 7 of the general introduction to Part 3 of the Guide to Practice.”

Paragraph (37), as amended, was adopted.

Paragraphs (38) to (40)

Paragraphs (38) to (40) were adopted.

Paragraph (41)

9. Mr. NOLTE, referring to the first sentence, said that he was not convinced that it was possible to speak of the “rigour” of a presumption. Either the words “rigour of the” should be deleted, or “rigour” should be replaced by “force”.

Paragraph (41), as amended, was adopted.

Paragraphs (42) and (43)

10. Mr. McRAE said that the word “First” at the beginning of paragraph (43) should be deleted, since no “second” followed.

11. Mr. FOMBA said that, in that case, the last sentence in paragraph (42), which indicated that an enumeration would follow, would also need to be deleted (“Several factors come into play”).

12. Mr. PELLET (Special Rapporteur) agreed to those two deletions.

Paragraphs (42) and (43), as amended, were adopted.

Paragraph (44)

Paragraph (44) was adopted.

Paragraph (45)

13. Mr. PELLET (Special Rapporteur) said that, in the second sentence of the first paragraph, the words “interpretative declaration” should be placed in quotation marks, because the declaration by Switzerland had proved to be a reservation. In the first sentence of the last paragraph, a footnote with a reference to the relevant guideline should be inserted after the phrase “owing to the relative effect of any reservation”.

Paragraph (45), as amended, and with a minor drafting change in the English text, was adopted.

⁴⁵⁸ HRI/MC/2007/5, p. 7.

Paragraph (46)

14. Mr. PELLET (Special Rapporteur) said that, in the last sentence, the words “Some members of the Commission” should be replaced by “The Commission”, since it had been agreed not to reflect the views of members, even minority positions, on second reading.

15. Mr. NOLTE said that in the current case, an important viewpoint was concerned, because the nature of the treaty was referred to in the Vienna Convention.

16. Mr. McRAE said that Mr. Nolte’s point was well taken. It had been agreed that minority views could be reflected on first reading, but since in the current case both first and second readings were concerned, States would not have an opportunity to consider the question. It should at least be specified that the Commission had decided not to include an explicit reference to the nature of the treaty.

17. Mr. PELLET (Special Rapporteur) said that this was not correct: that position had been duly indicated in plenary in 2010. However, he agreed to say that the Commission, upon reflection, had considered that the nature of the treaty should not be referred to explicitly. That would make it possible to evoke the existence of the problem without saying that the Commission had been divided on the subject. Mention could also be made in the new paragraph (20 *bis*) to the fact that several States had also supported that point of view.

18. Mr. NOLTE said that it would be preferable to delete the sentence rather than create the impression that the Commission was of the unanimous view that the nature of the treaty did not play any role. Perhaps the Special Rapporteur could include a reference to the nature of the treaty in the document, as he saw fit.

19. The CHAIRPERSON said he took it that the Commission agreed to delete the last sentence of the paragraph.

Paragraph (46), as amended, was adopted.

Paragraphs (47) to (50)

Paragraphs (47) to (50) were adopted.

4.6 *Absence of effect of a reservation on the relations between the other parties to the treaty*

Guideline 4.6 was adopted.

Commentary

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to guideline 4.6 was adopted.

4.7 *Effect of an interpretative declaration*

20. Mr. PELLET (Special Rapporteur) said that the title of the French text should be brought into line with the English text and should therefore read “*Effets d’une déclaration interprétative*”, as in guideline 4.6.

Guideline 4.7 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 4.7 was adopted.

4.7.1 *Clarification of the terms of the treaty by an interpretative declaration*

Guideline 4.7.1 was adopted.

Commentary

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

21. Mr. NOLTE suggested that, in the third sentence, the word “impartial” should be replaced by “competent and independent” to describe the third party that objectively established the interpretation of the treaty.

22. Mr. McRAE was of the view that the word “competent” was sufficient, since it implied independence. He also proposed replacing the word “body” in the English text by “party”.

23. Sir Michael WOOD said that the word “competent” was ambiguous: did it mean “intellectually competent”, or did it mean “authorized”? It would suffice to say “given by a third party”.

24. Mr. CANDIOTI said that a third party was independent *per se*.

25. The CHAIRPERSON said he took it that the Commission decided to delete the word “impartial” and, in the English text, to replace the word “body” by “party”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

26. Mr. NOLTE said that the first name of the author cited in the first sentence should be given.

27. Mr. PELLET (Special Rapporteur) said that, in French, it was not common usage to give the first name of an author. To address the problem, he suggested recasting the beginning of the paragraph to read: “According to another view, on the one hand ...”. The name of the author could then be cited in a footnote in keeping with the usage in the various languages.

Paragraph (13), as amended, was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

28. Mr. NOLTE suggested that the first footnote be deleted, since the proposition to which it referred was too abstract and general to be of any practical use.

Paragraph (16) was adopted with the deletion of the first footnote.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were adopted.

Paragraph (19)

29. Mr. McRAE said that, in the first sentence, the words “of the Dispute Settlement Body” should be deleted.

Paragraph (19), as amended, was adopted.

Paragraphs (20) to (26)

Paragraphs (20) to (26) were adopted.

Paragraph (27)

30. Mr. NOLTE said that the third sentence, which stated that the Court paid little attention to the declaration by Romania, sounded derogatory. He proposed rewording it to read: “In its judgment, however, the Court merely noted the following with respect to the declaration by Romania”.

Paragraph (27), as amended, was adopted.

Paragraphs (28) and (29)

Paragraphs (28) and (29) were adopted.

Paragraph (30)

31. Mr. McRAE said that, in the English text, the words “minor key” were difficult to understand. He suggested replacing them by “subdued manner”.

Paragraph (30), as amended in the English text, was adopted.

Paragraphs (31) to (33)

Paragraphs (31) to (33) were adopted.

The commentary to guideline 4.7.1, as amended, was adopted.

4.7.2 *Effect of the modification or the withdrawal of an interpretative declaration*

Guideline 4.7.2 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 4.7.2 was adopted.

4.7.3 *Effect of an interpretative declaration approved by all the contracting States and contracting organizations*

Guideline 4.7.3 was adopted.

Commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

32. Mr. NOLTE said that the word “*véritable*” in the first sentence of the French text should be rendered by “true” rather than “genuine”.

Paragraph (2), as amended in the English text, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

The commentary to guideline 4.7.3, as amended, was adopted.

33. Ms. ESCOBAR HERNÁNDEZ recalled that, at the 3121st meeting of the Commission, during the adoption of the commentary to guideline 4.1, she had evoked the problem posed by the use in the Spanish text of the expressions “*reserva establecida*” and “*establecimiento de una reserva*” to translate “established reservation” and “establishment of a reservation”. Following consultations, the Spanish-speaking members of the Commission had decided to retain the proposal which she had made at that meeting, namely to insert, after the title of each guideline of the Spanish text of the Guide to Practice in which either of those expressions appeared, an asterisk referring to a footnote with the following wording:

“* En las versiones oficiales del Artículo 21, de las Convenciones de Viena se utilizan los siguientes términos: ‘1. A reservation *established* with regard to another party in accordance with articles 19, 20 and 23’ (versión inglesa); ‘1. Une réserve *établie* à l’égard d’une autre partie conformément aux articles 19, 20 et 23’ (versión francesa); y ‘1. Una reserva *que sea efectiva* con respecto a otra parte en el tratado de conformidad con los artículos 19, 20 y 23’ (versión española).

“En la presente *Guía de la práctica* se ha optado por utilizar en la versión española los términos ‘reserva establecida’ y ‘establecimiento de una reserva’ a fin de homogeneizar los términos empleados en las versiones española, francesa e inglesa. No obstante, el empleo de estos términos se realiza en el entendimiento de que los mismos equivalen a la expresión ‘una reserva que sea efectiva’ en el sentido y con el significado que a dicha expresión le corresponde en virtud de las Convenciones de Viena.”

It was so decided.

34. The CHAIRPERSON invited the Commission to consider Part 5 of the Guide to Practice contained in document A/CN.4/L.783/Add.2.

5. *Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States* (A/CN.4/L.783/Add.2)

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

35. Sir Michael WOOD said that the word “pleonastic” in the second footnote to the paragraph was not very elegant. Perhaps it could be replaced.

36. Mr. NOLTE suggested replacing it by “tautological”.

Paragraph (7), as amended in the footnote, was adopted.

The commentary to Part 5 of the Guide to Practice, as amended, was adopted.

5.1 *Reservations in cases of succession of States*

5.1.1 *Newly independent States*

Guideline 5.1.1 was adopted.

Commentary

37. Mr. GAJA said that he had a problem in general with the commentary to guideline 5.1.1. The guideline contained two useful reminders: it indicated in paragraph 2 that a reservation formulated by a newly independent State when making a notification of succession must meet the conditions of permissibility set out in guideline 3.1; and it stipulated in paragraph 3 that the rules of procedure concerning reservations also applied in that case. However, there was nothing in the commentaries about those two paragraphs, which was very strange, since paragraph (16) of the commentary to the parallel provision in guideline 5.1.2 also concerned those questions. With regard in particular to paragraph 3 of guideline 5.1.1, it was important for the Guide to Practice to specify that newly independent States were free to formulate a new reservation when making a notification of succession, but that if they did, they must be aware that their notification of succession could not take effect immediately, because they needed to wait for acceptance by another State. He therefore suggested adding two paragraphs to the commentary to guideline 5.1.1, one similar to paragraph (16) of the commentary to guideline 5.1.2, and the other explaining what the implications were of the application of the procedural rules, in particular the fact that notification would not have an immediate effect.

38. Mr. PELLET (Special Rapporteur) said that Mr. Gaja’s remarks were entirely justified, and he was prepared to consult with him on the text of the two new proposed paragraphs for submission to the Commission.

It was so decided.

Paragraphs (1) to (20)

Paragraphs (1) to (20) were adopted.

5.1.2 *Uniting or separation of States*

Guideline 5.1.2 was adopted.

Commentary

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

Paragraph (11)

39. Mr. PELLET (Special Rapporteur) said that, in the last sentence of the French text, the words “*bout de phrase*” should be replaced by “*membre de phrase*”.

Paragraph (11), as amended in the French text, was adopted.

Paragraphs (12) to (16)

Paragraphs (12) to (16) were adopted.

The commentary to guideline 5.1.2, as amended, was adopted.

5.1.3 *Irrelevance of certain reservations in cases involving a uniting of States*

Guideline 5.1.3 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.1.3 was adopted.

5.1.4 *Maintenance of the territorial scope of reservations formulated by the predecessor State*

Guideline 5.1.4 was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.1.4 was adopted.

5.1.5 *Territorial scope of reservations in cases involving a uniting of States*

Guideline 5.1.5 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 5.1.5 was adopted.

5.1.6 *Territorial scope of reservations of the successor State in cases of succession involving part of a territory*

Guideline 5.1.6 was adopted.

Commentary

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to guideline 5.1.6 was adopted.

5.1.7 *Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State*

Guideline 5.1.7 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.1.7 was adopted.

5.1.8 *Late reservations formulated by a successor State*

40. Mr. PELLET (Special Rapporteur) said that it was necessary to make an exception to a sacred principle and to change the title of the guideline, which was no longer in line with the Commission's current terminology. He proposed replacing it by "Late formulation of a reservation by a successor State".

The Special Rapporteur's proposal was adopted.

Guideline 5.1.8, as amended, was adopted.

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to guideline 5.1.8 was adopted.

5.2 *Objections to reservations in cases of succession of States*

5.2.1 *Maintenance by the successor State of objections formulated by the predecessor State*

Guideline 5.2.1 was adopted.

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to guideline 5.2.1 was adopted.

5.2.2 *Irrelevance of certain objections in cases involving a uniting of States*

Guideline 5.2.2 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.2 was adopted.

5.2.3 *Maintenance of objections to reservations of the predecessor State*

Guideline 5.2.3 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.3 was adopted.

5.2.4 *Reservations of the predecessor State to which no objections have been made*

Guideline 5.2.4 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.4 was adopted.

5.2.5 *Right of a successor State to formulate objections to reservations*

41. Mr. PELLET (Special Rapporteur) proposed, in the title and in paragraph 3 of the French text, to write the word "droit" in Roman characters and not in italics. He also suggested that the text of the footnote whose reference was placed after the word "Right" be inserted in the commentary, either as a paragraph (1 *bis*) or at the end of paragraph (3).

The Special Rapporteur's proposal was adopted.

Guideline 5.2.5, as amended, was adopted.

Commentary

Paragraph (1)

42. Mr. PELLET (Special Rapporteur) said that, in the first sentence, the word "capacity" should be replaced by "right".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were adopted.

The commentary to guideline 5.2.5, as amended, was adopted.

5.2.6 *Objections by a successor State other than a newly independent State in respect of which a treaty continues in force*

Guideline 5.2.6 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.2.6 was adopted.

5.3 *Acceptances of reservations in cases of succession of States*

5.3.1 *Maintenance by a newly independent State of express acceptances formulated by the predecessor State*

Guideline 5.3.1 was adopted.

Commentary

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to guideline 5.3.1 was adopted.

5.3.2 *Maintenance by a successor State other than a newly independent State of express acceptances formulated by the predecessor State*

Guideline 5.3.2 was adopted.

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 5.3.2 was adopted.

5.3.3 *Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State*

Guideline 5.3.3 was adopted.

Commentary

The commentary to guideline 5.3.3 was adopted.

5.4 *Legal effects of reservations, acceptances and objections in cases of succession of States*

Guideline 5.4 was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to guideline 5.4 was adopted.

5.5 *Interpretative declarations in cases of succession of States*

5.5.1 *Interpretative declarations formulated by the predecessor State*

43. Mr. NOLTE suggested that the guideline be numbered 5.5, since there was no guideline 5.5.2.

Mr. Nolte's proposal was adopted.

Guideline 5.5.1, renumbered 5.5, was adopted.

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

44. Mr. PELLET (Special Rapporteur) said that, in the penultimate sentence of the French text, the words “*la réglementation des déclarations interprétatives dans le Guide de la pratique*” should be replaced by “*les règles applicables aux déclarations interprétatives figurant dans le Guide de la pratique*”.

Paragraph (3), as amended in the French text, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

The commentary to guideline 5.5, as amended, was adopted.

Part 5 of the Guide to Practice, as amended, was adopted.

45. The CHAIRPERSON invited the Commission to begin its consideration of the conclusions on the reservations dialogue, reproduced in document A/CN.4/L.783/Add.7, that would appear in the annex to the Guide to Practice.

ANNEX

CONCLUSIONS ON THE RESERVATIONS DIALOGUE (A/CN.4/L.783/Add.7)

First to fourth preambular paragraphs

The first to fourth preambular paragraphs were adopted.

Fifth preambular paragraph

46. Sir Michael WOOD said that it would be preferable to speak of the “Vienna Conventions” rather than the “Vienna Convention”.

47. Mr. HUANG asked whether the 1986 Vienna Convention was in force.

48. Mr. PELLET (Special Rapporteur) said that it was not.

49. Mr. HUANG said that the reference to “the considerable number of reservations that appear incompatible with the limits imposed by the law of treaties” went too far. He suggested the deletion of the word “considerable”.

The fifth preambular paragraph, as amended, was adopted.

Sixth preambular paragraph

50. Mr. HUANG said that he disagreed with the wording of the paragraph, and he suggested amending it to read “*Aware of the difficulties that States and international organizations might face in assessing the validity of reservations*”.

51. Mr. PELLET (Special Rapporteur) said that he would prefer the following formulation: “*Aware of the difficulties that some States and international organizations face in assessing the validity of reservations*”.

52. The CHAIRPERSON proposed amending the paragraph to read: “*Aware of the difficulties posed by the assessment of the validity of reservations*”.

It was so decided.

The sixth preambular paragraph, as amended, was adopted.

Seventh preambular paragraph

53. Mr. HUANG said that the paragraph should be deleted. Although he could agree in principle on the

utility of a pragmatic dialogue with the author of the reservation, he did not see why it needed to be specified in the preamble. First, it was not realistic because, given the considerable number of States and international organizations that formulated reservations, it was often impossible to hold such a dialogue in practice. Secondly, the paragraph was useless: it was obvious that, when a State formulated a reservation to a treaty that other States parties objected to, the States concerned would consult with the reserving State.

54. Mr. SABOIA, replying to Mr. Huang, said that the paragraph was simply referring to a constructive practice which could help solve diplomatic or political problems created by certain reservations. In so doing, the Commission was not adding anything new.

55. Mr. NOLTE said that the Commission might perhaps discuss the question in private consultations and resume consideration of the paragraph in public once it had reached an agreement.

56. Mr. PELLET (Special Rapporteur) disagreed with that proposal. The annex to the Guide to Practice, which contained the Commission's conclusions on the reservations dialogue, should be adopted without further delay, because it had already been the subject of a debate in plenary, during which Mr. Huang had not made any comment.

57. The CHAIRPERSON said he took it that the Commission wished to adopt the seventh preambular paragraph as it stood.

It was so decided.

The seventh preambular paragraph was adopted.

Eighth preambular paragraph

The eighth preambular paragraph was adopted.

The preambular paragraphs, as amended, were adopted.

First operative part

58. The CHAIRPERSON invited the members of the Commission to consider the operative part of the document, paragraph by paragraph, and recalled that paragraph 1 had already been adopted at an earlier meeting.

Paragraphs 2 to 9

Paragraphs 2 to 9 were adopted.

Second operative part

59. Sir Michael WOOD suggested the deletion, in the English text, of the word "undertake".

60. Mr. HUANG said that, in his view, the recommendation was useless, because States and international organizations already knew how to deal with the problems raised by reservations.

61. The CHAIRPERSON said he took it that the Commission wished to adopt the second operative part with the proposal by Sir Michael.

It was so decided.

The second operative part, as amended in the English text, was adopted.

The conclusions on the reservations dialogue, as amended, were adopted.

62. The CHAIRPERSON invited the members of the Commission to begin their consideration, paragraph by paragraph, of the introduction to the Guide to Practice, contained in document A/CN.4/L.783/Add.8.

(a) *Introduction (A/CN.4/L.783/Add.8)*

Paragraph (1)

63. Mr. HUANG said that paragraph (1) could not be adopted at the current meeting, because it stated that "The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the International Law Commission and are reproduced below", but all those guidelines had not yet been adopted. That was where the Commission should begin.

64. The CHAIRPERSON said that he understood Mr. Huang's concern and suggested that the Commission defer the adoption of paragraph (1) and begin with the adoption of paragraph (2).

It was so decided.

Paragraph (2)

65. Mr. GALICKI said that the Vienna Conventions should be presented in chronological order, both in paragraph (2) and throughout the Guide to Practice. On a more general matter, he noted that those Conventions were placed on an equal footing, although they were different from the point of view of international law, since the 1986 Vienna Convention was still not a binding source of international law; that should perhaps be indicated.

66. Sir Michael WOOD said that he agreed with Mr. Galicki's first proposal. With regard to his second proposal, the fact that the 1969, 1978 and 1986 Conventions were placed on an equal footing did not really pose a problem, because the Guide to Practice referred not so much to those instruments as to the rules contained therein, which were customary rules as well as conventional rules. He also wished to make two suggestions: in the third line of the English text, the word "permissibility" should be replaced by "validity" so as to cover both the substantive and the procedural validity of reservations; and the words "Despite frequent assumptions to the contrary" at the beginning of the second sentence should be deleted, because they were out of place in the introduction. On a more general point, he said that the English translation contained many inaccuracies; he would submit proposals for corrections to the secretariat.

67. Mr. SABOIA said that it should perhaps be indicated in a footnote that the 1986 Vienna Convention was not yet in force.

68. The CHAIRPERSON, noting the late hour, suggested that the adoption of the introduction be continued at the next meeting.

The meeting rose at 6.05 p.m.

3125th MEETING

Thursday, 11 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER IV. *Reservations to treaties (concluded)* (A/CN.4/L.783 and Add.1–8)

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (*continued*)

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (*continued*)

(a) *Introduction (continued)* (A/CN.4/L.783/Add.8)

1. The CHAIRPERSON invited the Commission to resume its consideration of chapter IV of the draft report, in particular the introduction to the Guide to Practice, contained in document A/CN.4/L.783/Add.8. He recalled that a number of amendments to paragraph (2) had been proposed at the previous meeting.

Paragraph (2) (*concluded*)

2. Mr. HUANG said that during the current session, he had generally refrained from commenting on problems of a linguistic nature. As someone from a country with a tradition of seeking the middle ground, he had taken a low-key approach on certain issues. That did not mean, however, that he would compromise on issues of principle.

3. For China, the Taiwan question was a matter of principle. At an earlier meeting, he had pointed out an error in the Commission's treatment of that question and proposed a reasonable solution. That solution had been rejected, however, perhaps out of a desire to oppose China or for some other ulterior motive. Whatever the case, that was unacceptable.

4. Three of the Vienna Conventions had been cited in paragraph (2) of the introduction to the Guide to Practice, but only two of them had entered into force. When, at the previous meeting, he had queried the status of the 1986 Vienna Convention, the Special Rapporteur had first informed the Commission that it had entered into force but had subsequently had to admit his error. Only 11 international organizations were parties to the 1986 Vienna Convention, yet the Commission had spent weeks discussing the issue of reservations by international organizations.

5. The Sixth Committee had repeatedly asked the Commission to shorten its reports. The excessive length of the commentary to the guidelines contained in the Commission's current report went against the requirements of the General Assembly, imposed an unbearable burden on the Secretariat and made it difficult for members of the Commission to analyse the text in a rational and scientific manner. Was it really necessary to have 50 paragraphs of commentary to a single guideline? A commentary that was 800 pages long would not be widely read; shortening it to 200 pages would result in significant savings.

6. In October 1997, at a colloquium held at United Nations Headquarters to mark the fiftieth anniversary of the establishment of the Commission, he had acknowledged the Commission's achievements but had also referred to the very sharp criticism of some of its work by the international community. Now, as a member of the Commission, he found that the problems were even more serious than he had imagined. What was the Commission's mandate? What sort of legal guidance should it provide to Member States? Instead of wasting human and material resources, the Commission should bring rapidly to a close its consideration of the item on reservations to treaties.

7. His comments at the current and previous meetings might have offended some members, but everything he had said was true. He took full responsibility for all those comments, which he wished to have placed on record and included in the Commission's report to the Sixth Committee.

8. The CHAIRPERSON said that Mr. Huang's statement had been noted.

Paragraph (2) was adopted, with the amendments put forward at the previous meeting.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

9. Mr. GAJA said that the opening phrase of the second sentence, "Like the Vienna rules themselves", should be deleted, since it was not appropriate to place the guidelines on the same level as the Vienna Convention.

10. Mr. PELLET (Special Rapporteur) said that he agreed with that remark and proposed rewording the beginning of the sentence to read: "The Vienna rules have a residual nature; the same is true, *a fortiori*, for those contained in the Guide to Practice" [*Les règles de Vienne*]

ont un caractère supplétif; il en va de même, a fortiori, de celles énoncées dans le Guide de la pratique].

11. Mr. GAJA said that the statement was too sweeping. It could not be said that all the Vienna rules were of a residual nature; some simply reproduced the rules of customary international law. No reference should be made to the Vienna regime: it should simply be stated that the rules in the Guide were not intended to be binding on States.

12. The CHAIRPERSON suggested that the second sentence read: “The rules set out in the Guide to Practice have, at best, a residual nature” [*Les règles énoncées dans le Guide de la pratique ont, dans le meilleur des cas, un caractère supplétif*].

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

13. Mr. VÁZQUEZ-BERMÚDEZ said that the first footnote to the paragraph should be deleted, since it might give the impression that the commentaries had not been reviewed during the current session. In addition, he proposed that in the third sentence, the phrase “which has often been criticized” be deleted.

14. Mr. HUANG said that he disagreed with the point made in the third sentence, namely that long commentaries were necessary.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

(b) *Text of the guidelines and the commentaries thereto* (concluded)

4.2.4 *Effect of an established reservation on treaty relations* (concluded)* (A/CN.4/L.783/Add.6)

Commentary (concluded)*

Paragraphs (22) and (23) (concluded)*

15. The CHAIRPERSON invited the members of the Commission to resume their consideration of paragraphs (22) and (23) of the commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations), contained in document A/CN.4/L.783/Add.6.

16. Mr. GAJA said that paragraphs (22) and (23) gave examples of reservations by States that imposed additional obligations on other States. Those reservations thus modified a treaty in a manner that did not correspond to the definition of a reservation in guideline 1.1. He suggested that the Special Rapporteur look into the matter with a view to ensuring consistency in the text.

Paragraphs (22) and (23) were adopted.

The commentary to guideline 4.2.4, as a whole, as amended, was adopted.

* Resumed from the 3122nd meeting.

4.5.3 *Status of the author of an invalid reservation in relation to the treaty* (concluded)** (A/CN.4/L.783/Add.6)

Commentary (concluded)**

Paragraph (20 bis)

17. The CHAIRPERSON invited the Special Rapporteur to present his proposal for a paragraph (20 bis), to be added to the commentary to guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty).

18. Mr. PELLET (Special Rapporteur) said that, in response to Mr. Nolte’s comments at the 3123rd meeting, he wished to propose the insertion of a new paragraph, to read:

“(20 bis) The same lack of agreement was evident in the discussion in the Sixth Committee during the sixty-fifth session of the General Assembly and the comments and observations made by Governments on draft guideline 4.5.2 (current guideline 4.5.3), provisionally adopted by the Commission in 2010.^x States were divided into two more or less equal groups, one in favour and one opposed to the positive presumption retained provisionally by the Commission and to the principle of severability of the invalid reservation from the rest of the treaty. All agreed, however, that the intention of the author of the reservation was the key criterion for determining whether the author was bound by the treaty or not, and that the author of the reservation was best placed to explain what that intention was. This led some States to suggest a compromise solution, giving greater weight to the role of the intention; thus, Austria and the United Kingdom proposed to retain the positive presumption of former draft guideline 4.5.2 but to allow authors of reservations to have the last word, by granting them the possibility of expressing a contrary intention.^y Guideline 4.5.3 is closely based on these proposals.”

^x *Yearbook ... 2010*, vol. II (Part Two), pp. 112–121.”

^y *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee*, 19th meeting (A/C.6/65/SR.19), para. 82 (Austria); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/639 and Add.1, comments and observations of Austria on invalid reservations and the United Kingdom on draft guideline 4.5.2 (Status of the author of an invalid reservation in relation to the treaty). See also *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee*, 21st meeting (A/C.6/65/SR.21), para. 39 (Greece) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/639 and Add.1, comments and observations of Switzerland on draft guideline 4.5.2.”

[*La même division a marqué les débats au sein de la Sixième Commission durant la soixante-cinquième session de l’Assemblée générale et les commentaires et observations des gouvernements sur le projet de directive 4.5.2 [4.5.3], provisoirement adopté par la Commission en 2010^x, les États se partageant en deux groupes à peu près égaux en faveur ou opposés à la présomption positive retenue provisoirement par la Commission et au principe de séparabilité de la réserve invalide du reste du traité. Cependant les uns et les autres sont convenus que l’intention de l’auteur de la réserve est le*

** Resumed from the 3123rd and 3124th meetings.

critère cardinal pour déterminer si son auteur est ou non lié par le traité et que c'est l'auteur de la réserve qui est le mieux placé pour préciser quelle était cette intention. Cela a conduit certains États à suggérer une solution de compromis renforçant le rôle joué par cette intention; dans cet esprit, l'Autriche et le Royaume-Uni ont proposé de conserver la présomption positive de l'ancien projet de directive 4.5.2, mais de laisser à l'auteur de la réserve le dernier mot en lui ouvrant la possibilité d'exprimer une intention contraire^x. La directive 4.5.3 s'inspire étroitement de ces propositions.

^x *Annuaire... 2010*, vol. II (2^e partie), p. 115 à 124.

^y *Documents officiels de l'Assemblée générale, Sixième Commission, soixante-cinquième session, 19^e séance (A/C.6/65/SR.19)*, par. 82 (Autriche); *Annuaire ... 2011*, vol. II (1^{re} partie), document A/CN.4/639 et Add.1, commentaires et observations de l'Autriche sur les réserves non valides et du Royaume-Uni sur le projet de directive 4.5.2 (Statut de l'auteur d'une réserve non valide). Voir aussi *Documents officiels de l'Assemblée générale, Sixième Commission, soixante-cinquième session, 21^e séance (A/C.6/65/SR.21)*, par. 39 (Grèce), et *Annuaire... 2011*, vol. II (1^{re} partie), document A/CN.4/639 et Add.1, commentaires et observations de la Suisse sur le projet de directive 4.5.2.]

Paragraph (20 bis) was adopted.

Paragraphs (51) to (53)

19. The CHAIRPERSON invited the Special Rapporteur to present the other additions that he was proposing for the commentary to guideline 4.5.3.

20. Mr. PELLET (Special Rapporteur) said that he would recommend the addition of three paragraphs after paragraph (50), to read:

“(51) Similarly, the Commission is aware that paragraphs 3 and 4 of guideline 4.5.3 leave open the question of precisely when the expression by the author of the reservation of its intention to be bound—or not—by the treaty without the benefit of its reservation produces its effects.”

[(51) Dans le même esprit, la Commission est consciente que les paragraphes 3 et 4 de la directive 4.5.3 laissent ouverte la question de savoir à quel moment l'expression par l'auteur de la réserve de son intention d'être lié – ou non – par le traité sans sa réserve produit ses effets.]

“(52) If the author declares that it accepts the application of the treaty without the benefit of the reservation, no real problem arises, and the treaty may be deemed to continue to apply for the future, on the understanding that the State or international organization that made the reservation cannot rely on it, either for the past or for the future. It is more difficult to respond to the question raised in the previous paragraph if the author of the declaration intends not to be bound by the treaty; in this scenario, it would no doubt be logical for the author to be considered never to have been bound by the treaty, because the nullity (from the outset) of its reservation led the author not to regard itself as bound. However, such a solution might give rise to great practical difficulties in terms of

reverting to the situation that existed at the time when the State or international organization had expressed its consent to be bound (subject to the reservation).”

[(52) Si sa position déclarée consiste en l'acceptation de l'application du traité sans le bénéfice de la réserve, aucun problème réel ne se pose et l'on peut considérer que le traité continue à s'appliquer pour l'avenir, étant entendu que l'État ou l'organisation internationale auteur de la réserve ne peut se prévaloir de celle-ci ni pour le passé ni pour l'avenir. La réponse à la question posée au paragraphe précédent est plus difficile si l'auteur de la déclaration entend ne pas être lié par le traité; dans cette hypothèse, la logique voudrait sans doute que l'on considère qu'il ne l'a jamais été puisque la nullité de sa réserve (ab initio) l'a conduit à choisir de ne pas se tenir comme étant lié par le traité. Toutefois, une telle solution risque de poser de difficiles problèmes pratiques de rétablissement de la situation existant au moment où l'État ou l'organisation internationale avait exprimé son consentement à être lié (avec la réserve).]

“(53) Since guideline 4.5.3 largely corresponds to the progressive development of international law, it would seem expedient to let practice evolve, although different circumstances might call for different solutions.”

[(53) Comme la directive 4.5.3 relève largement du développement progressif du droit international, il semble opportun de laisser la pratique se déployer, sans que l'on puisse exclure que des circonstances diversifiées appellent des solutions variées.]

21. Mr. HMOUD asked why, in the second sentence of paragraph (52), reference was made to the author of the declaration, rather than to the author of the reservation.

22. Mr. PELLET (Special Rapporteur) explained that in that context, the essential factor was that the State in question was the author of both the reservation and the declaration in which it stated that it was not bound by the treaty because its reservation had not been accepted.

Paragraphs (51) to (53) were adopted.

The commentary to guideline 4.5.3, as amended and completed, was adopted.

5.1.1 *Newly independent States* (concluded) (A/CN.4/L.783/Add.2)

Commentary (concluded)

Paragraphs (19 bis) and (19 ter)

23. The CHAIRPERSON invited Mr. Gaja to present his proposal for two new paragraphs, (19 bis) and (19 ter), to be inserted after paragraph (19) of the commentary to guideline 5.1.1, contained in document A/CN.4/L.783/Add.2.

24. Mr. GAJA said that at the Special Rapporteur's request, he had drafted two additional paragraphs which did not appear to be controversial because they merely repeated what was contained in the 1978 Vienna Convention. Paragraphs (19 bis) and (19 ter) would read:

“(19 *bis*) According to article 20, paragraph 2, of the 1978 Vienna Convention, ‘a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraphs (a), (b) and (c) of article 19 of the [1969] Vienna Convention on the Law of Treaties’. Paragraph 2 of guideline 5.1.1 provides a reminder that any reservation formulated by a newly independent State when making a notification of succession is subject to the condition of permissibility set out in subparagraphs (a), (b) and (c) of guideline 3.1, which reproduces article 19 of the 1969 and 1986 Vienna Conventions.

“(19 *ter*) Paragraph 3 of guideline 5.1.1 recalls that the rules set out in Part 2 (Procedure) of the Guide to Practice apply to reservations formulated by a newly independent State when making a notification of succession. This accords with paragraph 3 of article 20 of the 1978 Vienna Convention, which states that ‘[w]hen a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation’. The reference includes article 20, paragraph 4 (c), of the 1969 Vienna Convention, which provides that ‘an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation’. It follows that a notification of succession containing a reservation will take effect only from that date.”

Paragraphs (19 bis) and (19 ter) were adopted.

The commentary to guideline 5.1.1, as amended, was adopted.

ADDITIONAL AMENDMENTS TO THE GUIDE TO PRACTICE

25. The CHAIRPERSON invited the members of the Commission to continue their consideration of the amendments proposed during previous meetings by Mr. Huang concerning references to reservations made by China that were, in fact, references to the former Republic of China.

26. Mr. Huang was proposing the following: first, that all the references to the People’s Republic of China in the Guide to Practice be maintained; secondly, that references to the “Republic of China”, the “Taiwan authorities” or “China” when it was in fact the “Republic of China” that was meant be maintained, provided that they were accompanied by an explanatory footnote; and, thirdly, that references to “China” which were, in fact, to the Taiwan authorities and which appeared in a list with other States be deleted.

27. Mr. HUANG said that this had been his proposal from the beginning, and he would be grateful if the Commission could accept it, given that it concerned a politically sensitive issue.

28. The CHAIRPERSON said that the other members of the Commission were aware of the sensitivity of the issue for Mr. Huang’s country, but at the same time they were faced with the prospect of departing from the

Commission’s traditions by modifying official documents of the United Nations once the latter had been published and distributed. It was certainly not the Commission’s intention to create problems with respect to the People’s Republic of China. The Special Rapporteur had amply clarified his position, which was that the Government that had represented China in the United Nations prior to 1971 was illegitimate. The Commission had no hidden agenda, but was merely seeking to maintain the integrity of the official documents of the United Nations.

29. Mr. HUANG said that he appreciated those explanations; however, some misunderstandings still persisted, and he would therefore like to make four general points. The first was that the question of Taiwan was an extremely important political issue for the Chinese people, and that fact should be borne in mind by the members of all United Nations bodies, including the International Law Commission. The second was that the People’s Republic of China had declared all international conventions signed and ratified by the Taiwan authorities in the name of China prior to 1971 to be illegal and therefore null and void. It was a fundamental principle of law that illegal actions produced no legal effects. His third point concerned the fact that deleting from a list of several countries a reference to China that was in fact a reference to the authorities of Taiwan Province of China would not have any substantive implications for the Guide to Practice, as the reference was merely one of many examples. His fourth point related to the tradition of the International Law Commission—upheld for some 60 years or more—of working to achieve consensus while respecting any strong objections held on any issue by a member.

30. There were eight references in the Guide to Practice concerning China, three of which had already been rectified. Of the remaining five references, two were acceptable, while the other three concerned actions taken by the Taiwan authorities, and were therefore unacceptable. He had a clear and succinct proposal: simply to delete the references, which were found in (a) the penultimate footnote to paragraph (7) of the commentary to guideline 2.6.6; (b) the first footnote to paragraph (3) of the commentary to guideline 2.8.11; and (c) the antepenultimate footnote to paragraph (3) of the commentary to guideline 3.2.

31. Mr. PELLET (Special Rapporteur) said that he had no problem with deleting the example in the penultimate footnote to paragraph (7) of the commentary to guideline 2.6.6 that referred to China and finding another example to replace it. In the first footnote to paragraph (3) of the commentary to guideline 2.8.11, however, it would be difficult, even scientifically untenable, to remove the reference to the amendment by China, because that would be equivalent to denying something that had actually happened. He proposed instead to add an explanation that, at the time, China had been represented by the illegitimate Government of Taiwan and that the People’s Republic of China had subsequently declared the Taiwan position to be null and void. Reference could also be made to General Assembly resolution 2758 (XXVI) of 25 October 1971, as had been done in the first footnote to paragraph (18) of the commentary to guideline 4.5.3.

32. Lastly, contrary to what Mr. Huang had said, the antepenultimate footnote to paragraph (3) of the commentary to guideline 3.2 did not present a series of examples, but rather was an exhaustive list of States that had taken a particular position during a meeting of the United Nations Conference on the Law of Treaties in 1968. Although he was absolutely opposed to deleting only the reference to “China”, he could, for the sake of reaching consensus, agree to delete the entire list of States in the first sentence of the footnote and to replace it with the words: “See *Summary records* (A/CONF.39/11), footnote XXX above”. The final two sentences (“The representative of Sweden ... (para. 9)”) would be retained.

33. Mr. HUANG said that he could accept the Special Rapporteur’s proposals.

34. Mr. PELLET (Special Rapporteur) said that, in addition, in paragraph (18) of the commentary to guideline 4.5.3, the current example relating to the Republic of China could be replaced with another example, namely the text that appeared in the last footnote to the paragraph.

35. The CHAIRPERSON said he took it that the Commission wished to adopt the following additional amendments to the Guide to Practice: in the penultimate footnote to paragraph (7) of the commentary to guideline 2.6.6, the example referring to China would be replaced with another suitable example; in the first footnote to paragraph (3) of the commentary to guideline 2.8.11, the word “Chinese” would be deleted and the remainder of the footnote would be retained; in the antepenultimate footnote to paragraph (3) of the commentary to guideline 3.2, the first sentence would be replaced with the words: “See *Summary records* (A/CONF.39/11), footnote XXX above” and the two final sentences would be retained; and in paragraph (18) of the commentary to guideline 4.5.3, the example relating to the Republic of China would be replaced with the text that appeared in the last footnote to the paragraph.

It was so decided.

The additional amendments to the Guide to Practice were adopted.

36. Mr. DUGARD said that he wished to have it placed on record that he was unhappy with the procedure followed, namely, changing the historical record.

37. The CHAIRPERSON invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.783.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraphs 6 to 14

Paragraphs 6 to 14 were adopted.

1. CONSIDERATION OF THE SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR

(a) Introduction by the Special Rapporteur

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

(b) Action taken on the seventeenth report

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

C. Recommendation of the Commission concerning the Guide to Practice on reservations to treaties

Paragraph 22

38. Mr. PELLET (Special Rapporteur) proposed the insertion of the following phrase after the words “recommend to the General Assembly”: “to take note of the Guide to Practice and to ensure its widest possible dissemination” [*de prendre note du Guide de la pratique et d’en assurer la plus large diffusion*].

Paragraph 22, as amended, was adopted.

D. Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties

Paragraph 23

Paragraph 23 was adopted.

E. Tribute to the Special Rapporteur

Paragraph 24 was adopted by acclamation.

Sections A to E of chapter IV, as amended, were adopted.

F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (concluded)

1. TEXT OF THE GUIDELINES CONSTITUTING THE GUIDE TO PRACTICE

Paragraph 25

Paragraph 25 was adopted.

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (concluded)

Paragraph 26

Paragraph 26 was adopted.

39. The CHAIRPERSON drew attention to document A/CN.4/L.783/Add.1, which contained the guidelines constituting the Guide to Practice, adopted by the Working Group on reservations to treaties earlier in the current session. The guidelines would be included in section F of chapter IV of the report with the amendments made during the adoption of the report. On that understanding, he would take it that the Commission wished to adopt document A/CN.4/L.783/Add.1.

It was so decided.

(a) *Introduction* (concluded) (A/CN.4/L.783/Add.8)

40. The CHAIRPERSON drew attention to document A/CN.4/L.783/Add.8, recalling that the adoption of paragraph (1) had been deferred pending the completion of work on the other parts of chapter IV. All those texts having now been adopted, he would take it that the Commission wished to adopt paragraph (1) of document A/CN.4/L.783/Add.8.

Paragraph (1) (concluded)

Paragraph (1) was adopted.

Section F of chapter IV, as amended, was adopted.

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

41. Mr. PELLET (Special Rapporteur) said that he wished to thank all members of the Commission for their spirit of cooperation. In particular, he thanked the members of the Working Group on reservations to treaties, who had helped him to complete his work on the Guide to Practice, and the Chairperson, for his able conduct of the proceedings. He also thanked his assistants and members of the Secretariat for their invaluable contributions.

The meeting rose at 12.55 p.m.

3126th MEETING

Thursday, 11 August 2011, at 3 p.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (concluded)* (A/CN.4/638, sect. B, A/CN.4/642)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the progress report of the Committee concerning the topic “Expulsion of aliens” before the Commission adopted chapter VIII of its draft report.

2. Mr. MELESCANU (Chairperson of the Drafting Committee) said that during the current session, the Drafting Committee had held 12 meetings, during which it

had considered six draft articles referred to it during the second part of the sixty-second session of the Commission following the debate on the Special Rapporteur’s sixth report,⁴⁵⁹ seven draft articles referred to it during the first part of the current session following the debate on the second addendum to the Special Rapporteur’s sixth report⁴⁶⁰ and a draft article on “Expulsion in connection with extradition”, as revised by the Special Rapporteur during the sixty-second session,⁴⁶¹ which had also been referred to the Drafting Committee at the current session. Moreover, the Special Rapporteur had submitted to the Drafting Committee, in the light of the plenary debate, a number of suggestions with a view to modifying the text of some of the draft articles referred to the Committee during the current session, and he had also proposed an additional draft article on the suspensive effect of an appeal against an expulsion decision. The Commission would recall that, at the current session, it had also referred to the Drafting Committee the restructured summary of the draft articles contained in the Special Rapporteur’s seventh report (A/CN.4/642).

3. The work undertaken by the Drafting Committee on those various draft articles had been very productive. The Drafting Committee had been able to provisionally adopt the following 15 draft articles: “Prohibition of disguised expulsion”, “Grounds for expulsion”, “Detention conditions of aliens subject to expulsion”, “Requirement for conformity with the law”, “Procedural rights of aliens facing expulsion” (which provided a single list of procedural rights applicable both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State), “Expulsion in connection with extradition”, “Return to the receiving State of the alien being expelled”, “State of destination of expelled aliens”, “Protecting the human rights of aliens subject to expulsion in the transit State”, “Protecting the property of aliens facing expulsion”, “Right of return to the expelling State”, “Responsibility of States in cases of unlawful expulsion”, “Diplomatic protection”, “Procedures for individual recourse” and “Suspensive effect of an appeal against an expulsion decision”.

4. The Drafting Committee had also considered the restructuring and renumbering of the draft articles on the basis of the general framework provided in the last chapter of the Special Rapporteur’s seventh report, which had been considered at the current session. However, due to lack of time, the Drafting Committee had not been able to make a final determination on certain issues that were still pending. He was confident, however, that the Drafting Committee would be in a position to complete the remaining work and finalize the text so that it could be submitted to the Commission for adoption on first reading at the 2012 session. An introduction of all the draft articles would be provided on that occasion.

⁴⁵⁹ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

⁴⁶⁰ At its sixty-second session, the Commission began the consideration of chapters I to IV, section C, of the sixth report of the Special Rapporteur, and continued at the present session with chapters IV, section D, to VIII, contained in the second addendum to the sixth report (see the summary records of the 3091st to 3094th meetings above).

⁴⁶¹ *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176.

* Resumed from the 3098th meeting.

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

CHAPTER VIII. *Expulsion of aliens* (A/CN.4/L.787)

5. The CHAIRPERSON invited the Commission to begin its consideration of chapter VIII of its draft report, on expulsion of aliens, contained in document A/CN.4/L.787.

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE REMAINING PORTION OF HIS SIXTH REPORT AND OF HIS SEVENTH REPORT

Paragraphs 11 to 24

Paragraphs 11 to 24 were adopted.

2. SUMMARY OF THE DEBATE

(a) *General remarks*

Paragraphs 25 to 29

Paragraphs 25 to 29 were adopted.

(b) *Comments on the draft articles*

Paragraphs 30 to 48

Paragraphs 30 to 48 were adopted.

(c) *The question of appeals against an expulsion decision*

Paragraphs 49 to 53

Paragraphs 49 to 53 were adopted.

3. SPECIAL RAPporteur'S CONCLUDING REMARKS

Paragraphs 54 to 59

Paragraphs 54 to 59 were adopted.

6. The CHAIRPERSON said that, following consultations, it had been decided to insert, after paragraph 10 of chapter VIII, a paragraph 10 *bis*, which read:

“At its 3126th meeting, the Commission took note of an interim report by the Chairperson of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.”

Paragraph 10 bis was adopted.

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

CHAPTER X. *The obligation to extradite or prosecute* (aut dedere aut judicare) (A/CN.4/L.789)

7. The CHAIRPERSON invited the Commission to begin its consideration of chapter X of its draft report, on the obligation to extradite or prosecute (*aut dedere aut judicare*), contained in document A/CN.4/L.789.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

1. INTRODUCTION OF THE FOURTH REPORT BY THE SPECIAL RAPporteur

Paragraphs 5 to 16

Paragraphs 5 to 16 were adopted.

2. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

(b) *Draft article 2: Duty to cooperate*

Paragraphs 19 to 26

Paragraphs 19 to 26 were adopted.

(c) *Draft article 3: Treaty as a source of the obligation to extradite or prosecute*

Paragraphs 27 to 30

Paragraphs 27 to 30 were adopted.

(d) *Draft article 4: International custom as a source of the obligation aut dedere aut judicare*

Paragraphs 31 to 37

Paragraphs 31 to 37 were adopted.

(e) *Future work*

Paragraph 38

8. Mr. NOLTE said that the first sentence combined two issues which, if he recalled correctly, had been separate, namely suspending or terminating consideration of the topic and expanding the scope of the topic to include universal jurisdiction.

9. Mr. GALICKI (Special Rapporteur) suggested that he could recast the beginning of the paragraph in consultation with Mr. Nolte, whose comment was well founded; they could then submit a revised text to the Commission.

It was so decided.

3. CONCLUDING REMARKS BY THE SPECIAL RAPporteur

Paragraphs 39 to 43

Paragraphs 39 to 43 were adopted.

Chapter X of the report of the Commission, contained in document A/CN.4/L.789, was adopted as a whole, with the exception of paragraph 38, to which the Commission would return.

CHAPTER VII. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.786 and Add.1)

10. The CHAIRPERSON invited the Commission to begin its consideration of chapter VII of its report, on immunity of State officials from foreign criminal jurisdiction, contained in documents A/CN.4/L.786 and Add.1.

A. Introduction (A/CN.4/L.786)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session (A/CN.4/L.786)

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SECOND REPORT

Paragraphs 5 to 14

Paragraphs 5 to 14 were adopted.

2. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 15 to 19

Paragraphs 15 to 19 were adopted.

(b) *The question of possible exceptions to immunity*

Paragraphs 20 to 29

Paragraphs 20 to 29 were adopted.

(c) *Scope of immunity*

Paragraphs 30 to 33

Paragraphs 30 to 33 were adopted.

(d) *Other comments*

Paragraphs 34 to 36

Paragraphs 34 to 36 were adopted.

3. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT (A/CN.4/L.786/Add.1)

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

4. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 16 to 18

Paragraphs 16 to 18 were adopted.

Paragraph 19

11. Mr. NOLTE, stressing the need to ensure that the debate was correctly reflected, suggested to end the second sentence after the words “in favour of accountability” and then to start the new third sentence with “Some others

preferred a balance”. He also pointed out that the words at the beginning of the current third sentence (“On the contrary”) incorrectly suggested that what followed was in contrast to what was in the previous sentence, and he therefore suggested the following reformulation: “Some members noted that the Commission had to always balance different legitimate considerations and not let itself be disproportionately swayed by any one of them.” The phrase “no cause to be concerned about risking its reputation since it was part of its functioning” should be deleted, and the idea of such a risk, to which Mr. Dugard had referred, could be introduced earlier.

12. Following a discussion in which Mr. NOLTE, Mr. McRAE and Mr. VASCIANNIE took part, the CHAIRPERSON suggested that paragraph 19 be left in abeyance until an agreed revised formulation was proposed.

Paragraph 19 was left in abeyance.

(b) *Timing*

Paragraph 20

Paragraph 20 was adopted.

(c) *Invocation of immunity*

Paragraphs 21 to 32

Paragraphs 21 to 32 were adopted.

(d) *Waiver of immunity*

Paragraphs 33 to 39

Paragraphs 33 to 39 were adopted.

(e) *Relationship between invocation of immunity and the responsibility of that State for an internationally wrongful act*

Paragraphs 40 to 42

Paragraphs 40 to 42 were adopted.

5. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 43 to 60

Paragraphs 43 to 60 were adopted.

CHAPTER XII. The most-favoured-nation clause (A/CN.4/L.791)

13. The CHAIRPERSON invited the Commission to begin its consideration of chapter XII of its report, on the most-favoured-nation clause, contained in document A/CN.4/L.791.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

1. DISCUSSIONS OF THE STUDY GROUP

Paragraphs 5 to 12

Paragraphs 5 to 12 were adopted.

Paragraph 13

14. Mr. McRAE said that the end of the first sentence was not complete, and he suggested amending it to read: “a difference between the qualifying conditions for access to the substantive rights and the substantive rights themselves and the qualifying conditions for access to the jurisdictional means and the exercise of jurisdiction itself”.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

15. Mr. McRAE said that the third sentence was unclear and should be deleted.

It was so decided.

Paragraph 15, as amended, was adopted.

2. FUTURE PROGRAMME OF WORK

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

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

CHAPTER XI. Treaties over time (A/CN.4/L.790 and Add.1)

16. The CHAIRPERSON invited the Commission to begin its consideration of chapter XI of its report, on treaties over time, contained in document A/CN.4/L.790 and Add.1.

A. Introduction (A/CN.4/L.790)

Paragraph 1

Paragraph 1 was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.790)

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

1. DISCUSSIONS OF THE STUDY GROUP

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraph 8

17. Mr. HMOUD suggested the insertion, in the last sentence, of the word “his” before “nine preliminary conclusions”.

It was so decided.

Paragraph 8, as amended, was adopted.

Paragraph 9

18. Mr. HMOUD proposed that the last sentence be amended to read: “The Study Group agreed that those preliminary conclusions by the Chairperson would have to be revisited and expanded ...”.

It was so decided.

Paragraph 9, as amended, was adopted.

2. FUTURE WORK AND REQUEST FOR INFORMATION

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

CHAPTER IX. Protection of persons in the event of disasters (concluded)* (A/CN.4/L.788/Add.1–2)**C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted by the Commission at its sixty-third session (concluded)***

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

19. The CHAIRPERSON invited the Commission to return to the commentaries to draft article 10 (Duty of the affected State to seek assistance) and draft article 11 (Consent of the affected State to external assistance), contained in document A/CN.4/L.788/Add.2.

*Article 10. Duty of the affected State to seek assistance (concluded)**

*Commentary (concluded)**

*Paragraph (1) (concluded)**

20. Mr. VASCIANNIE suggested the insertion of the following sentence at the end of the paragraph: “The existence of the duty to seek assistance, as set out in draft article 10, was supported by a majority of the members of the Commission but opposed by others.”

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2 bis)

21. Mr. VASCIANNIE proposed the insertion of a new paragraph (2 bis), which would read:

“It is to be noted that in the debate within the Commission concerning the formulation of draft article 10, some members of the Commission opposed the idea that affected States are under, or should be placed under, a legal duty to seek external assistance in cases of disaster. This opposition was premised on the view that, as it currently stands, international law does not place any such binding duty upon affected States. The members of the Commission who shared this perspective indicated that draft article 10 should be worded in hortatory terms to the effect that affected States ‘should’ seek external assistance in cases where a disaster exceeds national response capacity.”

* Resumed from the 3122nd meeting.

It was so decided.

Paragraph (2 bis) was adopted.

The commentary to article 10, as amended, was adopted.

*Article 11. Consent of the affected State to external assistance (concluded)**

*Commentary (concluded)**

*Paragraph (3) (concluded)**

22. Mr. VASCIANNIE suggested the insertion of the following sentences at the end of the paragraph:

“On the other hand, some members of the Commission resisted the idea that the dual nature of sovereignty necessarily meant that the Commission should support the approach taken in draft article 11, paragraph 2. For these members of the Commission, draft article 11, paragraph 2, should not be drafted to include the mandatory ‘shall’; rather, the provision should indicate that consent to external assistance ‘should’ not be withheld arbitrarily.”

It was so decided.

Paragraph (3), as amended, was adopted.

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

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

Chapter IX, as a whole, as amended, was adopted.

CHAPTER VII. Immunity of State officials from foreign criminal jurisdiction (concluded) (A/CN.4/L.786 and Add.1)

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

4. SUMMARY OF THE DEBATE (concluded)

(a) *General comments* (concluded)

23. The CHAIRPERSON invited the Commission to return to paragraph 19, the adoption of which had been postponed pending the formulation of a new text.

Paragraph 19 (concluded)

24. Mr. NOLTE suggested the following wording for the paragraph:

“It was also observed that some of the views presented certain risks for the future not only for the Commission but also for the development of international law itself. It was cautioned that there was a risk to the reputation of the Commission if there was a greater tilt towards State interests; the Commission would not be in a position to find the necessary balance between the old law—based on an absolute conception of sovereignty—and the new expectation of the international community in favour of accountability. Other members preferred a balance between legitimate

interests of sovereign States and the concern for accountability. Some members noted that the Commission had no cause to be concerned about risking its reputation since it was part of its functioning to always balance different legitimate considerations and not let itself be disproportionately swayed by any one of them.”

It was so decided.

Paragraph 19, as amended, was adopted.

Chapter VII, as a whole, as amended, was adopted.

CHAPTER X. The obligation to extradite or prosecute (aut dedere aut judicare) (concluded) (A/CN.4/L.789)

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

2. SUMMARY OF THE DEBATE (concluded)

(e) *Future work* (concluded)

25. The CHAIRPERSON invited the Commission to return to paragraph 38 of chapter X, the adoption of which had been postponed pending the formulation of a drafting proposal.

Paragraph 38

26. Mr. GALICKI (Special Rapporteur) read out the new version of the paragraph, which had been distributed in the conference room, and said that it constituted a compromise from among all the proposals made by members. The text read:

“As to the future work on the present topic, the view was expressed that there was an inherent difficulty in the topic. It was even suggested that the Commission should not be hesitant to reflect on the possibility of suspending or terminating the consideration of the topic, as it had done in the past with respect to other topics. Some other members, however, noted that the topic remained a viable and useful project for the Commission to pursue. Moreover, States were interested and had legitimate expectations and were keen for progress. It was also recalled that this aspect had been a subject for discussion in the past and that the resulting preparation of the 2009 general framework pointed to the viability of the topic.

“Furthermore, recognizing that the Sixth Committee was dealing with a related item on the scope and application of the principle of universal jurisdiction, it was also suggested that the topic could be combined with the topic on the *aut dedere aut judicare* obligation.”

27. Sir Michael WOOD suggested the deletion of the reference to legitimate expectations in the fourth sentence, which would then read: “Moreover, States were interested in the topic and were keen for progress.” If the second paragraph was retained, he proposed that a phrase be added to the effect that there had also been differing views on the question within the Sixth Committee.

28. Mr. GALICKI (Special Rapporteur) said that the point was not to give the position of the Commission, but to reflect the discussion. He was not sure that the paragraph should refer to the views of the Sixth Committee.

* Resumed from the 3122nd meeting.

29. Mr. CANDIOTI said that, on the contrary, he supported Sir Michael's suggestion. The Commission should be cautious and should not encourage a decision. Thus, it was important to recall that the Sixth Committee was also divided on the question. He also proposed replacing the words "the topic could be combined with" in the last sentence by "this matter could be combined with" to make it clear that it was still not a topic.

30. The CHAIRPERSON said he took it that the Commission agreed to adopt paragraph 38 in its new version, as amended by Sir Michael and Mr. Candiotti and with a minor drafting change suggested by Mr. Nolte.

It was so decided.

Paragraph 38, as amended, was adopted.

Chapter X, as a whole, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its sixty-third session (A/CN.4/L.781 and Add.1)

31. The CHAIRPERSON invited the Commission to begin its consideration of chapter II of its report, on the summary of the work of the Commission at its sixty-third session, beginning with the portion of the chapter contained in document A/CN.4/L.781.

Document A/CN.4/L.781

Paragraphs 1 to 17

Paragraphs 1 to 17 were adopted.

Paragraph 18

32. Ms. JACOBSSON (Chairperson of the Planning Group) proposed the insertion of a paragraph 18 *bis* to recall that certain important issues on which responses were sought were considered in chapter III. The new paragraph would read:

"The specific issues relating to topics which remain under consideration by the Commission, and on which comments would be of particular interest to the Commission, are found in chapter III."

Paragraph 18 and paragraph 18 bis were adopted.

Document A/CN.4/L.781/Add.1

Paragraph 1

33. Ms. JACOBSSON (Chairperson of the Planning Group) proposed the insertion of the following phrase at the beginning of the second sentence: "As a result of the work undertaken throughout the quinquennium by the Working Group on the long-term programme of work". It was important to inform the reader that the result of five years of work was concerned. In the last sentence, she suggested the insertion of the phrase "preparations of commentaries to draft articles, how to make the Commission's report more informative" after "on, *inter alia*, Special Rapporteurs, Study Groups, the Drafting Committee,". She also proposed the insertion of a reference at the end of chapter XIII, as had been done in the other paragraphs.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Chapter II, as a whole, as amended, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.782)

34. The CHAIRPERSON invited the Commission to begin its consideration of chapter III of its report, on specific issues on which comments would be of particular interest to the Commission, contained in document A/CN.4/L.782.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

35. Sir Michael WOOD, supported by Mr. VASCIANNIE, suggested the deletion of the paragraph, the substance of which was covered in paragraph 2.

It was so decided.

B. Expulsion of aliens

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

36. Sir Michael WOOD said that it would be preferable to delete the words "In the event there is no such practice", because the question was addressed to all States.

37. The CHAIRPERSON, speaking as a member of the Commission, thought that, on the contrary, the paragraph was justified only for States which had not introduced the suspensive effect of an appeal in their legislation. Those States that had already done so did not need to give their opinion on the question.

38. Mr. NOLTE said that even States with a particular practice in the area could have a view with respect to whether the practice was required by international law. That was what the Commission was asking them.

39. The CHAIRPERSON, speaking as a member of the Commission, said that, in that case, the question needed to be reformulated. In the current wording, only States with no practice were being asked about the need for a suspensive effect, without any reference to international law.

40. Sir Michael WOOD proposed the reformulation of the paragraph to read: "The Commission would also welcome the views of States on whether, as a matter of international law or otherwise, an appeal against an expulsion decision should have suspensive effect."

Paragraph 8, as amended, was adopted.

C. Protection of persons in the event of disasters

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

41. Mr. GAJA, referring to the first sentence, said it was preferable to say that “The Commission has taken the view” rather than “The Commission has affirmed”.

42. Mr. NOLTE said that the paragraph was unclear: it began by making a statement, and then posed a question concerning what had just been affirmed. The second sentence in the English text should start with the word “Does” rather than “Should”.

43. Mr. MELESCANU asked why there was a reference to “third States” in the second sentence, whereas the duty evoked in the first sentence concerned all States.

44. Mr. VASCIANNIE noted that the paragraph would thus be reformulated to read:

“The Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?”

Paragraph 10, as amended, was adopted.

The meeting rose at 6 p.m.

3127th MEETING

Friday, 12 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-third session (concluded)

CHAPTER III. *Specific issues on which comments would be of particular interest to the Commission (concluded)* (A/CN.4/L.782)

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter III of its report, contained in document A/CN.4/L.782.

D. The obligation to extradite or prosecute (*aut dedere aut judicare*)

Paragraphs 11 to 13

2. Mr. McRAE said that paragraph 11 gave the impression that the Commission had engaged in a

fairly extensive discussion about the legal source of the obligation to extradite or prosecute. He did not recall that it had done so, however, and he did not think it should be saying to the Sixth Committee that it had.

3. Mr. PETRIČ said that the use of the word “question” in paragraph 11 seemed inappropriate because no question was being asked.

4. Sir Michael WOOD, supported by Mr. VASCIANNIE, said that paragraphs 11 to 13 did not actually raise questions, but instead provided unnecessary background information. The paragraphs should be deleted.

It was so decided.

Paragraph 14

5. Mr. McRAE said that it seemed a little odd to attempt to discover whether there was a basis in customary international law for an obligation to extradite or prosecute by conducting an opinion poll in the General Assembly: what was required was a detailed analysis of the literature and State practice. The Sixth Committee might well say that it was up to the Commission to decide whether there was a customary rule of international law. He wondered whether it was necessary to retain the paragraph.

6. Sir Michael WOOD said that he would prefer to see section D deleted, but if paragraph 14 was retained, a number of drafting changes should be made. The final phrase of the *chapeau*, “as to their views on these matters”, should be reworded to read: “as to their views on the following matters”. In the first bullet point, the opening words, “Is there a basis”, should be replaced with the words “Do they consider that there is a basis”, since the Commission would be seeking the views of States as to whether they thought there was a basis in customary international law for an obligation to extradite or prosecute. In the second bullet point, the words “If not” should be deleted, since there was a range of possible answers to the preceding question.

7. Mr. DUGARD said that he also supported the deletion of paragraph 14. The first bullet point did indeed suggest that an opinion poll should be taken in the Sixth Committee on the subject. Surely it was the task of the Commission to decide whether or not there was a basis in customary law for such an obligation. As to the second bullet point, he was not sure whether the Commission had ever asked whether it should engage in a particular exercise *de lege ferenda*. It was for the Commission to decide such an issue. The line between codification and progressive development was very thin and the Commission seldom engaged in a wholesale exercise *de lege ferenda*. It generally engaged in progressive development but within the parameters of codification. The only question the Commission could ask of the Sixth Committee was if States could provide evidence of their practice. The second bullet point should therefore be deleted.

8. Mr. MELESCANU said that he preferred to retain section D, since the Commission had addressed the topic of the obligation to extradite or prosecute and its omission from the report might be misinterpreted. He therefore

proposed that the section should contain just one paragraph based on Sir Michael's proposal indicating that, in order to orient its future work on the topic, the Commission would appreciate receiving from Governments information about their practice in the field, especially whether they considered that there was a basis in customary international law for an obligation to extradite or prosecute persons accused of the most serious international crimes.

9. Ms. JACOBSSON said that she agreed with Mr. Melescanu that it was important to keep section D. The section should also remind States of questions put to them during previous sessions and indicate that the Commission would welcome responses from States that had not yet replied. She agreed with colleagues that the Commission should be wary of asking States about whether the Commission should engage in progressive development or not. That was the Commission's prerogative.

10. Mr. SABOIA said that he supported the views of Ms. Jacobsson and Mr. Melescanu.

11. Mr. VASCIANNIE said that paragraph 14 should be retained in the form proposed by Sir Michael. The Commission had raised the question of *lex ferenda* in relation to a number of other subjects in other parts of its report, and the same yardstick should be applied to *aut dedere aut judicare* as to other topics.

12. Mr. PELLET said that it seemed hard to argue that, because the Commission had prerogatives, it could not seek the views of States. As the question of State practice was of real interest to the Commission, the questions to Governments should be, first, whether in their legislation and case law there were crimes or categories of crimes in respect of which the obligation to extradite or prosecute had been implemented, and, secondly, if so, whether any tribunal or court had ever relied in that respect on customary international law.

13. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 14 along the lines proposed by Mr. Pellet.

Paragraph 14, as amended, was adopted.

E. Treaties over time

Paragraphs 15 and 16

14. Sir Michael WOOD suggested that, for the sake of clarity and readability, paragraphs 15 and 16 be merged.

Paragraphs 15 and 16 were merged and adopted.

F. The most-favoured-nation clause

Paragraph 17

Paragraph 17 was adopted.

G. New topics

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

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

CHAPTER XI. Treaties over time (concluded) (A/CN.4/L.790 and Add.1)

15. The CHAIRPERSON invited the Commission to resume its consideration of chapter XI of its draft report, with particular reference to the preliminary conclusions by the Chairperson of the Study Group, contained in addendum A/CN.4/L.790/Add.1.

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

3. PRELIMINARY CONCLUSIONS BY THE CHAIRPERSON OF THE STUDY GROUP, REFORMULATED IN LIGHT OF THE DISCUSSIONS IN THE STUDY GROUP

Conclusions 1 to 7

Conclusions 1 to 7 were adopted.

Conclusion 8

16. Ms. ESCOBAR HERNÁNDEZ said that, in the second paragraph, the phrase "Elements of crime" [*Elementos del crimen*] should be replaced with "Elements of crimes" [*Elementos de los crímenes*].

Conclusion 8, as amended, was adopted.

Conclusion 9

Conclusion 9 was adopted.

The nine preliminary conclusions by the Chairperson of the Study Group reformulated in light of the discussions in the Study Group, as a whole, as amended, were adopted.

Chapter XI, as a whole, as amended, was adopted.

CHAPTER I. Organization of the work of the session (A/CN.4/L.780)

17. The CHAIRPERSON invited the Commission to begin its consideration of chapter I of its draft report.

Paragraph 1

18. Mr. McRAE pointed out that Mr. Wisnumurti had opened the current session, not Mr. Petrič.

Paragraph 1 was adopted, with that correction.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

B. Casual vacancies

Paragraph 3

Paragraph 3 was adopted.

C. Officers and the Enlarged Bureau

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

D. Drafting Committee

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

*Paragraph 8 was adopted, subject to the addition by the secretariat of certain factual elements.***E. Working Groups and Study Groups**

Paragraphs 9 and 10

*Paragraphs 9 and 10 were adopted.***F. Secretariat**

Paragraph 11

*Paragraph 11 was adopted.***G. Agenda**

Paragraph 12

*Paragraph 12 was adopted.**Chapter I of the report of the Commission, as a whole, as amended, was adopted.***CHAPTER XIII. Other decisions and conclusions of the Commission (A/CN.4/L.792)**

19. The CHAIRPERSON invited the Commission to begin its consideration of chapter XIII of the draft report and drew attention to the portion of the chapter contained in document A/CN.4/L.792.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraphs 3 to 7

Paragraphs 3 to 7 were adopted.

2. METHODS OF WORK OF THE COMMISSION

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

(a) Role of the Special Rapporteurs

Paragraph 10

Paragraph 10 was adopted.

(b) Study Groups

Paragraph 11

Paragraph 11 was adopted.

(c) Drafting Committee

Paragraphs 12 to 15

Paragraphs 12 to 15 were adopted.

(d) Planning Group

Paragraph 16

Paragraph 16 was adopted.

(e) Preparation of commentaries to draft articles

Paragraphs 17 to 20

Paragraphs 17 to 20 were adopted.

(f) Final form

Paragraph 21

Paragraph 21 was adopted.

(g) The report of the International Law Commission

Paragraphs 22 and 23

Paragraphs 22 and 23 were adopted.

(h) Length and nature of future sessions

Paragraphs 24 to 26

Paragraphs 24 to 26 were adopted.

(i) Relationship with the Sixth Committee

Paragraphs 27 to 29

Paragraphs 27 to 29 were adopted.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 65/32 OF 6 DECEMBER 2010 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 30 to 32

Paragraphs 30 to 32 were adopted.

Paragraph 33

20. Mr. NOLTE said that the quotation of the President of the International Court of Justice should be preceded by a phrase showing that the Commission endorsed the President's views. He therefore proposed inserting the word "convincingly" between the words "has" and "emphasized" in the first sentence.

Paragraph 33, as amended, was adopted.

Paragraphs 34 to 36

Paragraphs 34 to 36 were adopted.

4. HONORARIA

Paragraph 37

Paragraph 37 was adopted.

5. ASSISTANCE TO SPECIAL RAPPORTEURS

Paragraph 38

Paragraph 38 was adopted.

6. ATTENDANCE OF THE GENERAL ASSEMBLY BY SPECIAL RAPPOREURS DURING THE CONSIDERATION OF THE COMMISSION'S REPORT

Paragraph 39

Paragraph 39 was adopted.

7. DOCUMENTATION AND PUBLICATIONS

(a) *Processing and issuance of reports of Special Rapporteurs*

Paragraph 40

Paragraph 40 was adopted.

(b) *Summary records of the work of the Commission and the posting on the website*

Paragraphs 41 to 43

Paragraphs 41 to 43 were adopted.

(c) *Yearbook of the International Law Commission*

Paragraphs 44 to 47

Paragraphs 44 to 47 were adopted.

(d) *Trust fund on the backlog relating to the Yearbook of the International Law Commission*

Paragraph 48

Paragraph 48 was adopted.

(e) *Assistance of the Codification Division*

Paragraph 49

Paragraph 49 was adopted.

(f) *Websites*

Paragraph 50

Paragraph 50 was adopted.

B. Date and place of the sixty-fourth session of the Commission

Paragraphs 51 to 53

Paragraphs 51 to 53 were adopted.

C. Peaceful settlement of disputes

Paragraphs 54 and 55

Paragraphs 54 and 55 were adopted.

D. Cooperation with other bodies

Paragraphs 56 to 58

Paragraphs 56 to 58 were adopted.

Paragraph 59

21. Mr. McRAE said that the consideration by AALCO of the work of the Commission was worthy of mention. He consequently proposed that the words "In particular, he reviewed the consideration given by AALCO to the work of the Commission" should be inserted as the penultimate sentence.

Paragraph 59, as amended, was adopted.

Paragraph 60

Paragraph 60 was adopted.

E. Representation at the sixty-sixth session of the General Assembly

Paragraph 61

Paragraph 61 was adopted.

Paragraph 62

22. The CHAIRPERSON said that he had been informed by the secretariat that, owing to budgetary constraints, it would not be possible to designate one or more Special Rapporteurs of the International Law Commission to attend the sixty-sixth session of the General Assembly.

23. Mr. PELLET said that the wording of paragraph 62 had been a standard text in the Commission's report for years. He proposed that the Commission should express in that paragraph its regret that no Special Rapporteur was to be requested to attend the upcoming session of the General Assembly.

With that amendment, paragraph 62 was adopted.

F. Gilberto Amado Memorial Lecture

Paragraph 63

Paragraph 63 was adopted.

G. International Law Seminar

Paragraph 64

Paragraph 64 was adopted.

Paragraph 65

24. Mr. HMOUD proposed that, in the first sentence, the phrase "from all geographic regions of the world", be deleted, as there had been no participant from the Arab region in the International Law Seminar in 2011. A number of colleagues joined with him in expressing regret at the unprecedented lack of participants from the Arab region, which had a long-established legal system.

Paragraph 65, as amended, was adopted.

Paragraphs 66 to 69

Paragraphs 66 to 69 were adopted.

Paragraph 70

25. Mr. McRAE said that the reference to the memorial seminar organized in honour of Ms. Paula Escarameia deserved to be treated in its own right, in a separate section to be placed before section G. The new section should include the information that the seminar had been organized by Ms. Jacobsson in conjunction with the Graduate Institute of International and Development Studies of Geneva, and paragraph 70 should be amended so as to simply refer to the new section on the memorial seminar. He proposed to work with the secretariat on drafting the new and amended texts.

On that understanding, paragraph 70 was adopted.

Paragraphs 71 to 75

Paragraphs 71 to 75 were adopted.

Paragraph 76

26. Mr. HMOUD proposed that after the words “especially from developing countries”, the phrase “and from all geographic regions and legal traditions” should be inserted.

Paragraph 76, as amended, was adopted.

Paragraph 77

Paragraph 77 was adopted.

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

The report of the International Law Commission, as a whole, as amended, was adopted.

Chairperson’s concluding remarks

27. The CHAIRPERSON thanked all the members of the Commission for their contributions to the work of the sixty-third session. To those members who were leaving—some after decades—he wished to convey the Commission’s profound gratitude and appreciation for the excellence and dedication with which they had served to advance the codification and progressive development of international law. He was also grateful for the competent and continuous assistance provided by the secretariat. He thanked all the interpreters, précis-writers, conference officers and other members of conference services for their cooperation and assistance.

Closure of the session

28. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-third session of the International Law Commission closed.

The meeting rose at 11.25 a.m.

