

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION

2013

*Volume I*

*Summary records  
of the meetings  
of the sixty-fifth session  
6 May–7 June and  
8 July–9 August 2013*

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UNITED NATIONS



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## 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 ... 2012*).

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.

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\* \*

This volume contains the summary records of the meetings of the sixty-fifth session of the Commission (A/CN.4/SR.3159–A/CN.4/SR.3197), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2013
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## 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. Donald M. McRAE	Canada
Mr. Ali Mohsen Fetais AL-MARRI	Qatar	Mr. Shinya MURASE	Japan
Mr. Lucius CAFLISCH	Switzerland	Mr. Sean D. MURPHY	United States of America
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Mr. Ahmed LARABA	Algeria	Sir Michael WOOD	United Kingdom of Great Britain and Northern Ireland

## OFFICERS

*Chairperson:* Mr. Bernd H. NIEHAUS

*First Vice-Chairperson:* Mr. Pavel ŠTURMA

*Second Vice-Chairperson:* Mr. Narinder SINGH

*Chairperson of the Drafting Committee:* Mr. Dire D. TLADI

*Rapporteur:* Mr. Mathias FORTEAU

*Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, 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.*

\* On 6 May 2013, the Commission elected Mr. Marcelo Vázquez-Bermúdez to fill the casual vacancy occasioned by the resignation of Mr. Stephen C. Vasciannie (see 3159th meeting below, paras. 7–8).

## AGENDA

At its 3159th meeting, held on 6 May 2013, the Commission adopted the provisional agenda for its sixty-fifth session. The agenda, modified in the light of the decision adopted by the Commission at its 3171st meeting\*\* contained the following items:

1. Organization of the work of the session.
2. Filling of a casual vacancy.
3. The obligation to extradite or prosecute (*aut dedere aut judicare*).
4. Protection of persons in the event of disasters.
5. Immunity of State officials from foreign criminal jurisdiction.
6. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
7. Provisional application of treaties.
8. Formation and evidence of customary international law.\*\*\*
9. Protection of the environment in relation to armed conflicts.
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-sixth session.
13. Cooperation with other bodies.
14. Other business.

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\*\* On 28 May 2013, the Commission decided to include in its programme of work the topic “Protection of the environment in relation to armed conflicts” (see the 3171st meeting below, para. 1).

\*\*\* The Commission decided, at its 3186th meeting, on 25 July 2013, to change the title of the topic to “Identification of customary international law” (see the 3186th meeting below, para. 22).

## ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
AUCIL	African Union Commission on International Law
CAHDI	Committee of Legal Advisers on Public International Law (Council of Europe)
FARDC	<i>Forces armées de la République démocratique du Congo</i> (Armed Forces of the Democratic Republic of the Congo)
IAJC	Inter-American Juridical Committee
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NGO	non-governmental organization
OAS	Organization of American States
OAU	Organization of African Unity
UNISDR	United Nations Office for Disaster Risk Reduction
WHO	World Health Organization
WTO	World Trade Organization

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<i>I.C.J. Reports</i>	International Court of Justice, <i>Reports of Judgments, Advisory Opinions and Orders</i> . All judgments, advisory opinions and orders of the Court are available from the Court's website ( <a href="http://www.icj-cij.org">www.icj-cij.org</a> ).
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
<i>ITLOS Reports</i>	International Tribunal for the Law of the Sea, <i>Reports of Judgments, Advisory Opinions and Orders</i>
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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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.

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## 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.

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



## CASES CITED IN THE PRESENT VOLUME

Case	Nature and source of the decision
<i>A. v. Ministère public de la Confédération</i>	Case No. BB.2011.140, Decision of 25 July 2012, Federal Criminal Tribunal of Switzerland; available from the Tribunal's website: <a href="http://www.bstger.ch/">www.bstger.ch/</a> , "Jurisprudence".
<i>Aerial Herbicide Spraying</i>	( <i>Ecuador v. Colombia</i> ), <i>Order of 13 September 2013, I.C.J. Reports 2013</i> , p. 278.
<i>Ahmadou Sadio Diallo</i>	( <i>Republic of Guinea v. Democratic Republic of the Congo</i> ), <i>Compensation, Judgment, I.C.J. Reports 2012</i> , p. 324.
<i>Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway</i>	<i>Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands</i> , Decision of 24 May 2005, UNRIAA, vol. XXVII (Sales No. 06.V.8), p. 35.
<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i>	<i>Judgment, I.C.J. Reports 2005</i> , p. 168.
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<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>Bosphorus</i>	<i>Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland</i> , Application no. 45036/98, Judgment of 30 June 2005, European Court of Human Rights, <i>Reports of Judgments and Decisions 2005-VI</i> .
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<i>Budayeva and Others v. Russia</i>	Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 20 March 2008, First Section, European Court of Human Rights, <i>Reports of Judgments and Decisions 2008</i> (extracts).
<i>Certain Questions of Mutual Assistance in Criminal Matters</i>	( <i>Djibouti v. France</i> ), <i>Judgment, I.C.J. Reports 2008</i> , p. 177.
<i>Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)</i>	<i>Order of 16 July 2013, Provisional Measures, I.C.J. Reports 2013</i> , p. 230. <i>Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013</i> , p. 200.
<i>Corfu Channel</i>	<i>Judgment of 9 April 1949, I.C.J. Reports 1949</i> , p. 4.
<i>Daimler Financial Services AG v. Argentine Republic</i>	ICSID Case No. ARB/05/1, Award dispatched to the parties on 22 August 2012; available from <a href="https://icsid.worldbank.org/">https://icsid.worldbank.org/</a> .
<i>Decision regarding delimitation of the border between Eritrea and Ethiopia</i>	Decision of 13 April 2002, UNRIAA, vol. XXV (Sales No. E/F.05.V.5), p. 83.
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<i>Dispute regarding Navigational and Related Rights</i>	( <i>Costa Rica v. Nicaragua</i> ), <i>Judgment, I.C.J. Reports 2009</i> , p. 213.
<i>English Channel</i>	( <i>Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic</i> ), Decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3.
<i>Frontier Dispute (Burkina Faso/Niger)</i>	<i>Judgment, I.C.J. Reports 2013</i> , p. 44. <i>Order of 12 July 2013, Nomination of Experts, I.C.J. Reports 2013</i> , p. 226.
<i>Gabčíkovo-Nagymaros Project</i>	( <i>Hungary/Slovakia</i> ), <i>Judgment, I.C.J. Reports 1997</i> , p. 7.
<i>Hulley Enterprises Limited (Cyprus) v. the Russian Federation</i>	Case No. AA 226, Interim Award on Jurisdiction and Admissibility of 30 November 2009, Permanent Court of Arbitration; available from <a href="https://pca-cpa.org/">https://pca-cpa.org/</a> , Cases.
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<i>Kadi</i>	<i>Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities</i> , Joined cases C-402/05 P and C-415/05 P, Judgment of 3 September 2008, Court (Grand Chamber), <i>European Court Reports 2008</i> , p. I-06351.
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<i>Katanga</i>	<i>Prosecutor v. Germain Katanga</i> , Case No. ICC-01/04-01/07, International Criminal Court; see <a href="http://www.icc-cpi.int/">www.icc-cpi.int/</a> .
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<i>Khurts Bat</i>	<i>Khurts Bat v. the Investigating Judge of the German Federal Court</i> , Case Nos. CO/3672/2011 and CO/1655/2011, Judgment of 29 July 2011 ([2011] EWHC 2029 (Admin)), Administrative Court, England and Wales High Court; see also ILR, vol. 147 (2012), p. 633.
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<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)</i>	<i>Advisory Opinion</i> , <i>I.C.J. Reports 1971</i> , p. 16.
<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i>	<i>Advisory Opinion</i> , <i>I.C.J. Reports 2004</i> , p. 136.
<i>Legality of the Threat or Use of Nuclear Weapons</i>	<i>Advisory Opinion</i> , <i>I.C.J. Reports 1996</i> , p. 226.
<i>Lubanga</i>	<i>Prosecutor v. Thomas Lubanga Dyilo</i> , Case No. ICC-01/04-01/06, Judgment of 14 March 2012, Trial Chamber I, International Criminal Court; see <a href="http://www.icc-cpi.int/">www.icc-cpi.int/</a> .
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<i>Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear</i>	<i>Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)</i> , ( <i>Cambodia v. Thailand</i> ), Judgment, <i>I.C.J. Reports 2013</i> , p. 281. The verbatim records of the public sittings held in 2013 (CR 2013/1–6) are available from the Court’s website: <a href="http://www.icj-cij.org/">www.icj-cij.org/</a> .
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<i>Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea</i>	<i>UNRIAA</i> , vol. III (Sales No. 1949.V.2), p. 1905.
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- Memorandum of Understanding between the Governments of Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia regarding the Free Territory of Trieste (London, 5 October 1954) *Ibid.*, vol. 235, No. 3297, p. 99.

### Privileges and immunities, diplomatic and consular relations, etc.

- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, No. 8638, p. 261.
- Convention on special missions (New York, 8 December 1969) *Ibid.*, vol. 1400, No. 23431, p. 231.
- European Convention on State Immunity (Basel, 16 May 1972) *Ibid.*, vol. 1495, No. 25699, p. 181.
- 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.
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- Convention for the protection of individuals with regard to automatic processing of personal data (Strasbourg, 28 January 1981) *Ibid.*, vol. 1496, No. 25702, p. 65.
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*Ibid.*, vol. 2080, No. 36116, p. 95.

Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part (Cotonou, 23 June 2000)

*Official Journal of the European Communities*, No. L 317, 15 December 2000, p. 3.

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African Charter on Democracy, Elections and Governance (Addis Ababa, 30 January 2007)

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African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (Kampala, 23 October 2009)

*Ibid.*



## CHECKLIST OF DOCUMENTS OF THE SIXTY-FIFTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/656	Provisional agenda for the sixty-fifth session	Mimeographed. The agenda as adopted is reproduced on p. viii above.
A/CN.4/657	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Sixty-seventh Session, prepared by the Secretariat	Mimeographed.
A/CN.4/658	Provisional application of treaties, memorandum by the Secretariat	Reproduced in <i>Yearbook ... 2013</i> , vol. II (Part One).
A/CN.4/659	Formation and evidence of customary international law: Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, memorandum by the Secretariat	<i>Idem.</i>
A/CN.4/660	First report on subsequent agreements and subsequent practice in relation to treaty interpretation, by Mr. Georg Nolte, Special Rapporteur	<i>Idem.</i>
A/CN.4/661	Second report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	<i>Idem.</i>
A/CN.4/662	Sixth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/663	First report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur	<i>Idem.</i>
A/CN.4/664	First report on the provisional application of treaties, prepared by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.813	Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of draft conclusions 1–5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission	Mimeographed.
A/CN.4/L.814	Immunity of State officials from foreign criminal jurisdiction: Text of draft articles 1, 3 and 4 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission	<i>Idem.</i>
A/CN.4/L.815	Protection of persons in the event of disasters: Texts and titles of draft articles 5 <i>ter</i> and 16, provisionally adopted by the Drafting Committee on 17 July 2013	<i>Idem.</i>
A/CN.4/L.816	Draft report of the International Law Commission on the work of its sixty-fifth session, chapter I (Organization of the session)	<i>Idem.</i> See the adopted text in <i>Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10)</i> . The final text appears in <i>Yearbook ... 2013</i> , vol. II (Part Two).
A/CN.4/L.817	<i>Idem</i> , chapter II (Summary of the work of the Commission at its sixty-fifth session)	<i>Idem.</i>
A/CN.4/L.818	<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.819 and Add.1–3	<i>Idem</i> , chapter IV (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)	<i>Idem.</i>
A/CN.4/L.820 and Add.1–3	<i>Idem</i> , chapter V (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.821 and Add.1–2	<i>Idem</i> , chapter VI (Protection of persons in the event of disasters)	<i>Idem</i> .
A/CN.4/L.822 and Add.1	<i>Idem</i> , chapter VII (Formation and evidence of customary international law)	<i>Idem</i> .
A/CN.4/L.823	<i>Idem</i> , chapter VIII (Provisional application of treaties)	<i>Idem</i> .
A/CN.4/L.824	<i>Idem</i> , chapter IX (Protection of the environment in relation to armed conflicts)	<i>Idem</i> .
A/CN.4/L.825	<i>Idem</i> , chapter X (The obligation to extradite or prosecute ( <i>aut dedere aut judicare</i> ))	<i>Idem</i> .
A/CN.4/L.826	<i>Idem</i> , chapter XI (The most-favoured-nation clause)	<i>Idem</i> .
A/CN.4/L.827 and Add.1	<i>Idem</i> , chapter XII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.828	Report of the Study Group on the most-favoured-nation clause	Mimeographed.
A/CN.4/L.829	Report of the Working Group on the obligation to extradite or prosecute ( <i>aut dedere aut judicare</i> )	<i>Idem</i> . See the adopted text in <i>Official Records of the General Assembly; Sixty-eighth Session, Supplement No. 10 (A/68/10)</i> . The final text appears in <i>Yearbook ... 2013</i> , vol. II (Part Two).
A/CN.4/L.830	Report of the Planning Group	Mimeographed.
A/CN.4/SR.3159– A/CN.4/SR.3197	Provisional summary records of the 3159th to 3197th meetings	<i>Idem</i> . The final text appears in the present volume.

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-FIFTH SESSION

*Held at Geneva from 6 May to 7 June 2013*

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### 3159th MEETING

*Monday, 6 May 2013, at 3.05 p.m.*

*Outgoing Chairperson:* Mr. Lucius CAFLISCH

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

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### Opening of the session

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

#### **Tribute to the memory of Chusei Yamada, former member of the Commission**

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note owing to the death of Mr. Chusei Yamada on 21 March 2013. For 16 years, the Commission had benefited from Mr. Yamada's wealth of experience in the areas of international law and diplomacy. His achievements, in particular through his work as Special Rapporteur on the topic of shared natural resources, had included the adoption on second reading of the draft articles on the law of transboundary aquifers.<sup>1</sup>

*At the invitation of the Outgoing Chairperson, the members of the Commission observed a minute of silence.*

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<sup>1</sup> The final version of the draft articles on the law of transboundary aquifers, with commentaries thereto, was adopted by the Commission at its sixtieth session (2008), *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54. The draft articles on the law of transboundary aquifers adopted by the Commission are reproduced in an annex to General Assembly resolution 63/124 of 11 December 2008.

### Statement by the Outgoing Chairperson

3. The OUTGOING CHAIRPERSON said that he would provide a brief overview of the discussion in the Sixth Committee of the report of the Commission on the work of its sixty-fourth session.<sup>2</sup> A topical summary of that discussion, prepared by the Secretariat was contained in document A/CN.4/657.

4. The consideration of the Commission's report had been the main focus of the Sixth Committee's work, even if it had been necessary to postpone the discussion on chapter IV of the report of the Commission on the work of its sixty-third session on the topic "Reservations to treaties"<sup>3</sup> until the sixty-eighth session of the General Assembly, in 2013, owing to the fact that the United Nations Headquarters had been closed for several days in a row due to Hurricane Sandy. Based on the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 67/92 of 14 December 2012, in which it expressed its appreciation to the International Law Commission for the work accomplished at its sixty-fourth session, in particular the completion of the first reading of the draft articles on the expulsion of aliens,<sup>4</sup> and recommended that the Commission continue its work on the topics in its current programme, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee. In paragraph 5 of the same resolution, the General Assembly noted its decision to continue, at its sixty-eighth session, the consideration of chapter IV of the Commission's report on the work of its sixty-third session. In paragraph 6, it drew the attention of Governments to the importance for the Commission of receiving by 1 January 2014 their comments and observations on the draft articles on the topic "Expulsion of aliens", which had been adopted on first reading by the Commission at its sixty-fourth session. In paragraph 7, it noted with appreciation the decision of the Commission to include the topics "Provisional application of treaties" and "Formation and evidence of customary international

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<sup>2</sup> *Yearbook ... 2012*, vol. II (Part Two).

<sup>3</sup> *Yearbook ... 2011*, vol. II (Part Two), chap. IV, and *ibid.*, vol. II (Part Three).

<sup>4</sup> *Yearbook ... 2012*, vol. II (Part Two), paras. 45–46.

law<sup>5</sup> in its programme of work, and encouraged the Commission to continue the examination of the topics that were in its long-term programme of work.<sup>6</sup> Lastly, in paragraph 8, it invited the Commission to continue to give priority to the topics “Immunity of State officials from foreign criminal jurisdiction” and “The obligation to extradite or prosecute (*aut dedere aut judicare*)”.

### Election of officers

*Mr. Niehaus was elected Chairperson by acclamation.*

*Mr. Niehaus took the Chair.*

5. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred upon him and paid tribute to Mr. Cafilisch, Chairperson of the sixty-fourth session, and to the other officers of the sixty-fourth session for their outstanding work.

*Mr. Šturma was elected First Vice-Chairperson by acclamation.*

*Mr. Singh was elected Second Vice-Chairperson by acclamation.*

*Mr. Tladi was elected Chairperson of the Drafting Committee by acclamation.*

*Mr. Forteau was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/656)

*The provisional agenda was adopted.*

*The meeting was suspended at 3.40 p.m.  
and resumed at 4.40 p.m.*

### Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew the members' attention to the programme of work for the following two weeks. During the current meeting, after the election to fill the vacancy in the Commission, Mr. Nolte, Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” would introduce his first report, which would be considered during the following three plenary meetings. The Planning Group and the Working Group on the long-term programme of work would meet on Tuesday afternoon, and the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet on Wednesday afternoon. In addition, the Bureau proposed that the plenary meeting on Wednesday morning should be dedicated to the memory of Mr. Chusei Yamada. In the second week, the Working Group on the long-term programme of work would meet on Monday afternoon. At the plenary meeting on Tuesday morning, the Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” would summarize the debate

<sup>5</sup> *Ibid.*, paras. 267–268.

<sup>6</sup> *Yearbook ... 2011*, vol. II (Part Two), paras. 365–369.

on his first report. Subsequent plenary meetings would be devoted to consideration of the second report of Ms. Escobar Hernández, Special Rapporteur for the topic “Immunity of State officials from foreign criminal jurisdiction”. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet after the close of the plenary meeting on Tuesday and Thursday, and the Drafting Committee on the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” would meet on Tuesday, Wednesday and Thursday afternoon.

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

### Filling of a casual vacancy

[Agenda item 2]

7. The CHAIRPERSON said that, in accordance with article 11 of its statute, the Commission would proceed to fill the seat that had become vacant owing to the resignation of Mr. Stephen C. Vasciannie. The curricula vitae of the three candidates were contained in documents A/CN.4/655/Add.1–2,<sup>7</sup> and a related communication was contained in document ILC/LXV/Misc.1. As was customary, the election would be held in a closed meeting.

*The meeting was suspended at 4.45 p.m.  
and resumed at 5 p.m.*

8. The CHAIRPERSON announced that Mr. Vázquez-Bermúdez had been elected to fill the casual vacancy resulting from the resignation of Mr. Vasciannie. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.

### Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/660,<sup>8</sup>A/CN.4/L.813<sup>9</sup>)

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR

9. The CHAIRPERSON invited Mr. Nolte, Special Rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” to introduce his first report (A/CN.4/660).

10. Mr. NOLTE (Special Rapporteur) recalled that the Commission had already addressed important aspects of the topic in the Study Group on treaties over time. The objective of the present report, which was based on and continued the previous work, was to provide guidance to all those responsible for interpreting or applying treaties. The materials and analyses contained in the present report and those to be contained in future reports, together with the Commission's conclusions, should serve as a point of

<sup>7</sup> Mimeographed; available from the Commission's website, documents of the sixty-fourth session (2012).

<sup>8</sup> Reproduced in *Yearbook ... 2013*, vol. II (Part One).

<sup>9</sup> Mimeographed; available from the Commission's website.

reference and thereby contribute, as far as possible, to the development of a common approach to the interpretation and application of any treaty.

11. The report contained four draft conclusions that were based not only on the informal reports previously submitted to the Study Group on treaties over time, but also on the preliminary conclusions reached following their consideration.

12. Draft conclusion 1 concerned the general rule of interpretation and the various means of interpretation set out in the Vienna Convention on the law of treaties (1969 Vienna Convention) and applied by the major international courts and tribunals. As mentioned in the report, the latter recognized articles 31 and 32 of the 1969 Vienna Convention as formulating the general rule and the supplementary rules on treaty interpretation, and as having the status of rules of customary international law. In their interpretative practice, those courts and tribunals took into account the various means of interpretation, in accordance with article 31 of the Convention, without considering any one of those means as being determinative or higher in rank than the others. However, they could place more or less emphasis on one or the other means of interpretation without that resulting in derogation from the rule embodied in the Convention. The Convention thus provided for a rather broad framework of interpretation within which the various means of interpretation had to be carefully identified and taken into account in their “interaction”. That interaction required giving the appropriate weight to the respective means of interpretation, meaning that the weight given might differ depending on the treaty in question. Thus, the first paragraph of draft conclusion 1 essentially confirmed that article 31 of the Convention, as treaty obligation and as reflection of customary international law, set forth the general rule on the interpretation of treaties. It seemed worthwhile to enunciate that common point of departure for all those called upon to apply treaties. The second paragraph of draft conclusion 1 stated that the interpretation of a treaty in a specific case might result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned. It seemed important to highlight that point in order to illustrate that placing more or less emphasis on one or the other of those elements was part and parcel of the process of interpretation that was provided for in the Convention.

13. The first paragraph of draft conclusion 2 reaffirmed the rule set out in article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention, according to which subsequent agreements and subsequent practice between the parties to a treaty were means of interpretation that were to be taken into account in the interpretation of treaties, as had been recognized in the case law of major international courts and tribunals. It stated that those means of interpretation were “authentic” in order to indicate why they were to be taken into account. The second paragraph of draft conclusion 2 stated that subsequent agreements and subsequent practice could guide an evolutive interpretation of a treaty. In order to

illustrate the importance of those means of interpretation, the report cited several examples of how subsequent agreements and subsequent practice could affect the selection and weighing of other means of interpretation, such as the “ordinary meaning” of the terms of a treaty in their context and the object and purpose of the treaty.

14. Draft conclusion 3 was concerned with the definition of the terms “subsequent agreement” and “subsequent practice” as means of treaty interpretation, which gave rise to two main issues: what distinction should be drawn between subsequent agreement and subsequent practice, and whether subsequent practice had to be agreed between all the parties. It seemed that the main difference between the two categories was that subsequent agreements were more formal in nature; however, since such agreements were not always in writing, it was proposed to include only “manifested” agreements. As to a subsequent practice that might be followed by one or more parties without necessarily establishing the agreement of all the parties regarding the interpretation of the treaty, it was recognized that such practice could be used as a supplementary means of interpretation, though not an authentic one, within the meaning of the Convention, so long as it did not constitute a breach of the treaty, as could also be the case. The proposed text therefore also took that into account.

15. Draft conclusion 4 defined the possible authors of subsequent practice. It followed from the case law of international courts and tribunals that the rules for the attribution of a practice to a State for the purpose of treaty interpretation were not the same as those for the attribution of conduct to a State for the purpose of establishing its responsibility for wrongful acts; they must therefore be derived from the specific character of the interpretation and application of each treaty by the parties thereto. Subsequent practice could emanate from all government officials who were considered by the international community to be responsible for the application of the treaty, as well as from lower government officials. On the other hand, the courts remained reluctant to take into account the practice of non-State actors or conduct related to social developments, thence the need to specify that point in the second paragraph of the draft conclusion.

16. The first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties covered general aspects of the topic. He would submit a second report in 2014 that synthesized the other issues dealt with in the three reports of the Study Group on treaties over time,<sup>10</sup> followed by a third report, in 2015, that would address the practice of international organizations and the case law of national courts, and would contain new draft conclusions. He envisaged submitting his final report in 2016, with the conclusions and commentaries thereto revised in the light of the debate in the Commission and the discussions in the Sixth Committee.

17. The CHAIRPERSON thanked the Special Rapporteur for his introduction and invited the members of the Commission to comment.

<sup>10</sup> See *Yearbook ... 2010*, vol. II (Part Two), pp. 194–195, paras. 347–354; *Yearbook ... 2011*, vol. II (Part Two), paras. 336–344; and *Yearbook ... 2012*, vol. II (Part Two), paras. 232–233.

18. Mr. TLADI said that it should be borne in mind that subsequent agreements and subsequent practice were merely tools that facilitated the application of the general rule of interpretation of treaties, as set forth in article 31, paragraph 1, of the 1969 Vienna Convention. While it was true that the Commission had sought to emphasize that the process of treaty interpretation was “a single combined operation” and that the elements of that operation should be placed “on the same footing” as the other means of interpretation provided for in the paragraphs of article 31 that followed, which included subsequent practice and subsequent agreements, its intention had been to underscore the unity, rather than the equality, of the various elements, and to avoid a situation in which they were presented as a hierarchy. It had thus specified that all elements were obligatory.

19. Yet, a methodological analysis of the weight accorded by judicial and quasi-judicial bodies to subsequent agreements and subsequent practice in relation to the other means of interpretation, such as that performed by the Special Rapporteur, risked de-emphasizing the idea of unity that was so essential. It would have been preferable to assess in which cases those two elements contributed, or failed to contribute, to determining the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. That was the purpose that they should serve, rather than offering a competing vision or idea of the ordinary meaning of a treaty provision. For that reason, he disagreed with the Special Rapporteur when he stated, in paragraph 49 of his report, that subsequent agreements and subsequent practice could also render a more evolutive interpretation of an apparently clear treaty provision, citing as an example the advisory opinion of the International Court of Justice in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Far from indicating that subsequent practice had allowed for elucidating a new meaning from an already clear provision, the Court limited itself to noting that that practice was “consistent with” the provision in question.

20. Subsequent agreements and subsequent practice could just as easily support an evolutive interpretation as they could a contemporaneous interpretation, owing to the fact that they were merely tools for identifying, in good faith, the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. For that reason, he also wished to express his disagreement with the second paragraph of draft conclusion 2, which, by stating that those two elements could “guide an evolutive interpretation of a treaty”, might suggest that subsequent practice and subsequent agreements did not guide a contemporary interpretation. One might also question the usefulness of the first paragraph of draft conclusion 2, which did not say anything beyond what was stated in the 1969 Vienna Convention to the effect that subsequent practice and subsequent agreements were “authentic” means of interpretation.

21. Lastly, if one took into account the fact that subsequent agreements and subsequent practice were, in effect, merely tools that were neither binding nor determinative, it was perhaps unnecessary to require that

they be concluded among all the parties of a given treaty, as was advocated by the Special Rapporteur.

*The meeting rose at 5.50 p.m.*

### 3160th MEETING

*Tuesday, 7 May 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

#### **Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)** (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

##### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the first report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660).

2. Sir Michael WOOD said that the elements of interpretation provided for in article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention were sometimes overlooked by those who assumed, wrongly, that paragraph 1 of that article alone constituted the essence of the general rule on interpretation. Yet a subsequent agreement between parties regarding the interpretation of the treaty carried great, probably the greatest, weight as an interpretative factor. That said, care needed to be taken in the practical application of the principles set out in paragraph 3 (*a*) and (*b*).

3. It was somewhat misleading to refer to subsequent agreements and subsequent practice within the meaning of article 31, paragraph 3 (*a*), and paragraph 3 (*b*), respectively, as “means” of interpretation, since their role as part of an integrated system was better captured by the word “elements”. In paragraph (14) of its 1966 commentary to the draft articles on the law of treaties,<sup>11</sup> the Commission stated that an agreement as to the interpretation of a provision reached after the conclusion of the treaty represented an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. The reiteration of that statement in the commentaries to the conclusions would draw attention to an important aspect of treaty

<sup>11</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), p. 221, commentary to article 27.

interpretation that supplemented the provisions of the 1969 Vienna Convention, without modifying or contradicting them. Yet, no matter how important or authentic the elements of interpretation listed in article 31, paragraph 3 (a) and (b), might be, they should not be treated as separate or distinct from the other elements in the general rule of interpretation.

4. His comments regarding the four draft conclusions suggested by the Special Rapporteur were largely editorial. With regard to draft conclusion 1, which described article 31 as a reflection of customary international law, the Commission should avoid making an *a contrario* implication concerning the status of the rule set forth in article 32, since there was now ample authority for regarding it, too, as a rule of customary international law. Concerning the second paragraph, it might be going too far to contrast the text of a treaty with its object and purpose, since article 31 referred to a single operation. Moreover, the words “a different emphasis” were potentially misleading in that a difference in emphasis was inherent in the structure of articles 31 and 32, in that the latter addressed supplementary means of interpretation, as distinct from the text of the treaty in the light of its object and purpose. In fact, the presence or absence of particular elements of interpretation was not really a question of emphasis.

5. In draft conclusion 2, it was inaccurate to suggest that subsequent agreements and subsequent practice should “guide an evolutive interpretation” of a treaty in all cases, since they might equally guide a contemporaneous interpretation.

6. As to draft conclusion 3, given that agreement could be manifested through practice, the Commission should consider replacing the phrase “a manifested agreement” with “an agreement made” between the parties, and what was meant by the word “agreement” in that context should be explained, either in the draft conclusion or elsewhere.

7. With regard to draft conclusion 4, he proposed redrafting the first paragraph so as to indicate when conduct was attributable to the State for the purpose of treaty interpretation. In paragraph 2, the attribution of two different meanings to the term “subsequent State practice” was confusing. Ultimately, he wondered whether the paragraph was necessary at all.

8. With those comments, he would be in favour of referring the draft conclusions to the Drafting Committee.

9. Mr. AL-MARRI said that treaties constituted one of the most important primary sources of international law. The ultimate goal of their interpretation was to ascertain the intentions of the various parties in the event of a dispute over a treaty provision. Any exploration of the parties’ intentions should start with the text of the treaty.

10. Mr. HUANG said that with regard to the study of the topic, the Commission’s main challenge was to establish rules while preserving the flexibility inherent in the provisions on subsequent agreements and subsequent practice. However, it should refrain from allowing so much flexibility that the treaty regime and States

parties’ obligations were undermined. The Commission should also emphasize the clarifying role of subsequent agreements and subsequent practice in relation to treaty interpretation, bearing in mind that they were part of an integrated process. Care should be taken not to interpret treaties too broadly.

11. Turning to methodology, he said that disregarding the original intention of the parties and the content of the treaty or deeming them subject to evolutive interpretation was not in conformity with article 31 of the 1969 Vienna Convention. It was necessary to balance the contemporaneous and evolutive interpretations and weigh the consequences in order to define guidelines for subsequent agreements and subsequent practice. Since treaties and agreements were the result of negotiations by consensus, subsequent agreements and subsequent practice should reflect such consensus and be based on comprehensive State practice.

12. Mr. HMOUD sought clarification regarding the essential issue—the role of intent in the interpretation of treaties. Twenty years after the conclusion of a treaty, would an interpretation that did not reflect the intention of the drafters be permissible under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention?

13. Mr. NOLTE (Special Rapporteur) said that to discover the intention of the parties was the ultimate goal of treaty interpretation; while article 31, paragraphs 1 to 3, of the Convention did not refer to the intention of the parties as a means of interpretation, the Convention presupposed that the goal of interpretation was furthered by the different means of interpretation spelled out in article 31. When drafting the Convention, the Commission had followed the approach first adopted by Sir Humphrey Waldock in his third report,<sup>12</sup> and it should continue to do so. As Mr. Tladi had said, the means of interpretation as set out in article 31 were means to facilitate the identification of the interpretation of the parties.

14. Mr. FORTEAU said that the Special Rapporteur had neglected to mention article 31, paragraph 4, of the 1969 Vienna Convention, according to which a special meaning should be given to a term if it was established that the parties so intended. In its judgment in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the International Court of Justice had held that the subsequent practice of the parties could result in a departure from the original intent on the basis of a tacit agreement between the parties. In that sense, subsequent agreement or subsequent practice could be seen as an intention modifying the original intention of the parties.

15. Mr. NOLTE (Special Rapporteur) said that he had failed to mention paragraph 4 because it suggested that “the parties so intended” meant the original intentions, which was restrictive.

16. Mr. FORTEAU, commending the Special Rapporteur on the research and analysis done for the first report, said that by and large he endorsed its four draft conclusions. Before addressing them, he wished to

<sup>12</sup> *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3.

emphasize that he fully endorsed the goal outlined by the Special Rapporteur in paragraph 6 of his report, namely that the Commission's work on the topic should contribute, as far as possible, to a common and uniform approach to the interpretation of a particular treaty in the light of subsequent agreements and subsequent practice. That was all the more important in that the rule of interpretation spelled out in article 31 applied to all treaties, irrespective of whether they had been concluded before or after the entry into force of the 1969 Vienna Convention.

17. Concerning the methodology behind draft conclusion 1, he thought that an analysis of case law by theme, instead of by court or other adjudicative body, would have been perhaps more conducive to the identification of common principles of interpretation. The Special Rapporteur's method was apparently based on the premise that each body developed its own characteristic approach to interpretation. Yet other factors such as the nature of the instrument—bilateral trade accord or human rights treaty, for example—could result in different approaches to interpretation being used by the same body. If that was the case, then that should have been more clearly spelled out in the draft conclusion and in the report.

18. He had some reservations regarding the second paragraph of the draft conclusion, which implied that an interpreter of a treaty could decide how much weight was to be given to the different means of interpretation. That was not in line with the Commission's conclusion, in its 1966 commentary, that all of the elements of interpretation cited in article 31 were on an equal footing. Moreover, the draft conclusion suggested that the means of interpretation in article 32 could be given preference over those in article 31, although the former were clearly subsidiary to the latter. He himself would prefer to adhere more closely to the 1966 commentary, perhaps in a slightly more nuanced way, by stating that depending on the specific case, the evidentiary weight of each element of interpretation could differ. In short, he thought it would be wrong to fuse two very different issues, namely the nature of the available means of interpretation and the probative value of those means in specific cases.

19. He welcomed the analysis that led up to draft conclusion 2, particularly on the difficult question of evolutive interpretation which, as the Special Rapporteur pointed out, was not a separate method of interpretation, but rather the result of the interpretation process. The text of the draft conclusion should be fleshed out, however, in view of the important legal issues it was intended to cover. The first paragraph should be more closely aligned on article 31 of the 1969 Vienna Convention: it was not all subsequent practice, but only subsequent practice that established the agreement of the parties, that constituted authentic means of interpretation. The second paragraph needed to be strengthened: article 31 did not simply evoke a possibility, it laid down an obligation to take into account any subsequent agreement or subsequent practice. Substantive provisions should be introduced, to cover evolutive interpretation, and specifically to resolve the issues raised by the Special Rapporteur in paragraphs 62 and 63 of his report. In his own view, the fact that evolutive interpretation was not a separate method of interpretation accounted for the absence of a

presumption of contemporaneous interpretation. If the Commission agreed that that statement reflected current practice, then a separate conclusion should be drafted to indicate, on the one hand, that international law made no presumptions with regard to evolutive interpretation and, on the other, that any subsequent agreement or subsequent practice constituted one of the elements to be taken into account in determining whether the meaning to be given to a treaty provision was evolutive or not.

20. Draft conclusion 3 was based on the Special Rapporteur's assumption that two separate types of agreement were addressed in article 31, paragraph 3 (a) and (b), whereas in his own view, the agreements envisaged in paragraph 3 (b) were subsumed in paragraph 3 (a). That view was supported by the decisions of international courts, which made no clear distinction between the two types of agreements. Moreover, the use of the term "manifested" would restrict the scope of paragraph 3 (a). Ultimately, the draft conclusion should include a more detailed description of what could be considered as practice establishing the agreement of parties; a clear distinction between subsequent practice in the restrictive sense of article 31 and in the broader sense of article 32; and a reference to the fact that a subsequent agreement in the sense of article 31 was an agreement between all the parties to the treaty.

21. Draft conclusion 4 was a useful starting point but needed further detail. It should cover subsequent agreements, which also raised attribution issues. The first paragraph seemed somewhat redundant: the Commission should define the cases in which there was attribution for the purpose of treaty interpretation, based on its consideration of State practice. The second paragraph seemed to relate to the definition of practice and was more relevant to draft conclusion 3.

22. Mr. PARK said that the draft conclusions were all formulated in rather general terms and were lacking in legal clarity. More specific conclusions were required in order to determine the role of subsequent agreements and subsequent practice, to resolve ambiguity in the principles of interpretation and to offer guidance to those who interpreted or applied treaties. The conclusions should have sufficient normative content while retaining the flexibility inherent in the concept of subsequent practice and subsequent agreements. He asked the Special Rapporteur whether such agreements and practice covered by article 32, rather than article 31, paragraph 3 (a) and (b), might be included in the Commission's work.

23. He had no substantive reservations on draft conclusion 1, because it was similar to the Study Group's conclusions and because it was plain that there was no absolute hierarchy in the general principles or rules of treaty interpretation. With reference to draft conclusion 2, he drew attention to a lack of coherence between paragraphs 30, 70 and 95 of the report. He asked whether the example mentioned in paragraphs 49 and 50 did not pertain more to a *de facto* amendment of Article 12 of the Charter of the United Nations than to a question of interpretation. While it was true that the evolutive interpretation of treaties had been examined in the past in the context of the fragmentation of international law, he was unsure whether it was necessary to mention it

in the second paragraph of draft conclusion 2, given the view expressed by the Special Rapporteur in the second sentence of paragraph 62. Furthermore, he wished to know what was meant by the term “authentic means” in the first subparagraph of that draft conclusion.

24. Moving on to draft conclusion 3, he wondered if the relevant rules of international law applicable in relations between the parties had any bearing on subsequent agreements and subsequent practice of a relational character. He pointed out that the words “after the conclusion of” had been omitted in the French version of the first paragraph of the draft conclusion. In the Drafting Committee, it would be advisable to clarify the meaning of the phrase “the conclusion of a treaty”.

25. Lastly, with regard to draft conclusion 4, he was uncertain whether the collections and other reports by international organizations on State practice could be said to possess evidentiary weight, since they did not constitute the practice of the international organization itself. He concurred with Mr. Forteau’s comments in respect of the second paragraph of that draft conclusion.

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

[Agenda item 1]

26. Mr. ŠTURMA (Chairperson of the Planning Group) read out the names of the 24 members of the Planning Group.

*The meeting rose at 11.45 a.m.*

### **3161st MEETING**

*Wednesday, 8 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Adoke, Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

#### **Tribute to the memory of Chusei Yamada, former member of the Commission (concluded)\***

1. The CHAIRPERSON announced that the current meeting was dedicated to the memory of Mr. Chusei Yamada, who had been a member of the Commission from 1992 to 2008. With his vast experience of diplomacy and his outstanding skills as a jurist, Mr. Yamada had

made a significant contribution to the development and codification of international law in areas as varied as the law of the sea, the use of natural resources, disarmament and international trade. He had also made an exceptional contribution to the work of the Commission, as evidenced in his tireless efforts as Special Rapporteur on the topic of shared natural resources, which had reached a successful conclusion with the Commission’s adoption of the set of draft articles on the law of transboundary aquifers in 2008.<sup>13</sup>

2. Mr. WISNUMURTI, Mr. MURASE, Mr. COMIS-SÁRIO AFONSO, Mr. CANDIOTI, Mr. SABOIA, Mr. NOLTE and Mr. PARK also paid a tribute to Mr. Yamada, whose passing was a great loss for the Commission and the international legal community, and expressed their appreciation for his important contribution to the development and codification of international law. At the age of 14, after witnessing first-hand the bombing of Hiroshima on 6 August 1945 and having understood that diplomacy was the only way to put an end to the use of atomic weapons, Mr. Yamada had decided to become a diplomat. As a student at the Faculty of Law at the University of Tokyo, he had studied international law under Professor Kisaburo Yokota, the first Japanese member of the International Law Commission. Finding his approach to be too theoretical to be useful, Mr. Yamada had quickly arrived at a more pragmatic approach, the antithesis of the prevailing trend in academia at the time. He had constantly striven to strengthen the practical utility of international law, which he considered an instrument of peace, and to promote international understanding and harmony through diplomacy and the law. He had been the incarnation of post-war Japanese diplomacy, embodying its strengths and, perhaps, its imperfections.

3. He had been an exemplary member of the Commission, and his legal and diplomatic skills, his modesty, his spirit of compromise and his tireless commitment had been the keys to his success. Mr. Yamada had always tried to be friendly with all his colleagues, carefully avoiding overly assertive or offensive remarks. He had always been ready to offer compromise solutions, had contributed a great deal to the creation of a friendly and collaborative atmosphere in the Commission and had always respected his colleagues’ points of view, even when he disagreed with them. He had been a competent lawyer, a man of integrity and generosity, hard-working and meticulous. In 1997, while serving as Chairperson of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, his insightful proposals had enabled the Commission to move forward when the project had reached an impasse.

4. However, his greatest contribution had been in the development of principles and standards for the protection of natural resources and the environment, and he had proven to be a determined researcher, valuable legal adviser and careful and skilled negotiator, always working to reach

<sup>13</sup> The final version of the draft articles on the law of transboundary aquifers, with commentaries thereto, was adopted by the Commission at its sixtieth session (2008), *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54. The draft articles on the law of transboundary aquifers adopted by the Commission are reproduced in an annex to General Assembly resolution 63/124 of 11 December 2008.

\* Resumed from the 3159th meeting.

a compromise. As Special Rapporteur on the topic of shared natural resources, he had overcome both technical and legal challenges to bring his diplomatic skills, his initiative and his determination to bear in promoting the adoption of the draft articles on the law of transboundary aquifers by the Commission and the General Assembly.

5. Mr. Yamada had also been one of the few members of the Commission to have succeeded in forging constructive links with the representatives of the Sixth Committee. The relationship between the two bodies had continued to be a major concern for him and, at a recent meeting of the Japanese Society of International Law, he had suggested setting up a joint committee to serve as liaison between the two. His passing was a great loss, and it was the duty of the Commission to perpetuate his legacy.

6. Mr. PETRIČ, Mr. HMOUD, Mr. AL-MARRI, Mr. VALENCIA-OSPINA, Mr. KITTICHAISAREE, Mr. HUANG, Mr. SINGH and Mr. KAMTO then each also paid a warm tribute to Mr. Yamada, highlighting his human qualities and his exceptional professional skills. They all recalled that their eminent colleague had been not only an outstanding lawyer and diplomat, but also a man of great wisdom who was a good listener and sought to foster collaboration. Throughout his life, he had been committed to the development of international law, convinced that it was essential to international peace. A forward-looking man, he had also been concerned about the preservation of natural resources and had dared to guide the Commission's deliberations into the field of science. His contribution to the Commission's work on the subject of shared natural resources, in particular, had been invaluable. The Commission had been an important part of his life, and even after leaving it, he had continued to have its best interests at heart.

7. Members of the Commission would also recall the role Mr. Yamada had played as Chairperson of the Drafting Committee, where his remarkable diplomatic skills had been a valuable asset. In that role, he had launched an unprecedented initiative, namely the submission to the plenary Commission and to the Sixth Committee of two conflicting proposals on a single draft article whose consideration had stalled in inconclusive discussions. The initiative had resulted in the adoption of a consensus version of the contentious article on second reading.

8. Outside the Commission, Mr. Yamada had been heavily involved in the work of the Asian–African Legal Consultative Organization (AALCO), advising and encouraging several francophone African countries to become members, and had worked tirelessly to promote international law and training in that subject in Asia. He had also undertaken to promote ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property. His legacy was invaluable and would remain a source of inspiration for all.

9. The CHAIRPERSON in turn paid a tribute to Chusei Yamada. Quoting two haikus by the Japanese poet Issa, he said that though the world was ephemeral and life, all too brief, one's loved ones stayed on, even after their passing.

## Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

10. The CHAIRPERSON invited the members of the Commission to pursue their examination of the Special Rapporteur's first report on subsequent agreements and subsequent practice in relation to treaty interpretation (A/CN.4/660).

11. Mr. SABOIA said that, even though it was understood that the different means of interpretation established in the 1969 Vienna Convention were to be applied by way of a single combined operation, with no hierarchical order, article 31, paragraphs 1 and 2, of the Convention nevertheless established a general framework for their application.

12. Subsequent agreements and subsequent practice were important means of interpretation as they embodied actions taken by the parties to allow a treaty to adapt to changing circumstances and remain a useful instrument. That element of flexibility must be balanced with the element of stability represented by the terms of the treaty, its context and its object and purpose.

13. As the Special Rapporteur pointed out in paragraph 83 of the report, the concept "subsequent agreements" should be limited to individual agreements between all the parties. Similarly, subsequent practice should reflect a common position. Concerning the contrast between evolutionary and contemporaneous interpretation, it was only natural that a given court should emphasize one approach or the other depending on the treaty under consideration. Thus, in the case of a human rights treaty, greater importance would be attached to elements such as its context or the object and purpose. Environmental treaties, meanwhile, must be adapted dynamically to constant technological change. An interesting, but audacious, example was the interpretation given by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, which had argued that "measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge".<sup>14</sup>

14. In conclusion, he said that he was in favour of sending the four draft conclusions to the Drafting Committee, taking into account remarks made during the debate.

15. Mr. PETRIČ said that, since the report was the first on the topic, he would limit himself to making some general comments that, in his view, should be kept in mind throughout the project. Firstly, it was important not to deviate from the commentary to articles 31 and 32 of the 1969 Vienna Convention without good reason. As indicated by the title of article 31, which referred to a single general rule of interpretation, the Commission and States had wanted to stress that the interpretation of a

<sup>14</sup> *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, para. 117.*

treaty was a single operation which involved combining various means of interpretation, without hierarchy or distinction. It should be borne in mind that the international jurisprudence cited in the report, as extensive as it was, was not a source of law but simply an aid for identifying the existing international law. The decisions of the various adjudicatory bodies were binding only *inter partes* and did not create rules with *erga omnes* effect.

16. The Commission was going to produce conclusions that, while not being binding, would be imbued with its authority. The conclusions must therefore be well thought out and very cautious, particularly with respect to sensitive issues such as evolutive interpretation, the impact of social developments and practice in the broad sense, in other words, practice which did not reflect the agreement of all parties on the interpretation of the treaty. In addition, it should be recalled that the conclusions would be addressed not only to adjudicatory bodies but also to States, which also had to interpret treaties. Furthermore, the contradiction between stability and evolution caused a real dilemma, and the Commission must remain mindful of that in its deliberations. The issue of legal security, which was particularly important for small States, should also be kept in mind.

17. While he agreed with the substance of draft conclusion 1, he wondered whether the conclusion itself was actually necessary, except to introduce the subsequent draft conclusions. In his view, the “evolutive interpretation” of the European Court of Human Rights cited in paragraph 38 of the Special Rapporteur’s report was very complex and specific to the Court and should therefore have only a limited impact on the general conclusions drafted by the Commission. He took issue with the view expressed in paragraph 49 of the report, as well as with draft conclusion 2, which would have to be discussed by the Drafting Committee. In the English version, the verb “shall” was too restrictive, as was the link established between subsequent agreements and subsequent practice on the one hand and evolutive interpretation on the other. He also disagreed with the idea in paragraphs 107 and 108 of defining the concept of “subsequent practice” broadly and taking it into consideration for the purposes of treaty interpretation. In addition, the conclusion drawn went too far and was questionable from the point of view of legal certainty. He also had grave doubts with respect to draft conclusion 3, paragraph 3, in particular the last sentence, and serious reservations with regard to draft conclusion 4. It was not true that all State organs could be considered the authors of subsequent practice for the purpose of treaty interpretation, as such practice could only come from organs whose conduct had an international dimension. Lastly, draft conclusion 4, paragraph 2, could be misleading and should be modified or deleted. In conclusion, he proposed that the draft conclusions should be sent to the Drafting Committee.

18. Mr. MURPHY said that draft conclusion 1 should be a broad statement about the central importance of the rules on interpretation expressed in the 1969 Vienna Convention. He would prefer the first paragraph to also include a reference to articles 32 and 33 of the Convention, as articles 31 to 33 all reflected customary international law. The Commission should specify whether those

articles were binding on parties as treaty law or as customary international law. He therefore proposed that the first paragraph of the draft conclusion should read:

“Articles 31 to 33 of the Vienna Convention on the Law of Treaties address the interpretation of treaties. These rules bind as a matter of treaty law in circumstances where the Convention itself applies and otherwise bind as a matter of customary international law.”

19. As to the second paragraph, it must not suggest that the various tools available were autonomous units, any one of which might be used to the exclusion of others. He therefore proposed that the paragraph should read:

“Articles 31 and 32 identify various elements that may be used when interpreting a treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.”

20. With respect to draft conclusion 2, it was not necessary to describe subsequent agreements and subsequent practice as “authentic” means of interpretation, as all other means were also authentic. He also had doubts, for a variety of reasons, about the use of the expression “evolutive interpretation”, which could be confusing, and his preference would be to repeat the terms used in the 1969 Vienna Convention. He therefore proposed that the paragraph should be reworded:

“One of the elements that may be used in treaty interpretation, as identified in article 31, paragraph 3, concerns taking into account (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

21. Draft conclusion 3 could be strengthened by explaining what was not included in the concepts of “subsequent agreement” and “subsequent practice” and indicating that agreements to amend or modify a treaty were not considered the types of “subsequent agreement” and “subsequent practice” at issue in the draft conclusion, but were instead governed by articles 39 and 40 and by article 41 of the 1969 Vienna Convention, respectively. It could also be helpful to indicate that the Commission’s idea of modification of a treaty by subsequent practice had been expressly rejected by the Diplomatic Conference that had finalized the Vienna Convention. He did not understand what was meant by the term “manifest”, which appeared in three places in the Convention, but not as a modifier to “agreement”, and did not appear to be anchored in any of the prior work of the Commission or the jurisprudence of international courts or tribunals.

22. With regard to the title of draft conclusion 4, it was important also to mention the authors of subsequent agreements. In addition, the first sentence should provide readers with guidance in identifying the State organs in question, perhaps by pointing, as in paragraph 121 of the report, to the practice of “those organs of a State party which are internationally regarded as being responsible

for the application of the treaty” or, as in the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, by indicating that an “organ” was a body that exercised “legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”.<sup>15</sup> Failing such a modification, the sentence should be deleted.

23. The second sentence of draft conclusion 4 read as though the practice of non-State actors was a form of “subsequent practice” envisaged by article 31 of the 1969 Vienna Convention, an assertion for which there was no support—not surprisingly, given that the Convention dealt exclusively with the practice of parties to the treaty. The reference to “social practice” was driven exclusively by the jurisprudence of the European Court of Human Rights, which did not seem appropriate in a general guideline intended to assist all international courts and tribunals. If the intention of the sentence was to say “Subsequent practice by relevant State organs may be influenced by the conduct of other actors, including international organizations, non-governmental organizations and other non-State actors”, then it should be put in those terms. In conclusion, he said that he was in favour of sending the draft conclusions to the Drafting Committee.

*The meeting rose at 1.05 p.m.*

## 3162nd MEETING

*Friday, 10 May 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

### Protection of persons in the event of disasters (A/CN.4/657,<sup>16</sup> sect. B, A/CN.4/662,<sup>17</sup> A/CN.4/L.815<sup>18</sup>)

[Agenda item 4]

#### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON introduced the text and titles of draft articles 5 *bis*, and 12 to 15, adopted by the Drafting

<sup>15</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40, art. 4, para. 1. The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

<sup>16</sup> Mimeographed; available from the Commission’s website.

<sup>17</sup> Reproduced in *Yearbook ... 2013*, vol. II (Part One).

<sup>18</sup> Mimeographed; available from the Commission’s website.

Committee at the sixty-fourth session, as contained in document A/CN.4/L.812.<sup>19</sup>

2. Following comments by Mr. FORTEAU and Mr. CANDIOTTI, the CHAIRPERSON said he took it that the Commission wished to adopt the titles and texts of the draft articles, subject to editorial corrections to the French and Spanish versions.

*It was so decided.*

### Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. Mr. ŠTURMA commended the Special Rapporteur on his first report and his careful analysis of the case law of various international adjudicative bodies. Concerning methodology, there was one basic issue to be resolved: whether the draft conclusions should be considered as descriptive or prescriptive in nature. He shared the concerns expressed by other members about the risk of the latter approach.

4. He endorsed draft conclusion 1 and the first paragraph of draft conclusion 2, but thought that the insertion of the words “establishing agreement” after “subsequent practice” might be useful. As to the second paragraph of draft conclusion 2, the question of whether the term “evolutive” was more appropriate than “evolutionary” should be discussed by the Drafting Committee. On a matter of principle, however, he considered that evolutive interpretation was not another method of interpretation, but a result of the application of certain means of interpretation pursuant to the 1969 Vienna Convention. The case law of the human rights bodies mostly led to the evolutive interpretation of treaties, although it could in some cases lead to a contemporaneous interpretation.

5. With the exception of the reference to “social practice” in draft conclusion 4, he found the draft conclusions to be generally acceptable and recommended their referral to the Drafting Committee.

6. Mr. KAMTO commended the Special Rapporteur on a detailed and in some respects bold first report, which raised some serious problems.

7. Concerning methodology, he questioned the structure of the report. It would have made more sense for the chapter on the definition of subsequent agreement and subsequent practice as means of interpretation of a treaty to have preceded the chapter on the general rule and the means of interpreting a treaty, in other words, for the concepts to have been defined before the legal regime was examined. Another methodological problem was the failure to draw a distinction between subsequent agreements and subsequent practice in relation to multilateral and bilateral treaties. While for the former

<sup>19</sup> *Ibid.*, documents of the sixty-fourth session (2012).

they could be a means of interpretation, for the latter their effect was to modify or confirm the original intention of the parties. Admittedly, articles 31 and 32 of the 1969 Vienna Convention did not draw such a distinction, but the Commission's objective was to clarify how the different means of interpretation mentioned in those articles should be applied. As to the form of the report, the distinction drawn between a narrow and broad definition of subsequent practice in paragraphs 92 *et seq.* would have been clearer if all the decisions based on one or the other definition had been grouped together; the conclusion, in paragraphs 107 and 108, did not indicate which was the dominant trend.

8. Turning to substance, he endorsed the Special Rapporteur's statement that evolutive interpretation did not seem to be a separate method of interpretation but rather a proper application of the usual means of interpretation (para. 62) and Mr. Forteau's suggestion that that point should be explicitly made in draft conclusion 2, or at least in the commentary. He also endorsed the statement that subsequent practice must be practice "in the application of the treaty" (para. 111). However, he had serious problems with other aspects of the Special Rapporteur's analysis.

9. First, article 31 of the 1969 Vienna Convention listed the means of interpretation in a certain logical order, with the object and purpose of the treaty shedding light on its interpretation and consequently on the application of the means of the interpretation. Yet the first step in interpreting a treaty was to look at the "ordinary meaning" of its terms "in their context". It was not so much a question of a hierarchy but of a logical order which must be followed so as to avoid subjective interpretations based on a selective application of the means of interpretation. Draft conclusion 1, paragraph 2, which violated that logic, was unacceptable and should be redrafted.

10. Second, he expressed concern about the definition of subsequent practice in draft conclusion 3, paragraph 2, as "conduct, including pronouncements", by "one or more" parties. That might allow for the practice of one State, including one more powerful than others, to be considered a means of interpretation for multilateral treaties and was not in keeping with the 1969 Vienna Convention. He drew attention to the narrower definition provided by the World Trade Organization (WTO) Appellate Body in the *Japan—Taxes on Alcoholic Beverages* case, referred to in paragraph 92 of the report, and suggested that paragraph 2 should be reworded along those lines.

11. Third, he was not convinced by the Special Rapporteur's argument that subsequent practice should include "social practice". Although an exception might be made for the interpretation of human rights treaties, that would call for an approach based on treaty type that was not advisable. Moreover, while "social acceptance" and "social developments" were part of the case law of the European Court of Human Rights, they had no basis in any other regional or in universal case law.

12. Fourth, he endorsed Mr. Murphy's objections to mentioning non-State actors, in particular non-governmental organizations (NGOs), in connection with

subsequent practice; the Special Rapporteur's explanations in that regard, in paragraphs 138 to 140 of the report, were simply too far-fetched. However, the case of the International Committee of the Red Cross (ICRC) could be considered in greater depth, given that organization's special role in international humanitarian law. Draft conclusion 4, paragraph 2, should therefore be reviewed.

13. In conclusion, he said that with the exception of draft conclusion 2, all the draft conclusions required some revision. He was confident that the task could be entrusted to the Drafting Committee, to which he was in favour of referring all the draft conclusions, and in which he would continue to argue the points he had just raised.

14. Mr. MURASE said that the report could have been submitted several years earlier if the Commission had commenced the topic under the normal procedure: by appointing a special rapporteur instead of setting up a study group, whose documents went unpublished and debates unrecorded in all of the Commission's working languages.

15. Regarding the scope of the topic as described in paragraph 4 of the report, he said that the exercise of interpretation covered not only textual but also contextual, teleological and "effectiveness-based" aspects. In its decision in 2002, the Eritrea–Ethiopia Boundary Commission found that the function of subsequent practice and conduct was not limited to treaty interpretation: it could also affect the legal relations of the parties.<sup>20</sup> The Special Rapporteur therefore would be well advised not to take an overly restrictive approach to the scope of the topic. He himself did not consider it necessary to make a clear demarcation between the topic under consideration and the topic "Formation and evidence of customary international law", as the Special Rapporteur did in paragraph 7 of the report. The two topics would inevitably overlap, for example in the parallel development of subsequent practice within a treaty and the formation of customary law outside the treaty. The two Special Rapporteurs could work on the same problem, but from different angles.

16. Concerning methodology, he cautioned against trying to draw common principles on treaty interpretation from the case law of different international courts and tribunals, as each body had its own constitutional apparatus, making for inherent differences in treaty interpretations. He was particularly bothered by the descriptions in paragraphs 13 and 96 of the report on the International Centre for Settlement of Investment Disputes (ICSID) arbitrations. It was improper to treat an interpretation of a specific investment agreement by an *ad hoc* tribunal as if it represented ICSID as a whole. Besides, the nature of an ICSID tribunal in which the two parties were the investor and the host State was quite different from ordinary inter-State arbitration tribunals. The ICSID tribunals could invoke the case law of international courts, but that did not mean that their decisions could be treated as precedents of international law.

<sup>20</sup> *Decision regarding delimitation of the border between Eritrea and Ethiopia*, decision of 13 April 2002, p. 85.

17. Turning to draft conclusion 1, he was not sure to what extent customary international law was viewed as regulating matters such as the hierarchical order of the various means of treaty interpretation and their interrelations, as was implied in the second paragraph. There were few explicit references to customary international law in the pronouncements of international courts. It might therefore be better not to mention customary international law in the draft conclusion and to transpose the remaining text to the preamble of the draft.

18. On draft conclusion 2, he recalled his strong reservation regarding evolutionary interpretation, set out in the paper on the subject he had submitted to the Study Group in 2011. That position had been generally accepted by the Study Group, and he therefore proposed that the second paragraph of draft conclusion 2 should either be deleted or redrafted along the lines suggested by Mr. Murphy. Concerning draft conclusion 4, he endorsed members' criticism of the first paragraph and the suggested deletion of the words "Subsequent practice by non-State actors, including social practice" in the second paragraph. He was nonetheless in favour of referring all the draft conclusions to the Drafting Committee.

19. Mr. WISNUMURTI said that, as the International Court of Justice and other adjudicative bodies had confirmed, the basic rule governing treaty interpretation was contained in article 31 of the 1969 Vienna Convention. For that reason, he agreed with the first paragraph of draft conclusion 1. However, since that article did not establish a hierarchy of the different means of treaty interpretation and since no consistent pattern in the use of those means could be discerned from the decisions of international adjudicative bodies and the Human Rights Committee, he had doubts about the wording of the second paragraph of the draft conclusion.

20. He had no problems with the first paragraph of draft conclusion 2, but the second paragraph was unclear and lacked the necessary parameters for guiding the application of evolutive interpretation. Such interpretation had to be treated with caution, must preserve treaty stability and must be accompanied by common subsequent practice or express subsequent agreement of the parties. In the case of multilateral treaties, it had to rest on the common understanding of all States parties.

21. In draft conclusion 3, the word "manifested" should be replaced with "expressed" in the first paragraph and the phrase "which contributes to the manifestation of an agreement of the parties regarding the interpretation of the treaty" should be added to the second paragraph. He had no difficulty with the third paragraph. The first paragraph of draft conclusion 4 was fine, but he had reservations about the second paragraph, because it was supported by very limited case law.

22. All four draft conclusions should be referred to the Drafting Committee.

23. Mr. KITTICHAISAREE said that a balance had to be maintained between the principle of *pacta sunt servanda* and the need for flexibility in treaty interpretation. Flexibility must not, however, undermine the

object and purpose of a treaty or negate the intention of its drafters. The courts had not relied on subsequent agreement or subsequent practice in any consistent manner, as was shown in paragraphs 36, 40 and 41 of the report. That raised the question, with regard to the draft conclusions, of whether the use of subsequent agreements and subsequent practice could or should vary according to the nature of the subject matter—human rights, for example.

24. The first paragraph of draft conclusion 1 should refer to articles 31, 32 and 33 of the 1969 Vienna Convention, as Mr. Murphy had suggested. He himself wondered how the second paragraph would apply in practice in relation to the Charter of the United Nations, which was a classic example of a living instrument. The Special Rapporteur should have analysed subsequent agreements and subsequent practice in the context of the Charter of the United Nations before drafting his conclusions, and he should have examined in the report the issue of *de facto* amendments through subsequent practice.

25. The first paragraph of draft conclusion 3 should be amended to reflect the fact that a subsequent agreement or subsequent practice that might affect the interpretation of a multilateral treaty must include all States parties thereto, unless the effect envisaged concerned only certain States parties. He concurred with Sir Michael Wood with regard to the third paragraph of draft conclusion 3.

26. The second paragraph of draft conclusion 4 was unsubstantiated, because the practice referred to in paragraphs 136 to 140 of the report was State practice, not the practice of international organizations or NGOs. With respect to the ICRC, the so-called "interpretive guidance"<sup>21</sup> provided by it should be understood as being either a "supplementary means of interpretation" under article 32 of the 1969 Vienna Convention or a "special meaning" under article 31, paragraph 4, of the Convention. If the draft conclusion was to maintain the relevance of subsequent practice by non-State actors, despite the absence of its recognition in case law, it might be necessary to consider the relative weight given to different entities. For instance, more weight should be ascribed to the practice of international organizations or bodies which were given a special mandate to interpret respective treaties than to the practice of NGOs. Lastly, he agreed with Mr. Park that the text of each conclusion should have normative content expressed using legal terminology, not be too general and supplement the provisions of the 1969 Vienna Convention without modifying or contradicting them.

27. Mr. HMOUD said that, as the articles of the 1969 Vienna Convention on the interpretation of treaties had stemmed from a compromise between various doctrinal approaches to treaty interpretation, they had left a margin of appreciation not conducive to legal certainty. Treaty interpretation under the Vienna regime was an inherently flexible operation which not infrequently led legal practitioners to reach different conclusions on an ambiguous text. Hence the international law community

<sup>21</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009.

needed guidance from the Commission on treaty interpretation. The purpose of treaty interpretation was to clarify ambiguity, not to amend the treaty. Even when a text was ambiguous, it could be amended only through the formal methods specified in the 1969 Vienna Convention.

28. Article 31 of the Convention did not lay down a hierarchy of the means of treaty interpretation. While different courts and tribunals might place more emphasis on some elements than on others, no interpretation could run counter to the object and purpose of a treaty or void a treaty provision of its content. In reality, depending on the tribunal and the case, the supplementary means of interpretation referred to in article 32 might be as pertinent as the “authentic elements” of article 31.

29. For a subsequent agreement to have authoritative value for the purposes of interpretation, it had to be an agreement between all the parties to a treaty. Similarly, for subsequent practice to be an authentic element of interpretation, that had to be agreed on by all the parties to the treaty. It would be helpful if the Commission could explain the various conditions that had to be met for subsequent agreements and subsequent practice to be authentic elements or means of interpretation. While subsequent practice that did not evidence an agreement between the parties was not without merit for the purpose of interpretation, its value was limited. It was doubtful whether practice engaged in by a limited number of parties and on which other parties remained silent could be said to establish the agreement of the parties within the meaning of article 31, paragraph 3 (*b*). Courts and tribunals that had resorted to a broad definition of subsequent practice had plainly struggled to be consistent. It was important for dispute settlement bodies to adopt a uniform, predictable approach, otherwise they would only add to judicial and legal uncertainty.

30. While he agreed with the Special Rapporteur that subsequent practice by a State organ entrusted with the application of a treaty, or internationally regarded as such, might be attributed to the State, he was doubtful that social developments within States and the practice of non-State actors could be deemed relevant for the purpose of attributing subsequent practice to the State.

31. He was in favour of sending the draft conclusions to the Drafting Committee.

32. Ms. ESCOBAR HERNÁNDEZ, referring to the Special Rapporteur’s methodology, said that some aspects of the draft conclusions might need to be revised in the light of additional elements of practice, particularly that of national courts, that the Special Rapporteur intended to address in future. The excellent substantive content of the report had unfortunately not been fully reflected in the draft conclusions. She was especially concerned at the ambiguity in the way in which the limits of the system of interpretation set up under the Vienna regime were defined. The danger was that the process of interpretation might be construed as something other than a single combined operation, or that the means of interpretation set out in article 31 might be seen as interrelated in hierarchical, as opposed to logical, terms. The Commission had already taken a position on many such issues, and it was neither

reasonable nor desirable for it to reconsider that position in general, although it obviously had to do so in respect of the specific means of interpretation, subsequent agreements and subsequent practice, which were the subject of the topic.

33. Turning to the draft conclusions, she noted that the word “emphasis” in draft conclusion 1, paragraph 2, could give rise to confusion, since it might be construed to refer to a normative or hierarchical emphasis—something that the Commission had clearly excluded in its 1966 commentaries.<sup>22</sup> Secondly, the use of the expression “on the text of the treaty or on its object and purpose”, with reference to the two means of interpretation that could be emphasized, was incompatible with the single combined operation stipulated in the 1966 commentaries.<sup>23</sup> Thirdly, the means of interpretation provided for in articles 31 and 32 could not be placed on an equal footing, since each relied on distinct mechanisms, rules and conditions. Lastly, given the role of paragraph 2 as the frame of reference for the remaining draft conclusions, it should expressly refer to “subsequent agreements and subsequent practice”.

34. As to draft conclusion 2, she had serious reservations about the lack of clarity in the use of the terms “subsequent agreements” and “subsequent practice”, for they did not constitute authentic means of interpretation in all instances. Further, the text should include a reference to article 31, paragraph 3, the absence of which was all the more noticeable as none was made in draft conclusion 1 either. The draft conclusion should also state that subsequent agreements and subsequent practice could guide a contemporaneous interpretation of a treaty, not just an evolutive one.

35. Draft conclusion 3 was a key provision because it defined the two categories on which the Commission’s work focused. Since the term “*manifestado*” in Spanish was unclear and appeared in neither the 1969 Vienna Convention nor the Commission’s 1966 commentaries, she would appreciate an explanation of its intended purpose. The definition in paragraph 1 should provide practical elements to help determine whether a particular subsequent agreement was included within the meaning of article 31, paragraph 3 (*a*), especially given the wide variety of agreements encountered in practice.

36. Concerning paragraph 2, she objected to the use of the phrase “by one or more parties” since, in keeping with article 31, paragraph 3 (*b*), subsequent practice could never be unilateral but had rather to consist of conduct, including pronouncements, by all parties to the treaty. Moreover, paragraph 2 did not take into account the special nature of the subsequent practice defined in article 31, paragraph 3 (*b*), and its special relationship to the existence of an agreement between the parties, nor did it take sufficient account of the variety of acts that could constitute such practice.

37. With regard to paragraph 3, it was not desirable to link two separate categories of subsequent practice—those

<sup>22</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 187 *et seq.*; see, in particular, pp. 219–220, para. (8).

<sup>23</sup> *Ibid.*

referred to in article 31, paragraph 3 (b), and in article 32—in the same draft conclusion, since doing so could mislead the reader about the nature of such practice and its validity as a means of authentic interpretation. If the reference to “Other subsequent practice” was maintained, the paragraph should clearly specify the conditions in which recourse could be had to such practice. To have that phrase relate exclusively to article 32 was too restrictive, since it could just as easily refer to article 31, paragraph 1.

38. Draft conclusion 4 left open a number of gaps. It did not provide helpful elements for identifying the State organs whose subsequent practice could be taken into account for the purpose of treaty interpretation. It failed to address the authorship or attribution to the State of subsequent agreements, which was necessary since the notion of agreement expressed in article 31, paragraph 3 (a), was not limited to formal agreements such as treaties. The point made in paragraph 2 should be made more explicit, and the use of the expression “social practice” merited further consideration.

39. With those comments, she was in favour of referring the draft conclusions to the Drafting Committee.

40. Ms. JACOBSSON said that, owing to the nature of the topic, it was of the utmost importance to focus on State practice and to see how States interpreted the consequences of their action. Much State practice in the interpretation of treaties worked smoothly, causing no major conflicts, and it should be regarded as equally important as was the interpretation of treaties that sparked controversy. This was particularly relevant in situations where bilateral and regional treaties were applicable.

41. With regard to draft conclusion 1, she shared the view of other Commission members that it should state that article 32 of the 1969 Vienna Convention, like article 31, was to be considered as a rule of customary law: the risk of an *a contrario* interpretation should be averted. Equally important was the fact that international tribunals such as the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea had taken the position that articles 31 to 33 of the Convention were to be considered as reflecting customary law. Paragraph 1 should be moved to a separate draft conclusion and a distinction made between article 31, as a general rule of interpretation, and article 32, as a supplementary means of interpretation.

42. As to draft conclusion 2, paragraph 1, it should specify that it was only “together with the context” that subsequent agreements and subsequent practice were to be regarded as authentic means of interpretation. Although paragraph 2 was the most controversial part of the draft, it was far too early to dismiss it at the current stage, since there were convincing examples of case law, particularly in the field of human rights, which could not be disregarded. She endorsed the proposal to include a reference to contemporaneous interpretation. Paragraph 2 should also reflect the notion that a distinction had to be made between treaties of various types—bilateral and multilateral, for example. The interpretation of treaties that established rights for other States or actors, to which reference was made in the penultimate footnote to paragraph 30 of the report, required further discussion.

43. With regard to draft conclusion 3, paragraph 1, she was not convinced of the need for the word “manifested”. Concerning paragraph 2, she endorsed Mr. Kamto’s proposal to reword it in line with the narrower definition of subsequent practice given by the WTO Appellate Body and concurred with Ms. Escobar Hernández about the need for the references to articles 31 and 32 to be in separate paragraphs.

44. In draft conclusion 4, paragraph 1, the current wording did not seem adequate to address the complicated issue of the conduct of State organs that could be attributed to the State. It was important to elaborate on what was meant by attribution in that context, as distinct from in the articles on responsibility of States for internationally wrongful acts.<sup>24</sup>

45. She was in favour of referring all four draft conclusions to the Drafting Committee.

*The meeting rose at 1.05 p.m.*

### 3163rd MEETING

*Tuesday, 14 May 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

### Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the Special Rapporteur’s first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/660).

2. Mr. HASSOUNA said that it was vital not to amend or contradict the fundamental rules governing treaty interpretation set forth in the 1969 Vienna Convention. The prime purpose of subsequent agreements and subsequent practice was to contextualize the terms of a treaty, since they had to be interpreted in the light of their context, provided that the resultant interpretation did not

<sup>24</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

stray too far from their ordinary meaning, or lend them an absurd or unreasonable meaning. A straightforward reading of the Convention suggested that a subsequent agreement concerning the interpretation or application of a treaty presupposed express modification of the treaty language; subsequent practice would matter only if, through statements or other means, it clearly established the parties' agreement as to the meaning to be given to those terms. That restrictive approach excluded action by a party which contradicted its statements. Practice establishing a tacit or an express agreement on the application or interpretation of the treaty formed an integral part of the treaty and might serve as estoppel.

3. Since international case law was relatively heterogeneous, it would be preferable to rely more on regional case law and on the practice of the United Nations. The case law of the ICSID tribunals was also far from uniform but, contrary to the view expressed in the report, those tribunals had sometimes attached great weight to the presumed intentions of the parties to the 1969 Vienna Convention, as reflected in the *travaux préparatoires*.

4. He supported the draft conclusions proposed by the Special Rapporteur and was in favour of referring them to the Drafting Committee, provided that they were recast in clearer, more detailed language. For example, in the first paragraph of draft conclusion 2, it should be made plain that it was only subsequent practice within the meaning of article 31, paragraph 3 (b), of the 1969 Vienna Convention that constituted "authentic means of interpretation". Practice in the broader sense served simply as supplementary means of interpretation and, moreover, had to be the practice of all parties. In the second paragraph, it would be wise to define the term "evolutive interpretation", or to use a more readily understandable term. Lastly, it was questionable whether the practice of non-State actors should be taken into consideration, as suggested in draft conclusion 4, that being particularly true of social practice, which was not universally recognized.

5. Mr. GEVORGIAN endorsed the scope and aim of the work as defined by the Special Rapporteur. The topic was sensitive and not without political implications. It was therefore vital to devise a uniform approach which would be of service to all those who were called upon to interpret treaties. The Special Rapporteur's exhaustive analysis of international case law was valuable, but the *travaux préparatoires* to the 1969 Vienna Convention and the principles established by the Convention, especially those flowing from article 31, ought also to be borne in mind.

6. In draft conclusion 1, mention should be made of article 32, which was as much a reflection of customary international law as was article 31. It might be inadvisable to refer to evolutive interpretation in draft conclusion 2 as, in the absence of any definition of that notion, its meaning could be deduced only by applying a variety of means of interpretation. In draft conclusion 3, it was essential to avoid any ambiguity in the definitions of "subsequent agreement" and "subsequent practice". Lastly, he was unconvinced that it would be helpful to include a reference to social practice in draft conclusion 4. However, he considered that the four draft conclusions could be referred to the Drafting Committee.

7. The CHAIRPERSON invited the Special Rapporteur to sum up the discussion on his first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

8. Mr. NOLTE (Special Rapporteur) thanked the members of the Commission for their constructive comments. Mr. Šturma had made the very general point that the draft conclusions could be perceived either as more descriptive, or as more prescriptive. While that was true, that feature was not necessarily unique to the report and draft conclusions, for international law was often predicated on a description of practice that produced a more or less prescriptive effect. That comment had therefore been a helpful reminder that the draft conclusions could be formulated either way.

9. All the speakers in the debate had agreed that the Commission's work on the topic should cleave as faithfully as possible to the 1969 Vienna Convention, although it had to be remembered that the rules of interpretation defined therein had been a compromise between varying schools of thought. Those rules reflected a consensus which had lasted for half a century and there should be no departing from it unless there were good reasons for doing so. As had been suggested, in forthcoming reports and in the commentaries to the draft conclusions, he would give greater prominence to the Commission's *travaux préparatoires* leading up to the Convention.

10. Most members had insisted on the need to visualize the process of treaty interpretation as a "single combined operation" without distinguishing between, or unduly emphasizing, any of the means listed in article 31 of the 1969 Vienna Convention. The process of interpretation and its outcome were, however, two quite separate matters. Determining the relevance, in a specific case, of a given means of interpretation alone and then in relation to other means of interpretation, was not the same thing as singling out that means. In fact, subsequent agreements and subsequent practice were only two of several means of interpretation. That did not, however, signify that it was possible to choose freely how to use each means. The reasoning underpinning sound judgments often took as its point of departure the ordinary meaning of the terms of a treaty read in their context and in the light of the object and purpose, while at the same time taking into account the other means listed in article 31 of the Convention, supplemented by those mentioned in article 32. Draft conclusion 1 was certainly not meant to facilitate manipulation in that respect, as Mr. Kamto had feared. That balance between the various means of interpretation was fundamental to all the Commission's work on the law of treaties and must therefore be preserved. Some members had criticized the draft conclusions as being too general. He thought that a general approach was necessary at the introductory stage of the work and helped to recall that the interpretative process must remain open. The general nature of the draft conclusions should not, however, endanger legal certainty.

11. With regard to draft conclusion 1, several members had suggested that article 32, and even article 33, should be placed on the same footing as article 31 of the 1969 Vienna Convention. He had no objections to that. He had

drawn a distinction, because the Study Group on treaties over time had insisted on the need to make the “general rule” set forth in article 31 the unquestionable starting point of the interpretative process. On the other hand, members’ views had diverged somewhat on the question of whether the means of interpretation mentioned in article 31 should all be “thrown into the crucible”. Some members had stressed the importance of the means listed in paragraph 1 of that article, while others had considered that they alone did not comprise the whole essence of the general rule. At all events, nothing in the wording of the article or in the *travaux préparatoires* suggested that “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” should be given a privileged position. Nor was there any reason to infer that, conversely, the means referred to in paragraph 3 were less important; in fact, in his third report on the law of treaties (1964), the Special Rapporteur, Sir Humphrey Waldock, had gone so far as to say “[s]ubsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to the treaty”.<sup>25</sup> The only means which were supplementary in nature were those mentioned in article 32.

12. All the same, the “ordinary meaning” remained the point of departure for interpretation, as one member had rightly contended. That being so, a provision could be interpreted by giving more weight to some means than to others. As one member had commented, the interaction of the means thrown into the crucible was guided by the evaluation of those means by the interpreter; that evaluation entailed ascertaining the relevance of the various means of interpretation in the particular case and determining their interaction, by placing proper emphasis on them.

13. That was the reason the report referred to the case law of a variety of international courts and tribunals. Contrary to the understanding of some members, that case law did not show that, in the abstract, courts and tribunals diverged in the emphasis which they placed on various means of interpretation—which would mean that they disagreed about how to interpret the 1969 Vienna Convention. In reality, it seemed that the particular provisions applied by those courts and tribunals usually required the placing of varying degrees of emphasis on certain means of interpretation. The cases cited in the report therefore illustrated how given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty, as Mr. Tladi had put it. Perhaps, as Mr. Forteau had proposed, it would be better to link the emphasis to be placed on certain means of interpretation to the “nature” of the treaty or treaty provisions which were to be applied, to decide whether, when human rights treaties were interpreted, greater emphasis was to be placed on their object and purpose, whereas the ordinary meaning of terms would be stressed more when interpreting treaties containing specific, reciprocal obligations, such as bilateral commercial agreements. In

any event, draft conclusion 1 did not imply that different international courts and tribunals had developed a style of interpretation regardless of the nature or content of the treaties which they applied. Perhaps it was also necessary to make clear that the purpose of the second paragraph of that draft conclusion was not to change the logical order of reasoning suggested by article 31, but to refer to the practice of courts and tribunals in order to adjust the emphasis placed on the various means of interpretation mentioned in articles 31 and 32 according to the circumstances of the case.

14. Although Sir Michael had suggested that the expression “means of interpretation”, which might be misleading, should be replaced with “elements of interpretation”, he personally thought that, for various reasons, there should be no deviating from the terminology employed by the 1969 Vienna Convention and the Commission. The term “means” did not single out the different factors mentioned in articles 31 and 32 of the Convention, but indicated that, on the contrary, each had a particular function in the overall process of interpretation which was a single, combined operation. Just as a court usually began to construct its reasoning by examining the terms of a treaty, then by analysing them in their context and in the light of the object and purpose of a rule, it was necessary first to ascertain the relevance of the different means of interpretation in a given case before “throwing them into the crucible” in order to arrive at a correct interpretation where each was given its appropriate weight.

15. He concurred with Mr. Murase that some of the case law of the *ad hoc* tribunals set up under the Convention on the settlement of investment disputes between States and nationals of other States might be of limited significance in comparison with that of permanent courts and tribunals. On the other hand, unlike Sir Michael, he considered that paragraph 19 of the report was correct in stating that the Inter-American Court of Human Rights did not generally rely on a primarily textual approach, but tended to resort to other means of interpretation, in particular the object and purpose of the treaty.

16. With regard to draft conclusion 2, he was not convinced that it was necessary to depart from the wording of the 1969 Vienna Convention, as Sir Michael had proposed. Unlike Mr. Murphy, he deemed it essential to make it clear that subsequent agreements and subsequent practice were “authentic” means of interpretation for, although they did not express the original agreement between parties, they were equally relevant as means of interpretation. In order to dispel the doubts expressed by Ms. Escobar Hernández as to the authenticity of all subsequent agreements and all subsequent practice as means of interpretation, he drew attention to the fact that the first paragraph of draft conclusion 2 referred only to subsequent agreements and subsequent practice “between the parties to a treaty”. As far as the second paragraph of the draft conclusion was concerned, he endorsed the view expressed by several members that subsequent agreements and subsequent practice might guide evolutive interpretation and might also support a contemporaneous interpretation, a point which the Commission should make more explicitly. In that connection, courts and other authorities responsible for applying the

<sup>25</sup> *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 60, commentary to article 71, para. (25).

law should be reminded that what was sometimes called “evolutive” interpretation was generally intrinsically related to the parties’ practice and should not therefore be taken lightly. That, to reply to Mr. Park, was why evolutive interpretation had to be taken into consideration. The fact that, as Mr. Murase had said, different authors had given different shades of meaning to that term should perhaps, as Mr. Wisnumurti had suggested, lead the Commission to define it more precisely. A closer look should be taken both at Mr. Forteau’s suggestion that it was necessary to spell out the fact that there was no presumption of contemporaneous interpretation and at the proposal put forward by Mr. Forteau and Mr. Kamto that one conclusion should explicitly state that evolutive interpretation was not a special form of interpretation but resulted from the application of the usual means of interpretation. Lastly, Mr. Murphy was mistaken in believing that the report said that evolutive interpretation necessarily took account of subsequent agreements and subsequent practice; it made the more modest claim that it might be guided by them.

17. Turning to draft conclusion 3, he said that, unlike Mr. Forteau, he did not think that subsequent agreements within the meaning of article 31, paragraph 3 (a), and the subsequent practice which established the agreement of the parties within the meaning of article 31, paragraph 3 (b), were necessarily binding by virtue of the principle of *pacta sunt servanda*. As for the second paragraph of that draft conclusion, in order to take account of the diverging views of Ms. Escobar Hernández, Mr. Huang, Mr. Kamto, Mr. Petrič and Mr. Wisnumurti, on the one hand, and of Mr. Forteau, Mr. Hassouna, Mr. Hmoud and Sir Michael, on the other, regarding the practice of one or some, but not all, parties to a treaty, it might be wise to study the proposal put forward by Ms. Escobar Hernández to devote a separate draft conclusion to subsequent practice in the broader sense which did not reflect the agreement of all parties, but which might constitute a means of interpretation within the meaning of article 32 of the 1969 Vienna Convention. As for the comments made by Mr. Forteau and Sir Michael about the distinction between a subsequent agreement within the meaning of article 31, paragraph 3 (a), and subsequent practice within the meaning of paragraph 3 (b) of that article, the drafting history of the Convention clearly showed that that distinction turned on whether the parties’ agreement was express or tacit, something which could be of considerable importance when determining where the burden of proof lay. Contrary to what those terms seemed to suggest, the difference between the two kinds of agreement was not always clear in practice. For that reason, as proposed by Mr. Wisnumurti, it might be advisable, in the English version, to replace the adjective “manifested” with “express”.

18. He readily agreed with Mr. Forteau and Mr. Murphy that it would be desirable to have more precise and detailed wording in draft conclusion 4. One possibility would be to use the formulation contained in paragraph 124 of the report and to specify, as suggested by Mr. Murphy, that the practice in question was that of legislative or judicial organs at a level below that of the central government. The draft conclusion did make the important point that for the purposes of treaty interpretation, practice

must be specifically attributed to a State. Nevertheless, as Mr. Murphy had pointed out, the draft conclusion should probably also refer to subsequent agreements. He endorsed the concerns expressed by some members that in the second paragraph of that draft conclusion, the expression “Subsequent practice by non-State actors” might mislead the reader into thinking that that practice was deemed to be at the same, or a similar, level to that of States parties to a treaty. That phrase could be replaced, for example, with “the pronouncements or activities of non-State actors”, which would also meet Mr. Forteau’s concern, since he considered that that paragraph dealt with the question of evidence. However, the issue of non-State actors’ activities should not be ignored; the fact that they were mentioned did not interfere with the discretion of the treaty interpreter. Lastly, he took note of the fact that many members were reluctant to recognize “social practice” as a form of subsequent State practice. He had not, however, intended to assert that social practice constituted subsequent State practice but, on the contrary, to emphasize that, in order to be taken into account, any social practice had to acquire the form of State practice.

19. Finally, with regard to some points which were unrelated to any particular conclusion, he said that a number of aspects of the topic which had not been dealt with in his first report would be broached in later reports. With reference to the limits of interpretation based on subsequent practice, including what Mr. Kittichaisaree and Mr. Park had termed “*de facto* amendments”, several members had been reluctant to recognize any possibility of treaty modification through a subsequent agreement which was not a formal amendment. He considered that it was necessary to examine that matter in order to cover the whole of the topic. He assured members that he would display the appropriate sensitivity when doing so.

20. The CHAIRPERSON said that he took it that the Commission wished to refer draft conclusions 1 to 4 to the Drafting Committee.

*It was so decided.*

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

[Agenda item 1]

21. The CHAIRPERSON, speaking in the absence of the Chairperson of the Drafting Committee, said that the Drafting Committee on subsequent agreements and subsequent practice in relation to treaty interpretation was composed of Ms. Escobar Hernández, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood, Mr. Tladi (Chairperson of the Drafting Committee) and Mr. Forteau (Rapporteur, *ex officio*).

*The meeting rose at 11.10 a.m.*

\* Resumed from the 3160th meeting.

## 3164th MEETING

Wednesday, 15 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

### Immunity of State officials from foreign criminal jurisdiction (A/CN.4/657,<sup>26</sup> sect. C, A/CN.4/661,<sup>27</sup> A/CN.4/L.814<sup>28</sup>)

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPporteur

1. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), introducing her second report (A/CN.4/661), drew attention to a number of translation errors that would necessitate the issuance of corrigenda in some of the language versions.

2. With regard to the content of the second report, she noted that the report followed the methodological approach and timetable proposed for the work on the topic during the current quinquennium, in particular, the treatment of the various issues step by step. On that basis, the report focused on the preliminary questions that needed to be addressed at the outset of the Commission's work and on a set of issues on which the greatest degree of consensus had emerged among members of the Commission.

3. The report was divided into four parts devoted, respectively, to establishing the scope of the topic and of the draft articles; defining the concepts of immunity and jurisdiction; differentiating between immunity *ratione personae* and immunity *ratione materiae*; and identifying the normative elements of immunity *ratione personae*. In each of those parts, there were draft articles of various types. The draft articles on scope (draft articles 1 and 2), the concepts of immunity and jurisdiction and the concepts of immunity *ratione materiae* and immunity *ratione personae* (draft article 3) were introductory in nature. The draft articles on the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6) embodied elements whose purpose was to establish the legal regime applicable to that category of immunity. They were accordingly set forth in Part Two of the draft articles, which dealt with immunity *ratione personae*. Draft article 3 (Definitions) would be supplemented with new definitions as the Commission's work progressed. She noted that, for the time being, she had not included a

draft article on exceptions, which would all be addressed jointly at a later stage. If, at that point, it was decided to include a provision on exceptions to immunity *ratione personae*, it would be included in Part Two of the draft articles.

4. She also wished to make two points of a general nature. First, she had opted in her second report to continue, on a provisional basis, to use the term "*funcionario*" in Spanish, as the Commission had been doing so far. However, she recalled that that term and the ones used in English ("official") and French ("*représentant*") were not equivalents and therefore called for further consideration. In 2014, the Commission would have to take up the definition of the term, and, depending on the results, its use might have to be reviewed at some time in the future. Similarly, the title of the topic and of the draft articles might have to be reviewed to ensure consistency between the English, French and Spanish versions.

5. The second general point related to the treatment given in the second report to practice and the literature. Since the report took full account of the valuable information contained in the reports of the previous Special Rapporteur<sup>29</sup> and the memorandum by the Secretariat,<sup>30</sup> she had not thought it necessary to reproduce that information in the report. Instead, in order to make the report more readable and clear, she had chosen to consign all that information to footnotes. That had allowed for a new, systematic structuring of the report, unencumbered by tedious and unnecessary repetition of sufficiently well-known and still-valid information. References to new practice and to earlier practice and codification had been included in the body of the report only when absolutely necessary.

6. Having made those general points, she turned to the draft articles contained in the second report.

7. Draft articles 1 and 2 delimited the scope of the text. Draft article 1 defined the scope in positive terms and was to be read together with draft article 3, subparagraphs (a) and (b). Draft article 2 listed the situations in which, even where a foreign official enjoyed criminal immunity, such immunity was subject to a special regime or had been granted by a State unilaterally, in the absence of any international legal rule compelling it to do so. It was a clause on exceptions referring to the various special cases of immunity that were to be found in practice. The two aspects of the scope of the draft articles, inclusive and exclusive, positive and negative, had been presented in two separate draft articles, primarily for the sake of clarity. Draft articles 1 and 2 resulted from the application of the following criteria: (a) the draft articles dealt only with criminal jurisdiction, not civil or administrative jurisdiction; (b) they dealt only with foreign jurisdiction, not jurisdiction exercised by the official's own State of nationality; (c) they dealt only with domestic criminal jurisdiction, not international criminal jurisdiction; (d) they dealt only with the general regime of immunity

<sup>26</sup> Mimeographed; available from the Commission's website.

<sup>27</sup> Reproduced in *Yearbook ... 2013*, vol. II (Part One).

<sup>28</sup> Mimeographed; available from the Commission's website.

<sup>29</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

<sup>30</sup> A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

from foreign criminal jurisdiction, not special immunity regimes; and (e) they dealt only with the immunity of State officials from foreign criminal jurisdiction.

8. Draft article 3 contained the definitions that were deemed necessary for the purposes of the present draft articles. In her second report, she had incorporated two sets of definitions concerning the concepts of jurisdiction and immunity, on the one hand, and immunity *ratione personae* and immunity *ratione materiae*, on the other.

9. With regard to the concepts of jurisdiction and immunity, she noted that those two categories were not usually defined in the various international instruments that dealt with immunity, even though successive Special Rapporteurs on the topic of immunity had proposed definitions for both concepts. However, a definition of those terms would be especially useful in the present topic owing to the diversity of the acts intrinsic to the exercise of criminal jurisdiction and the special nature of immunity from criminal jurisdiction as applying to a specific individual (an official).

10. She pointed out that the proposed definitions of immunity and criminal jurisdiction were intrinsically interrelated, since it was meaningless to speak of immunity from jurisdiction in the absence of the jurisdiction whose exercise was to be precluded. The aim of immunity was to prevent an official from being subjected to any action intended to establish his or her criminal responsibility before a foreign court. Jurisdiction was to be understood as all of the forms of jurisdiction, processes, procedures and acts that would normally come into play in order to establish such responsibility under the applicable law of the State that had jurisdiction. She pointed out that both definitions had been formulated with reference to the proceedings of national courts, since it was ultimately they that were empowered to establish criminal responsibility. However, she noted that the concepts of jurisdiction and immunity were not limited to judicial proceedings but also included acts and procedures that were needed to establish an individual's criminal responsibility and that were not, strictly speaking, judicial acts. The concepts of immunity and jurisdiction would be supplemented at a later stage with a list of specific acts to which immunity applied. She also noted that, for the purposes of the present draft articles, the basis or nexus of the competence of national courts to exercise jurisdiction was irrelevant.

11. With regard to the difference between immunity *ratione personae* and immunity *ratione materiae*, she pointed out that it was one of the few aspects of the present topic on which there was broad consensus. Although both categories had the same purpose and a clear functional basis, it was possible to identify significant differences between them which must be spelled out in the present draft articles. Immunity *ratione personae*: (a) was granted only to certain State officials who played a prominent role in that State and who, by virtue of their functions, represented it in international relations automatically under the rules of international law; (b) applied to all acts, whether private or official, that were performed by the representatives of a State; and (c) was clearly temporary in nature and was limited to the term of office of the person who enjoyed immunity. Immunity *ratione materiae*, on the other hand:

(a) was granted to all State officials; (b) was granted only in respect of acts that could be characterized as “official acts”; and (c) was not time-limited, since immunity *ratione materiae* continued even after the person who enjoyed such immunity had left office. The definitions provided in draft article 3, subparagraphs (c) and (d), corresponded to those criteria and placed special emphasis on the distinction between the persons who were protected and the functions and acts that they performed. Although it was unusual to find explicit definitions of immunity *ratione personae* and immunity *ratione materiae* in legal instruments, whether international or national, she noted that it would be useful to include such definitions in the present draft articles, especially since they might be relevant in identifying the applicable legal regime for each of those categories of immunity.

12. Draft article 4, the first of those included in Part Two of the draft articles in which immunity *ratione personae* was addressed, identified the persons who enjoyed such immunity as Heads of State, Heads of Government and Ministers for Foreign Affairs. The choice of those three categories of officials had been made on the basis of the functions the officials performed by virtue of the rules and principles of international law that empowered them to represent a State in general terms and automatically in the main fields of international law. Although she recognized that other high-level State officials were participating more frequently in international relations, such “international activity” was carried out on the basis of unilateral and internal decisions of the State in which they performed certain functions, and it was not possible to identify rules or principles of international law that conferred on officials other than the “troika” a function identical, or even similar, to that accorded by international law to Heads of State, Heads of Government and Ministers for Foreign Affairs. For that reason, she stated that to grant those other high-level officials a form of immunity *ratione personae* that was identical or similar to that enjoyed by the members of the troika would constitute an unwarranted extension that did not have a legal basis in contemporary international law. Furthermore, she noted that the immunity of other senior State officials could be governed by other rules, such as the separate regime that applied to special missions. Lastly, she drew attention to the fact that any proposal to grant a general immunity *ratione personae* to other senior State officials would be a proposal *de lege ferenda*.

13. With regard to draft article 5, she said that it reflected a position undisputed in the literature and in practice, as well as in case law: immunity *ratione personae* applied to all acts, both private and official, performed by persons who enjoyed this immunity. Paragraph 2 of the draft article added a temporal aspect to that assertion with reference to the time period in which the acts were carried out; it made it clear that no act performed by a former Head of State, Head of Government or Minister for Foreign Affairs was covered by immunity *ratione personae*. She noted that draft article 5, paragraph 2, should be distinguished clearly from draft article 6, paragraph 2, which took the temporal aspect into account in establishing when immunity *ratione personae* could be invoked, irrespective of when the acts had been performed. Lastly, she drew attention to the fact that the description of immunity

*ratione personae* as “full” immunity had no implications whatsoever in respect of exceptions to immunity, which would be addressed at a later stage.

14. Draft article 6 delimited the temporal scope of immunity *ratione personae* and differentiated it in that respect from immunity *ratione materiae*. She noted that, although there was broad consensus regarding the assertion that immunity *ratione personae* applied only while the person who enjoyed it held office, terminological ambiguity still persisted in some cases, given the frequent use of the expression “residual immunity”, in other words, the assertion that immunity extended beyond the term of office of the person who enjoyed it in respect of official acts performed by them while in office. In her view, such an assertion was ambiguous and created confusion about the nature of the immunity that applied. Furthermore, it was methodologically incompatible with the very notion of immunity *ratione personae*—an immunity that, because it was full immunity, excluded any categorization of the acts in respect of which it applied, since it was irrelevant whether those acts were private or official. In the case of immunity *ratione materiae*, on the other hand, the categorization of the acts as “official” was indeed relevant. Accordingly, immunity in respect of official acts carried out by a member of the troika during his or her term of office but invoked after the person had left office, and which had to be characterized as official acts in order to produce effects, must be regarded as immunity *ratione materiae*. Those were the issues that were addressed in draft article 6, paragraph 2.

15. Mr. MURASE said that the report ignored the most essential aspect of immunity, namely the nature of the crimes that should be covered. From the outset, the Commission had had in mind the most serious crimes such as genocide, war crimes and crimes against humanity. However, in draft article 3, it had been given merely crimes and misdemeanours. International crimes should be addressed, not as exceptions to immunity and at a later stage in its work, but rather as the general rule and at the outset.

16. The Special Rapporteur stated in paragraph 41 of her report that she considered the legal nature of immunity to be purely procedural: in other words, it pertained to secondary, not primary, rules. Yet the Commission had always viewed immunity from the substantive perspective as well. That difference in perspective had a bearing on the Special Rapporteur’s definitions of immunity *ratione personae* and immunity *ratione materiae*, which showed some confusion in her understanding of the relationship between them. According to draft article 3, immunity *ratione materiae* was limited to acts performed in the exercise of official functions or “official acts”, but in his own view, that was merely a subsidiary element of immunity *ratione personae*. The essential aspect of the concept of immunity *ratione materiae* was the crime itself, to which there was no reference in the definition.

17. He strongly disagreed with any suggestion that members of the troika should enjoy absolute immunity, especially if they had committed serious core crimes. The Commission would be severely criticized by the international community if it tried to widen the impunity

gap by protecting dictators. It should not try to establish a regime diametrically opposed to the regime under the Rome Statute of the International Criminal Court. It should also be consistent with its past work, particularly article 7 of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission at its forty-eighth session.<sup>31</sup> The judgments of the International Court of Justice on which the Special Rapporteur based her arguments were binding only on the parties and were limited to the particular cases.

18. He agreed with the Special Rapporteur that diplomatic agents and consular officials should be excluded from the scope of the exercise, but what about military personnel? He wondered whether *de facto* Heads of State might be included in the troika.

19. Lastly, he regretted that the report did not reflect developments in international law or the debates of the Commission, and would therefore be hesitant about sending the draft articles to the Drafting Committee.

20. Mr. TLADI said that the International Court of Justice, as the principle judicial organ of the United Nations, was endowed with unmatched authority. However, its primary mandate was the resolution of disputes between parties, and its rulings were binding only upon the parties. Even when the Court had ruled on an issue, therefore, the Commission had to conduct its own independent assessment of the relevant State practice.

21. Turning to the draft articles, he said that the overly generous formulation of the subjective scope of immunity *ratione personae* might be acceptable, provided that the material aspects sufficiently took into account the need to limit immunity, in view of the fight against impunity. On the whole, he endorsed draft articles 1 and 2 and supported sending them to the Drafting Committee, where they might be reworked using normative treaty language and where draft article 2 might be streamlined.

22. He questioned whether it was necessary to include all of the definitions contained in draft article 3. The definitions of “criminal jurisdiction” and “immunity from foreign criminal jurisdiction” were incongruent, as the former was given an expansive meaning while the latter appeared to be limited to the actions of “courts and judges”. He wondered what the definition in draft article 3 (a) had been based on, as no source had been identified in the report. He would recommend deletion of draft article 3 (a) and (b). The definition of immunity *ratione personae* could be interpreted as applying to any number of officials; it should be narrowed to indicate that it applied to a distinct category of officials. Draft article 3 should be held in abeyance until the end of the work on the text.

23. The provision that he found most difficult was draft article 4. In terms of drafting, it was a statement of fact and not a normative statement. There was nothing in the language to suggest that immunity *ratione personae* applied only to the persons mentioned. In terms of substance, he maintained the view that immunity *ratione*

<sup>31</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, in particular pp. 26–27.

*personae* should be extended only to Heads of State and possibly Heads of Government. He was troubled by the absence of State practice to support the conclusion in paragraph 58 of the report that the granting of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs was established practice. Although the Special Rapporteur conceded that such immunity had originally been limited to Heads of State and had subsequently been extended to Heads of Government, she also suggested that its extension to Ministers for Foreign Affairs was not in doubt in the light of the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

24. He questioned the assertion (para. 59) that granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs was necessary because their functions included representing the State in international relations. First, that was a policy consideration and not a legal argument. Second, there was no *a priori* reason why representational status should imply only immunity *ratione personae* and not immunity *ratione materiae*. Third, if immunity *ratione personae* had to be accorded to the troika because of its representative function, he wondered why the Special Rapporteur was reluctant to see it extended to other officials who might play a similar role (para. 60).

25. It was an area that had not been sufficiently developed in the practice of States and was thus fit for progressive development. That process should take into account not only the fight against impunity, but also the general trend of the Commission's work. In both its draft articles on jurisdictional immunities of States and their property<sup>32</sup> and the draft Code of Crimes against the Peace and Security of Mankind,<sup>33</sup> the Commission had been reluctant to place the immunities of Ministers for Foreign Affairs on the same footing as those of Heads of State.

26. However, to help the Commission move forward, he was prepared to accept, as a matter of developing the law, the extension of immunity *ratione personae* to Ministers for Foreign Affairs on the basis that the reasoning in the *Arrest Warrant* judgment had not been rejected by States and provided that the extension was subject to some exceptions. It was difficult to accept the principle contained in draft article 4 before seeing the possible exceptions, however. He therefore could not endorse the Special Rapporteur's suggestion that the issue might be considered separately from the other draft articles and could not support the referral of draft article 4 to the Drafting Committee, although he would not stand in the way of consensus.

27. He supported the principles set forth in draft articles 5 and 6 and their referral to the Drafting Committee. However, draft article 6, paragraph 1, did not clearly reflect what he believed the Special Rapporteur wished to convey, namely that immunity *ratione personae* could not be invoked after the expiration of the term of office, even for acts committed while in office; the paragraph might need

some redrafting. Moreover, in view of the Commission's debate during the previous session on the implications of the *Arrest Warrant* case judgment, he considered that further analysis of the judgment and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal would be useful.

28. Mr. PETER said that the topic was followed closely in Africa, where some State officials had been arrested under the Rome Statute of the International Criminal Court and the principle of universal jurisdiction.

29. Concerning the draft articles, he suggested that the "without prejudice" clause should not be used at the beginning of draft article 1, in order not to set a negative tone. Regarding draft article 4, more research was needed to justify the inclusion of Ministers for Foreign Affairs, to the exclusion of other government officials. Regarding draft article 5, paragraph 1, he questioned the appropriateness of the words "prior to or", implying that State officials would enjoy immunity for past offences.

*The meeting rose at 11.45 a.m.*

### 3165th MEETING

*Thursday, 16 May 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Laraba, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)**

[Agenda item 5]

##### SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited 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.4/661).

2. Mr. CAFLISCH said that he would like to start with a few comments on terminology. It would be preferable to replace the term "acts" with "conduct", since the reference in some instances was not to acts but to failure to act. Similarly, a more neutral term than "official"—perhaps "agent"—would be preferable, since all persons who acted on behalf of a State and who performed State functions were

<sup>32</sup> *Yearbook ... 1991*, vol. II (Part Two), para. 28.

<sup>33</sup> See footnote 31 above.

not necessarily officials. In addition, the use of the term “jurisdiction” to refer both to criminal jurisdiction and to criminal courts, in other words, tribunals, as was currently the case in draft article 3, should be avoided. Lastly, when referring to “officials”, references to nationality should be avoided, since what mattered was the fact that a person acted for the State: there was nothing to prevent a foreign national from being charged with acting for a State, in which case his or her conduct could be covered by immunity *ratione materiae*.

3. As to the substantive aspects, the Commission had to determine who constituted the “holders of high-ranking office” who enjoyed immunity from both civil and criminal jurisdiction. Referring to the judgment of the International Court of Justice in the *Arrest Warrant* case, he said he could not understand what had led the Swiss Federal Criminal Court to extend immunity *ratione personae* to the Minister of Defence,<sup>34</sup> or what had prompted the representative of Switzerland to state before the Sixth Committee that foreign State officials other than the members of the troika enjoyed immunity.<sup>35</sup> The troika seemed to him to be the best solution, or the least wrong one, as it had the advantage of both reinforcing the status quo and resolving the question of who could enjoy immunity *ratione personae*. Lastly, since immunity in general was on the decline in the contemporary world, it would be sending the wrong signal to try to extend it in the specific area of immunity *ratione personae*. In conclusion, he said that subject to the remarks on terminology he had just made, he was in favour of referring the draft articles to the Drafting Committee.

4. Mr. HMOUD, noting that the topic was one of the most contentious ones ever discussed by the Commission, said that the outcome of its work would have a significant impact on international and legal relations in terms of immunity from criminal jurisdiction. The step-by-step approach adopted by the Special Rapporteur seemed to him to be prudent and practical. The conceptual divergences were not easy to reconcile, and moving forward required first tackling the issues on which consensus was most likely or that caused the least disagreement. The Commission could then delve into the issues that raised the greatest controversy, such as the scope of immunity and its limitations.

5. As some members had pointed out, the treatment in international law of the most serious crimes had shifted dramatically over the past 60 years. While some members favoured not moving with the times, the fact remained that sovereignty and immunity should no longer be mutually exclusive. As to the distinction between *lex lata* and *lex ferenda*, certain legal aspects associated with immunity could be described as settled in international law, yet on other aspects, either the law was silent or there were differences in the practice or practices of States that made it hard to deduce specific rules. The Commission must make a distinction between *lex lata* and *lex ferenda* only when the

applicable law was clearly delineated and when the distinction served a useful purpose for its work. Its conclusions must have a strong legal underpinning and be grounded in the current system of values in international law, all the while taking into account the need to strike a balance between one State’s right to exercise criminal jurisdiction and another State’s right not to be subject to the exercise of such jurisdiction or to ensure that such jurisdiction was limited when it interfered with its sovereignty. The legitimate interests of the two States must be weighed up, and some might prevail over others in certain situations. Immunity was not absolute, and its implementation, in the case both of individuals and of States, was limited. A procedural rule could only prevail and bar a substantive rule from being applied if it protected legitimate interests in the exercise of sovereignty and the performance of functions that were an integral part of such sovereignty.

6. Turning to specific comments, he agreed with the Special Rapporteur that the scope of the draft articles should be limited to immunity from the jurisdiction of foreign criminal courts and not encompass international criminal jurisdiction or special immunity regimes such as diplomatic and consular immunities. However, the legal and conceptual basis for such regimes should be studied in deducing relevant rules for the topic: why a diplomatic agent enjoyed immunity, how that immunity was exercised and what was the logic that justified the lack of immunity before international courts of officials performing “State acts” were matters that had to be analysed and taken into account. He thought that an article containing definitions should be included, although he did not see the need for a definition of “criminal jurisdiction”, since international legal instruments generally did not include definitions of national forms of jurisdiction. In addition, definitions of jurisdiction that might be more suitable in certain legal systems than in others should be avoided.

7. Regarding the definition of immunity from foreign criminal jurisdiction, which was not absolutely necessary but might shed light on the content and nature of immunity, he said that any such definition should clearly indicate that immunity was a procedural bar to the exercise of foreign jurisdiction that came into play in certain conditions and according to the rules of international law and the provisions of the draft articles. As to the types of immunity, it seemed appropriate to distinguish between immunity *ratione personae* and immunity *ratione materiae* for the purpose of identifying, insofar as possible, the rules associated with personal immunity and those relating to immunity for acts performed in an official capacity. As the Special Rapporteur had mentioned in her report, there were elements common to the two forms of immunity. Even when a State official was acting in the performance of his or her duty when committing a crime, that did not mean that the responsibility of both the individual and the State were to be treated the same way. To maintain that the act of an individual was solely the act of a State for the purposes of immunity *ratione materiae* was to say that the person concerned could not be responsible for the act under any circumstances—in other words, that he or she was absolved of responsibility. That ran counter to the consensus in the international community and the views of the International Court of Justice, particularly in the *Arrest Warrant* case. In the

<sup>34</sup> See *A. v. Ministère public de la Confédération* [BB.2011.140], decision of 25 July 2012, cited several times in the Special Rapporteur’s report.

<sup>35</sup> See *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), para. 36.

same vein, it might be prudent to postpone the inclusion of a definition of immunity *ratione materiae* until the Commission had agreed on the scope and content of that form of immunity, rather than to include a “without prejudice” clause at the current stage.

8. Lastly, he agreed with the restrictive approach advocated by the Special Rapporteur with regard to immunity *ratione personae*. He was in favour of having foreign ministers covered by that form of immunity, both because such immunity had been confirmed by the International Court of Justice and because of the presumption that Ministers for Foreign Affairs represented the State in international relations. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee.

9. Mr. HUANG said that given the difficult nature of the topic, the Commission should focus on the codification of *lex lata*, while giving consideration to progressive development on some specific issues, in a cautious manner and on the basis of consensus. He fully endorsed the Special Rapporteur’s approach and the distinction she had drawn between immunity *ratione personae* and immunity *ratione materiae*. However, he would like the meaning of “Immunities established under other *ad hoc* international treaties”, in draft article 2 (c), to be clarified, preferably by providing examples. It would also be useful to clarify whether the immunity of military officials was within the scope of the topic.

10. He did not agree with what the Special Rapporteur said in paragraph 29 of her report about methodological inconsistency: the fact was that draft article 1 excluded immunity before all international criminal courts from the scope of the draft articles. As to the case law of individual States, the only example so far was the decision of the Swiss Federal Criminal Court, and that could not be regarded as a trend. He was likewise not in agreement with the views set out in paragraph 30: he did not think that the jurisprudence of international criminal courts was particularly relevant to the topic. As to the definition of “official” mentioned in paragraph 32, he thought that the term could refer to a specific senior public office holder representing a State, within the framework of immunity *ratione personae*, while in the context of immunity *ratione materiae*, more emphasis would be given to function rather than to representation.

11. As to the relationship between jurisdiction and immunity, the “eminently procedural” legal nature of immunity should entail two elements: first, immunity was simply a procedural impediment to the exercise of jurisdiction and did not absolve the persons concerned from material responsibility; and second, immunity fell within the domain of procedural rules, and irrespective of the basis on which a court decided that it had jurisdiction, it did not imply the absolute exclusion of immunity. Caution was called for as to the definition of “criminal jurisdiction” mentioned in paragraph 38. The judicial systems of States differed: while some made a clear distinction between criminal proceedings and administrative and civil proceedings, that was not the case in all States. Moreover, the criteria whereby “executive acts” made it possible to “establish that ... there is specific individual criminal

responsibility for acts that constitute crimes” were too broad. There was accordingly a need to take into account the differences in the judicial systems of States and to exercise caution to prevent arbitrary expansion of the scope of criminal jurisdiction.

12. He felt that draft article 4 did not reflect the new trends in international practice; its wording essentially ruled out the possibility of including any State representatives other than the members of the troika among those who enjoyed immunity *ratione personae*. While it was true that Heads of State, Heads of Government and Ministers for Foreign Affairs traditionally enjoyed such immunity, it must not be forgotten that in the *Arrest Warrant* case and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice had not excluded the possibility that other senior State officials should also be granted such immunity. More and more cases in national courts demonstrated that immunity *ratione personae* was not limited to the troika. The judges in such cases stated that with the development of international relations, senior State officials such as ministers of defence and ministers of international trade increasingly took part in international exchanges and were better able to perform their functions as international representatives of the State if they were granted immunity *ratione personae*. Only a minority of countries in the Sixth Committee were in favour of limiting immunity *ratione personae* to members of the troika. A majority of States were ready to explore the possibility of extending that form of immunity to other senior officials. The absence of consensus on the subjective scope of immunity *ratione personae* must not lead the Commission to limit that scope to the members of the troika. The wording of draft article 4 should therefore be amended to allow other individuals, such as senior State officials, to be included. In conclusion, he was in favour of referring draft articles 1 to 6 to the Drafting Committee.

13. Mr. KAMTO commended the Special Rapporteur on her clear and well-structured second report. Although he found nothing of a methodological nature to criticize, he would have liked to have seen more examples of State practice and major trends in international law. He saluted the Special Rapporteur’s achievement in presenting six draft articles at such an early stage of the work, but he would have preferred for her to concentrate on the first three, providing the necessary clarification on the analysis that went into their formulation. When the Commission was drafting new rules of international law, it could not create them *ex nihilo*; rather, it must base them on established practice or, where necessary, on strong trends in international law deduced from analysis of international legal instruments.

14. He agreed that it was necessary to harmonize the wording of draft article 1, which spoke of the immunity of “certain” State officials, with the title of the topic, namely the immunity from foreign criminal jurisdiction of “State officials”. He proposed that the words “*renvoïé à*” should be replaced by “*traite de*” in the French version of draft article 1. Also to be deleted were the words “*ou le contexte*”, in draft article 2 (a), which were superfluous, and “*ad hoc*”, in draft article 2 (c), which added nothing except ambiguity. He welcomed the

Special Rapporteur's efforts to define the concepts of immunity and jurisdiction in draft article 3. One of the not insignificant contributions the Commission could make was in defining, wherever necessary, the terms that it used in order to foster a better understanding of the law. Nevertheless, each definition should be supported by an analysis of the relevant international conventions, case law and scholarly writings. The Special Rapporteur had not taken the latter sufficiently into account, and she could also have relied more on authoritative legal dictionaries. As a result, the definitions she proposed were not sufficiently well focused, their wording was somewhat cumbersome and they showed a tendency towards circular reasoning—indeed, some of the underlying reasoning was debatable. For example, it was hard to see why she insisted on the idea that criminal jurisdiction existed prior to immunity from criminal jurisdiction, when immunity actually appeared to exist *per se*, independently from criminal jurisdiction.

15. He shared the view expressed by Mr. Murase at the previous meeting that the definition of immunity from foreign criminal jurisdiction given in paragraph 45 (c) of the report might result in the exclusion of one whole aspect of the topic, namely immunity for international crimes. The topic of immunity could not be dealt with from the procedural standpoint alone, ignoring the consequences of the obligation to combat impunity. The precedents on that matter, both national and international, were far from perfectly clear and called for an in-depth analysis that was lacking in the report. A rapid survey of national practice showed the disparities that existed. For example, according to a study of civil liability in the United States published in the *Netherlands International Law Review*, foreign States could successfully invoke the immunity granted to their representatives or agents who were accused of international crimes.<sup>36</sup> On the other hand, in other jurisdictions, specifically the Netherlands and Spain, the commission of very serious international crimes was not assimilated to the duties of the Head of State, and the immunity argument was not valid where such crimes were concerned. As for international case law, it, too, did not always point in the same direction. Thus, in the *Blaškić* case in 1997, the International Tribunal for the Former Yugoslavia had clearly stated that functional immunity, which the Special Rapporteur termed immunity *ratione materiae*, did not apply to international crimes, although a chamber of that Tribunal had taken a much more reserved position in the *Krstić* case in 2003.

16. Although it was too early to draw final conclusions from that rapid overview, one could justifiably assert that there was currently a trend in international law towards recognizing individual responsibility for international crimes, independently of whether their perpetrators had the status of State official. Such immunity, which lasted as long as the person held office, did not cover acts performed prior to taking office, in contrast to what the Special Rapporteur suggested in draft article 5, paragraph 1. Immunity protected the State official in that capacity, but did not exonerate him or her of responsibility;

instead of erasing the offence by ruling out any possibility of prosecution, it merely deferred prosecution. In short, he felt that further consideration was required for draft article 4. While the Head of State, Head of Government and Minister for Foreign Affairs certainly enjoyed immunity from foreign criminal jurisdiction, it was an open question whether other State officials should be entitled to immunity. As to whether immunity from foreign criminal jurisdiction should be valid with respect to international crimes, the question must be dealt with now, probably in draft article 5. Lastly, the temporal factor must be clarified by clearly indicating that the expiration of immunity *ratione materiae* opened the door to foreign criminal jurisdiction for the most serious crimes committed before, during and, *a fortiori*, after an official's term of office.

17. In view of what he had just said, he was in favour of referring draft articles 1 and 2 to the Drafting Committee but thought it would be premature to do so for draft articles 3 to 6.

*The meeting rose at 11.30 a.m.*

### 3166th MEETING

*Friday, 17 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, 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.
2. Ms. ESCOBAR HERNÁNDEZ, Mr. NOLTE, Mr. CANDIOTI and Sir Michael WOOD proposed amendments to enable the Drafting Committee to complete its work on time.
3. The CHAIRPERSON said he took it that the Commission wished to adopt the proposed programme of work, as amended.

*It was so decided.*

<sup>36</sup> R. van Alebeek, "National courts, international crimes and the functional immunity of State officials", *Netherlands International Law Review*, vol. 59, No. 1 (2012), pp. 5–41, at p. 8.

\* Resumed from the 3163rd meeting.

**Immunity of State officials from foreign criminal jurisdiction (continued)** (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

4. Mr. MURPHY said that in future reports, the Special Rapporteur should provide a more detailed analysis of State practice and case law in support of her conclusions. The Commission itself must be clear about its general methodology in simultaneously engaging in codification and progressive development. It should pay rigorous attention to *lex lata* in the first instance. If the law was relatively well established, the Commission should codify it; if it was not, but it appeared to be supportive of a particular rule, the Commission should articulate the rule, as a matter of progressive development.

5. With respect to draft article 1, he suggested deleting the superfluous word “certain”. As to draft article 2, he agreed with other speakers that if other areas of immunity were to be identified, it would be appropriate to expressly mention immunities relating to the status of military forces. Other drafting points to be addressed were why the word “criminal” preceded “immunities” in paragraph 1 (a) and (b) but not in 1 (c) and (d) and whether the words “*ad hoc*” were necessary in paragraph 1 (c).

6. With regard to draft article 3, it would be useful to know whether the definitions had their origins in existing treaties on international criminal law and, if so, what those origins were, in order to see how they had operated in other contexts. If the definitions had simply been developed by the Special Rapporteur, it was fair to ask whether some of them were actually needed. The question of whether the phrase “all of the forms of jurisdiction” in draft article 3 (a) encompassed extradition proceedings should be expressly addressed. With respect to draft article 3 (b), he joined other speakers in asking why “Immunity from foreign criminal jurisdiction” was limited to the exercise of jurisdiction by “judges and courts”, when immunity from compulsory acts by police, investigators and prosecutors was also relevant. Did the “criminal jurisdiction” of a State include an order from that State compelling testimony by an official who was not a party in a case? Article 3 (b) did not read well in comparison with article 3 (a) and with the breadth of conduct, including “executive acts”, described in paragraph 38 of the report.

7. The second half of the definition in draft article 3 (c) was potentially confusing and unnecessary. In draft article 3 (d), the phrase “perform in the discharge of their mandate” was unclear—did it suggest that illegal or irregular acts were not subject to immunity? The definition of immunity *ratione materiae* in that paragraph should not be sent to the Drafting Committee.

8. Noting that draft article 4 presented the most important aspect of the topic by identifying the troika of persons entitled to immunity *ratione personae*, he agreed with other members that the Special Rapporteur failed to discuss fully the relevant practice. The analysis focused primarily on the judgment of the International Court of

Justice in the *Arrest Warrant* case, which was important in that it had been informed by extensive pleadings regarding existing State practice. The analysis also focused on the distinctiveness of the troika in international relations, yet some relevant treaty regimes did not see the troika as distinctive. The most obvious example was the United Nations Convention on Jurisdictional Immunities of States and Their Property, which safeguarded the immunities accorded to Heads of State *ratione personae* but did not mention Heads of Government, Ministers for Foreign Affairs or other State officials. To convincingly advance the proposition set forth in draft article 4, the Special Rapporteur should have provided a thorough analysis of relevant national court cases. Such an analysis would begin with the Secretariat’s 2008 memorandum<sup>37</sup> and then consider in detail cases since 2008.

9. There appeared to be a consensus in the Commission that both Heads of State and Heads of Government enjoyed immunity *ratione personae*, but opinions differed on Ministers for Foreign Affairs. The dissenting opinions of some of the judges in the *Arrest Warrant* case and some of the academic literature supported the view that Ministers for Foreign Affairs should be denied such immunity. Yet the majority in the *Arrest Warrant* case had found that the Minister for Foreign Affairs of the Democratic Republic of the Congo was immune from the arrest warrant issued by Belgium. He himself was not aware of any national court case in which a sitting Minister for Foreign Affairs had been denied such immunity. It appeared that sitting Heads of State, Heads of Government and Ministers for Foreign Affairs were simply not prosecuted in national courts: that led many States and scholars to take the position that immunity *ratione personae* was enjoyed by all the members of the troika.

10. As for other senior officials, a review of national court cases revealed that many national courts declined to extend immunity *ratione personae* beyond the troika. He cited cases in Italy, the United Kingdom and the United States as examples. On the other hand, a few national courts had recognized immunity *ratione personae* as going beyond the troika, although that was often asserted as *dicta*. Cases in France, Switzerland and the United Kingdom could be adduced in support of that point. He himself thought that the overall practice of States supported the proposition that immunity *ratione personae* was enjoyed solely by the troika. He endorsed the substantive proposition set forth in draft article 4, but if the intention was that only the troika should be entitled to immunity, then the word “only” should be inserted in the text.

11. Consideration should be given to whether immunity *ratione personae* should extend to the family members or entourage of the individual entitled to immunity *ratione personae*. Examples of national statutes granting such immunity had been provided in the memorandum by the Secretariat on the topic. The Commission could discuss in due course, and even after agreement was reached on draft article 4, whether contemporary practice demonstrated that there were exceptions to immunity *ratione personae*.

<sup>37</sup> A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

One such exception might be the waiver of immunity by the official's State. When considering the issue of exceptions, the Special Rapporteur should rigorously assess the relevance of the *Arrest Warrant* case and other international and national case law. Relevant, too, was the fact that the International Criminal Court had essentially affirmed that immunity *ratione personae* existed with respect to prosecution for serious crimes in national courts, as contrasted with its unavailability with regard to the arrest and surrender to an international criminal tribunal of a person suspected of such crimes. However, the Court did not interpret article 27 of the Rome Statute of the International Criminal Court as having the effect suggested by Mr. Murase.

12. Turning to draft articles 5 and 6, he proposed that the Drafting Committee should consider merging them. If it was decided to retain them as separate draft articles, then consideration should be given to deleting the second paragraph of draft article 5.

13. The reference in draft article 6, paragraph 2, to the enjoyment of immunity *ratione materiae* alone was too narrow and should be reformulated as the enjoyment of "any other available immunity".

14. He would be interested to know the Special Rapporteur's views on what happened with ongoing proceedings if a person moved in or out of a high-level position. If a person was indicted before becoming President, for example, was he or she immune from foreign criminal jurisdiction after becoming President? Conversely, if an official was indicted while serving as President, did he or she remain immune from an indictment after leaving office?

15. With the exception of draft article 3 (*d*), he was in favour of referring the draft articles to the Drafting Committee.

16. Mr. TLADI, referring to Mr. Murphy's remark that he was not aware of a single case in which a Minister for Foreign Affairs had been prosecuted in a national court, said that, while it might be an accurate reflection of reality, the more pertinent question was what to make of that negative practice. One might also ask whether any cases existed in which a national court had declined to exercise jurisdiction over a Minister for Foreign Affairs owing to his or her immunity *ratione personae*. In his view, Mr. Murphy's intervention suggested that there was a need to assess State practice more extensively before submitting draft article 4 to the Drafting Committee. As to whether the Commission had to agree on draft article 4 before discussing whether practice showed that there were exceptions to the rule of immunity *ratione personae*, he pointed out that there seemed to be a dearth of relevant practice, concerning both the enjoyment of immunity *ratione personae* by Ministers for Foreign Affairs and exceptions to immunity, which was a reason for considering the two questions jointly.

17. Mr. HMOUD said that, nevertheless, there were sufficient grounds for considering that *opinio juris* had developed around the entitlement to immunity *ratione personae* of Ministers for Foreign Affairs. He endorsed

the Special Rapporteur's reasoning that members of the troika shared the common feature of representing the State in its international relations, which, in turn, provided the basis for the establishment of a positive rule on immunity. No customary international law existed for granting immunity *ratione personae* to any State official other than those included in the troika.

18. Mr. ŠTURMA said that the decisions of the International Court of Justice furnished answers to specific questions *in concreto*, not general rules. The Commission, on the other hand, had to prepare draft articles on assigned topics *in abstracto*, to draft restatements of general rules. That was all the more important where the case law of the Court and of other international tribunals and national courts was far from uniform.

19. The draft articles must further the objective of granting immunity from foreign criminal jurisdiction to certain State officials in order to safeguard the sovereign equality of States and peaceful relations among them. That objective did not extend to protecting such officials from prosecution for the most serious crimes under international law. While the Special Rapporteur planned to address restrictions on and exceptions to immunity at a later stage, he would welcome a brief reference in the current draft to the concept of crimes under international law, at least in the form of a "without prejudice" clause.

20. He generally endorsed draft articles 1 and 2 but requested clarification as to what was meant in article 2 (*c*) by "Immunities established under other *ad hoc* international treaties".

21. Draft article 3, on definitions, must be viewed as provisional, in order to allow for changes and additions to the definitions over the course of the Commission's debate on the topic. A definition of "official acts" should be added to those set out in draft article 3. He agreed, in principle, with the fundamental distinction drawn between immunity *ratione personae* and immunity *ratione materiae*. The definition of the term "criminal jurisdiction" could benefit from a reformulation that would broaden it sufficiently to cover all measures and procedures necessary for the establishment and enforcement of individual criminal responsibility.

22. Draft articles 4, 5 and 6 constituted an interrelated set of rules on immunity *ratione personae*. On draft article 4, he shared the view that personal immunity was enjoyed by the members of the troika. Although the decisions of the International Court of Justice did not clearly indicate that this constituted an established rule of customary international law, such a rule was at least in the process of formation. After all, the three high-ranking State officials making up the troika were presumed to represent the State in international relations—a presumption that was reflected in article 7 of the 1969 Vienna Convention. Furthermore, the International Court of Justice had not given any precise indication, and national courts had not been consistent in their decisions, about which other officials, if any, enjoyed such immunity. While some national courts recognized that immunity was enjoyed by other officials, that was insufficient grounds for the formulation of a general rule.

23. Draft articles 5 and 6, dealing with the material and temporal scope of immunity *ratione personae*, could be misleading if viewed separately. When read together, however, they added up to a satisfactory description of immunity *ratione personae*: immunity that was procedural in nature did not exclude criminal responsibility and only temporarily excluded the exercise of foreign criminal jurisdiction.

24. Notwithstanding the need to improve the wording of some draft articles, he recommended referring all of them to the Drafting Committee.

25. Mr. FORTEAU said that he agreed with the Special Rapporteur's objective approach, which would enable the Commission to examine the topic with no preconceived notions. It was important not to proceed as if immunity was the rule and prosecution the exception: actually, immunity was an exception that prevented the forum State from exercising its criminal jurisdiction in the normal way. Immunity was likewise an exception in respect of other legal principles such as the right of access to a court and the duty of States to cooperate in halting serious breaches of imperative norms.

26. The numerous references to the link of nationality were problematic. They seemed to imply that a person could not be an official of a State whose nationality he or she did not possess and accordingly could not claim immunity. That was inconsistent with positive law. What counted was not the bond of nationality, but the bond of function which connected the State official to the State. The references to nationality should therefore be deleted in draft articles 3 (c) and 4.

27. On the other hand, it was not unknown for nationality to come into play in certain cases. Under articles 8 and 38 of the Vienna Convention on Diplomatic Relations, diplomats who were nationals or permanent residents of the country in which they served were set apart, including in respect of immunity *ratione personae*. The special situation of such State officials therefore required particular scrutiny.

28. Regarding the scope of the draft articles, he was not sure that immunity before international criminal courts could be completely excluded. A provision should be included to clarify whether and to what extent the customary law on immunity would apply to an individual being prosecuted by the International Criminal Court, for example, in situations when his or her immunity was governed by both the Statute of the Court and customary law.

29. While draft article 1 was welcome in principle, the explanation for the restriction of immunity to "certain" officials, given in paragraph 32 of the report, was unconvincing. The potential beneficiaries of immunity should not be confused with real beneficiaries: any State official could potentially benefit from immunity. State officials must therefore be defined as persons through whom the State acts, and the draft articles should delineate the circumstances in which those officials, or only some of them, enjoyed immunity. It would be advisable, first, to indicate that the draft articles applied to the criminal immunity of State officials, then to define those officials

for the purposes of the draft articles and lastly to specify the officials, the circumstances and the kinds of acts covered by immunity from criminal jurisdiction.

30. Draft article 2 should be converted into a second paragraph of draft article 1 and be formulated as a "without prejudice" clause, because a person's immunity might be governed simultaneously by special rules and by the draft articles. The term "other *ad hoc* international treaties" was by no means clear and should be replaced with a reference to *lex specialis*. It should be specified whether "other immunities granted unilaterally by a State" meant an international unilateral act or the granting of immunity under domestic law.

31. The text of draft article 3 (a) and (b) dealt with such complex definitions and raised so many difficulties that it should be deleted or thoroughly recast. He disagreed with the premise set out in paragraphs 38 and 40 of the report that establishing the State's competence to exercise criminal jurisdiction was a precondition for invoking immunity. The issue of immunity could arise regardless of whether the State which intended to hear the case had the international jurisdiction to do so. Immunity might be all the more necessary if a State claimed criminal jurisdiction that it did not have under international law.

32. The term "jurisdiction" could have several meanings, but in the strictest sense, it meant the power to prosecute. In English, the meaning was broader, encompassing the sovereign powers of the State, and the French term "*jurisdiction*" was not the exact equivalent. The previous Special Rapporteur had subsumed executive and judicial jurisdiction under the notion of criminal jurisdiction, and the current Special Rapporteur appeared to have done likewise. In paragraph 38 of her report, she suggested that the term "jurisdiction" covered the various acts—judicial and executive—in respect of which immunity could be invoked. However, that definition might lead to confusion between immunity from jurisdiction and immunity from enforcement. Paragraph 3 (a) and (b) thus gave rise to doubts as to whether the scope of the draft articles encompassed not only immunity from jurisdiction, but also inviolability and immunity from enforcement.

33. In international instruments and case law, a distinction was generally drawn between immunity from jurisdiction and measures of protection against acts of enforcement. However, rules on immunity from jurisdiction were always accompanied by rules on the related means of enforcement. On that basis, paragraph 3 (a) and (b) could be merged to state quite simply that immunity from criminal jurisdiction encompassed such immunity *per se*, as well as inviolability and immunity from coercive measures in relation to criminal proceedings. That would obviate the need for more precise definitions of "immunity" and "jurisdiction".

34. Definitions of immunity *ratione personae* and *ratione materiae* were certainly needed, but they must remain definitions and not deal with the substance of the respective immunity regimes. Accordingly, the last phrases in draft article 3 (c) and (d) should be deleted. On the other hand, it might be useful to highlight the fact

that immunity *ratione personae* flowed from the person's function, whereas immunity *ratione materiae* was linked to the act committed.

35. His earlier reservations about the idea of drawing up a list of persons enjoying immunity *ratione personae* had been dispelled by paragraphs 59 and 63 of the Special Rapporteur's second report, which made it clear that such immunity had to be restricted to the troika. Draft article 4 therefore seemed balanced and consistent with positive law. As Ghana had suggested at the previous year's Sixth Committee meetings, however, the question did arise as to whether the immunity of members of the troika who held office for life, or who were granted immunity by domestic law, might be tantamount to impunity.<sup>38</sup>

36. Turning to draft articles 5 and 6, he said that the two paragraphs of draft article 5 appeared to say the same thing, and the first sentence of paragraph 2 could therefore be deleted. Draft article 6, or the commentary thereto, should explain how and when a term of office might be deemed to have expired. In some legal systems, the rules governing immunity allowed for a grace period between the expiry of a term of office and the effective end of immunity. Nevertheless, the Special Rapporteur's idea that immunity ended automatically when the term of office expired seemed perfectly acceptable.

37. He was in favour of referring draft articles 1 to 6 to the Drafting Committee.

38. Mr. KAMTO said that immunity was not just a procedural matter: in response to a claim of immunity, a court must examine the modalities for granting such a claim.

39. The extensive substantive changes being proposed would necessitate a reformulation of the draft articles by the Drafting Committee, a task that normally fell to the Special Rapporteur.

*The meeting rose at 11.55 a.m.*

### 3167th MEETING

*Tuesday, 21 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the Special Rapporteur's second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Mr. COMISSÁRIO AFONSO congratulated the Special Rapporteur on her clear, well-argued and balanced report. She had taken the right approach to a very important topic. It was certainly necessary to take into account the reports by the previous Special Rapporteur<sup>39</sup> and the memorandum by the Secretariat,<sup>40</sup> which contained numerous examples drawn from State practice, case law and legal writings. The four clusters of issues identified by the Special Rapporteur and the six draft articles which she had proposed evidenced the progress made to date and offered a useful starting point.

3. The topic must indeed be approached from the perspective of both codification and progressive development, but it was perhaps unrealistic to start from the *lex lata* angle before weighing up the advisability of formulating proposals *de lege ferenda*. He looked forward to guidance from the Special Rapporteur on that matter. The Commission could uphold the relevance of immunity while rejecting impunity for the perpetrators of heinous crimes, provided that it took care to fulfil its dual mission of codification and progressive development throughout its work. A thorough analysis of the case law, in particular the *Arrest Warrant* case and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, might help it to stay on course. The Special Rapporteur had been right to take into account new developments over the previous year, especially the precedents set by the International Court of Justice and domestic courts. The careful examination of State practice, case law and legal writings which the Commission had often undertaken with much success might prove to be of great value in its work on the topic under consideration.

4. Commenting on the draft articles themselves, he proposed that the phrase "Without prejudice to the provisions of draft article 2" at the beginning of draft article 1 should be deleted and that the remainder of that article should be merged with the text of draft article 2. He agreed with draft article 3 *in toto*, although the Drafting Committee would have to decide whether its title should be "Definitions" or "Use of terms", both being acceptable. Although he fully endorsed the wording of draft article 4, he thought the Commission should extend the scope of immunity *ratione personae* in the light of the case law of the International Court of Justice. As an exercise in progressive development, it

<sup>39</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

<sup>40</sup> A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

<sup>38</sup> *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee, 23rd meeting (A/C.6/67/SR.23)*, para. 5.

could consider including other ministers or members of government among those who enjoyed such immunity. The beginning of draft article 5, paragraph 2, and paragraph 1 of draft article 6 were very similar. Some clarification was therefore needed. In conclusion, he was in favour of referring all the draft articles to the Drafting Committee.

5. Mr. SABOIA endorsed the Special Rapporteur's cautious approach consisting in a step-by-step examination of a complex, controversial subject. That method would help the Commission to advance towards the goals related to the principles of contemporary international law which had been outlined in the preliminary report—first and foremost, combating the impunity of perpetrators of international crimes—and to examine the extent to which exceptions to immunity were possible. There appeared to be merit in dealing first with preliminary questions such as the draft articles' scope and the definition of the terms employed, notwithstanding the criticism voiced of that method.

6. In view of the explanations provided by the Special Rapporteur in paragraphs 20 to 32 of the report, he supported the referral of draft articles 1 and 2 to the Drafting Committee. Mr. Murphy had proposed that express mention should be made in draft article 2 of treaties concerning military personnel, but that category of instruments could be regarded as being covered in subparagraphs (c) and (d). He endorsed draft article 3 (a), even though he supported proposals to also include acts performed by executive or administrative authorities. The last sentence of the subparagraph, which was somewhat unnecessary, should be placed in the commentary. Draft article 3 (b) was also acceptable; the answer to the question whether the adjective "certain" should be retained depended on what was meant by "officials". The term "*représentants*" employed in the French version might be misleading, since not all officials were State representatives. However, the Special Rapporteur had intimated in paragraph 32 of the report that those terms might be subject to subsequent revision. He also concurred with draft article 3 (c), where the phrase "which directly and automatically assigns them the function of representing the State in its international relations" was of particular significance, since it had a direct bearing on the subjective scope of immunity *ratione personae*. He likewise subscribed to draft article 4, which established that the latter kind of immunity was reserved for the members of the troika. He agreed with draft article 5—even if the use of the words "prior to" in paragraph 1 required more in-depth examination—and with draft article 6. He was in favour of referring all the draft articles to the Drafting Committee.

7. Mr. WISNUMURTI said that the six draft articles proposed by the Special Rapporteur attested to the substantial progress made in the work on the topic under consideration. Delegates in the Sixth Committee had approved of the general direction of the work and had endorsed the idea of a dual methodological approach combining codification and progressive development. In view of the disagreements that remained on some issues, he agreed with the Special Rapporteur's decision to begin with an examination of various aspects of the rules governing immunity *ratione personae* before moving on to the more sensitive, complex matter of exceptions to immunity. Draft articles 1 and 2, on the scope of the draft

articles, were closely related and should be merged. Draft article 1 did not pose any particular problems: it faithfully reflected the consensus within the Commission and the Sixth Committee, but it should not begin with a "without prejudice" clause. While it was necessary clearly to delimit the scope of the draft articles, making a list of immunities which were excluded was not, perhaps, the best method. The scope of a treaty was rarely defined by a negative list, which would be better placed in the commentary to the draft article.

8. He remained unconvinced by the Special Rapporteur's arguments in favour of a draft article defining the terminology employed. In any event, the definition of "criminal jurisdiction" in draft article 3 (a) was rather cumbersome. More importantly, it did not capture the meaning or essence of the term in question and was at odds with the Special Rapporteur's intentions as set forth in paragraph 41 of the report. Draft article 3 (b), which contained the definition of "immunity from foreign criminal jurisdiction", did not call for any particular comments; however, it should also cover the police and other law enforcement officers who had to deal with claims to immunity presented by foreign officials at an early stage of proceedings. The definitions of immunity *ratione personae* in draft article 3 (c) and of immunity *ratione materiae* in draft article 3 (d) had been extensively discussed and called for no special comments.

9. He fully approved of draft article 4, stipulating that immunity *ratione personae* was reserved for the members of the troika, a position which reflected customary international law. As the Special Rapporteur stated in paragraph 63 of the report, extending immunity *ratione personae* to other senior officials would amount to giving them the direct, automatic function of representing the State in international relations, a function accorded only to the members of the troika. Generally speaking, draft article 5 did not pose any particular problems, even though the words "prior to" in paragraph 1 were not quite appropriate. The Special Rapporteur should explain what was meant in paragraph 2 by the "other forms of immunity" that might be enjoyed by former Heads of State, Heads of Government and Ministers for Foreign Affairs after they had left office. Draft articles 5 and 6 should be merged. He was in favour of referring the six proposed draft articles to the Drafting Committee.

10. Mr. PARK said that the Commission had to safeguard two conflicting interests: the need to protect State sovereignty and the inviolability of persons holding State office, on the one hand, and the need to punish the perpetrators of international crimes, based on dramatic changes in international law and the international community, on the other. He concurred with the Special Rapporteur's two-stage approach consisting in first analysing *lex lata* before formulating proposals *de lege ferenda*. He was also a proponent of maintaining the distinction between immunity *ratione materiae* and immunity *ratione personae* and, in principle, of restricting the latter to the troika.

11. The topic covered immunity from foreign criminal jurisdiction but excluded international criminal jurisdiction. The question remained whether two kinds of

special tribunals also lay outside the scope of the topic, namely mixed or hybrid courts, such as the Special Court for Sierra Leone, and courts set up under domestic law to deal with international crimes, such as the International Crimes Tribunal in Bangladesh or the War Crimes Chamber of the Court of Bosnia and Herzegovina.

12. While there might be no need to define all the notions covered in the draft articles, as the Special Rapporteur had scrupulously done, the term “official” (“*représentant*”, “*fonctionnaire*”) had to be clarified at the earliest opportunity, for it could mean different things depending on language and country. Another moot point was whether the link of nationality was indispensable to the enjoyment of immunity by a State official; one question which arose in that respect was whether the Vienna Convention on Diplomatic Relations, which did not extend diplomatic immunity to a national of the receiving State, applied *mutatis mutandis* to a person representing a State of which he or she was not a national.

13. In draft article 1, the reference to the immunity of “certain” State officials rendered the scope somewhat vague. In draft article 2, the affirmative statement that some types of immunity were outside the scope of the draft articles would be preferable to stating that they were “not included”. The term “protection” in draft article 3 (b) should be spelled out or simply be replaced to convey, for example, the idea that immunity from foreign criminal jurisdiction was a “mechanism under international law that prevented” [the exercise of criminal jurisdiction by the judges and courts of another State]. Draft article 4 must take account of the fact that the status of a State official under national law was not sufficient for purposes of immunity *ratione personae* and that there could be *de facto* leaders, as one member of the Commission had pointed out. In draft article 5, it would be useful to clarify—for example by means of a saving clause—that immunity *ratione personae* remains likely to incur exceptions. In draft article 6, account must be taken of the fact that time might elapse between the expiry of a term of office and the cessation of immunity, including when an extension became necessary.

14. Mr. PETRIČ pointed out that the aim of the Commission’s work on the topic under consideration was not only to reaffirm and codify the existing immunity of State officials under customary international law, but also to ascertain the limitations on immunity based on emerging State practice, even if the latter was insufficient to turn such limitations into customary rules. That was why it was inadvisable to tackle the codification and progressive development of the law separately. The two approaches had to proceed simultaneously, starting from the stage at which definitions were established. It was plain from developments in law, judicial precedent and practice that there should be no immunity for certain crimes. Such limitations formed an integral part of the contemporary understanding of immunity and, for that reason, they must not be treated as exceptions, even if they concerned only a narrow circle of international crimes. That in no way detracted from the essential nature of immunity as a manifestation of State sovereignty and guarantor of harmonious relations between States. As several members had already said, in order to prove the existence of a rule

of customary international law, State practice had to be established *in concreto*.

15. With regard to draft article 1, he believed that it was unusual to begin an international instrument with a “without prejudice” clause. Like a number of other members, he thought that the reference to “certain” State officials was inappropriate because the draft articles covered both immunity *ratione personae* and immunity *ratione materiae*. Draft article 2 (c), which excluded immunities established under *ad hoc* international treaties from the scope of the draft articles, posed a problem, for once the draft articles became an integral part of international law it was rather unlikely that a State would be able to grant immunity for crimes covered by an exception to immunity. It would be preferable to examine the types of immunity which were not covered at the same time as exceptions to immunity. The two first draft articles could nonetheless be referred to the Drafting Committee if the majority of members so wished. The same was true of draft articles 5 and 6.

16. Draft article 3, however, lacked some important components. Several elements of the definitions that it contained depended on the important decisions to be taken about exceptions to immunity. In particular, as had just been seen, the contemporary definition of immunity from foreign criminal jurisdiction must include the definition of exceptions to that immunity. For subparagraph (a), it had to be borne in mind that omission could constitute a criminal act. In subparagraph (b), was it really the Commission’s intention to speak of “protection”? Was not the purpose of immunity more that of “precluding” the exercise of foreign criminal jurisdiction, as the report suggested?

17. More thought also had to be given to draft article 4. There was not enough State practice to prove that the troika’s immunity *ratione personae* was already a rule of customary international law. Nor was that immunity confirmed by the role played by members of the troika in international relations. Other State officials had a similar role, and Heads of State were not the officials who travelled the most frequently. In the *Arrest Warrant* case, the International Court of Justice had left the door open, and the Commission did not have sufficient reason to close it by restricting immunity *ratione personae* to the troika.

18. Sir Michael WOOD remarked that the previous Special Rapporteur’s reports and the memorandum by the Secretariat, to which the Special Rapporteur made frequent reference in her report, were now rather dated. It was necessary to take account of more recent State practice, case law and legal writings as well as the cases mentioned by Mr. Kamto, Mr. Murphy and other members. It would not be helpful to approach the topic by referring to some imagined “system of values and principles of contemporary international law”, as that might lead to an unproductive dialogue. Generally speaking, it would be wise to avoid vague and subjective notions, such as those encountered in paragraphs 7 (c) and 17 of the report, as well as hazy references to “trends” which often existed only in the eye of the beholder. In any event, he was pleased to note that the Special Rapporteur did not consider it necessary to consider such issues “at this

time”, as she made clear in paragraph 17 of her report. He was also in favour of the methodological approach outlined in paragraphs 7 (b) and 10.

19. He agreed that the scope of the topic and of the draft articles should be limited to immunity from criminal jurisdiction, which he supposed encompassed the inviolability of the person. The scope should be limited to specifically foreign criminal jurisdiction, to the exclusion of immunity before international courts or tribunals. As Mr. Forteau had suggested, it might be necessary to examine the manner in which the “common law of immunities” or the “general law of immunities” applied to actions by States in connection with international courts, although as Mr. Murphy had pointed out, some interesting and not uncontroversial case law already existed in that respect. The Commission would have to be cautious about taking account of immunity before international criminal courts and tribunals: the Special Rapporteur herself seemed to indicate as much in paragraph 30 of her report. The law and practice of international criminal courts and tribunals was unique to them and the considerations at play were quite different. He endorsed the comments made by Mr. Huang and Mr. Wisnumurti in that respect. Like Mr. Murase, Mr. Murphy and others, he believed that the Commission should expressly state that the draft articles did not apply to military personnel. He also agreed with Mr. Forteau that an official’s nationality was immaterial. On the other hand, further thought should be given to the question of whether nationality might have a bearing on the scope of immunity in the State of nationality.

20. As to the chapter of the report on the concepts of immunity and jurisdiction, it might not be necessary, or even desirable, to include definitions of “criminal jurisdiction” and “immunity from criminal jurisdiction”. Generally speaking, it was premature to consider elaborate definitions at the current stage of work, especially since, as paragraph 43 of the report noted, the notions of jurisdiction and immunity were not defined in the international instruments which had already emerged from the Commission’s work. As to the following chapter, while he agreed with the distinction drawn between immunity *ratione personae* and immunity *ratione materiae*, he was not sure that the Special Rapporteur was doing justice to it when she said in paragraph 48 of her report that those two types of immunity did not have the same basis and purpose.

21. Turning to the chapter entitled “Immunity *ratione personae*: normative elements”, and beginning with paragraphs 56 to 68, he said he agreed with the Special Rapporteur’s arguments in paragraphs 58 and 66. Unlike Mr. Tladi, he did not think that the Special Rapporteur’s proposed formulation was “overly generous”, and he disagreed with Mr. Forteau’s assertion that it was necessary to address the phenomenon of persons who held the office of Head of State for life, which was usually the position only in monarchies. The commentary should, however, cover the situation of heirs to the throne and Heads of State-elect.

22. For the reasons already given by Mr. Huang and Mr. Kamto, among others, he was not persuaded by the Special Rapporteur’s treatment of the question of which high-ranking officials, other than the troika, might benefit

from immunity *ratione personae*. She seemed to depart, without any real explanation, from the opinion of the International Court of Justice in the *Arrest Warrant* case that State officials other than the members of the troika might also enjoy that kind of immunity. It was hardly an answer to say that that was a “literal reading” of that judgment. The Special Rapporteur did not examine recent State practice that supported the Court’s opinion, for example, court decisions such as that of the England and Wales High Court in the *Khurts Bat* case. Nor, as Mr. Huang had pointed out, did she take full account of the opinions expressed in the Sixth Committee in 2012. If, as she stated, it should be only the members of the troika who enjoyed immunity *ratione personae*, on the grounds of a presumption that, simply by virtue of their office, they had full powers to act on behalf of the State, then it was permissible to ask why those powers of representation should be the criterion, or the sole criterion, for immunity *ratione personae*. Immunity did not follow from the State official’s power to represent or bind his or her State, but rather from that person’s functions and resultant role. Furthermore, even if that criterion was adopted, were the members of the troika necessarily the only persons covered? The last half of paragraph 60 seemed to raise that issue, at least as a theoretical matter.

23. In any event, the presumption that, simply by virtue of their office, members of the troika had full powers to act on behalf of their State did not seem to have been the principal or sole criterion in the *Arrest Warrant* case. With regard to the nature of the functions performed by a Minister for Foreign Affairs, in addition to the excerpts of the judgment cited by the Special Rapporteur in the first footnote to paragraph 59, the Court had found that “he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States” (*Arrest Warrant*, para. 53). While members of the troika did have a special position, as had been recognized in article 7 of the 1969 Vienna Convention, it could be argued that in today’s world, there were other holders of high-ranking office to whom immunities had to be granted “to ensure the effective performance of their functions on behalf of their respective States” (*ibid.*). Domestic courts in Switzerland and the United Kingdom had taken the view that those persons might include ministers of defence and ministers of foreign trade.

24. It went without saying that those “holders of high-ranking office” had to be confined to what the former Special Rapporteur had called “a narrow circle of high-ranking State officials”.<sup>41</sup> Although in paragraphs 64, 66 and 68 of her report, the Special Rapporteur seemed ready to consider criteria for that “narrow circle”, she also seemed to think that some kind of special immunity *ratione personae* would apply and that it should be addressed “independently of and separately from” that of the troika. He would therefore welcome clarification of paragraph 68, the last sentence of which seemed in

<sup>41</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, p. 426, para. 94 (i).

particular to be rather obscure. Lastly, he agreed with the Special Rapporteur's conclusions in paragraphs 69 to 74 of her report and her analysis of the temporal scope of immunity *ratione personae*.

25. In conclusion, he was in favour of referring all the draft articles to the Drafting Committee, on the understanding that the Committee should take into account all the comments made and, if necessary, defer returning to the Commission any draft articles which it might consider not to be ready for that.

*The meeting rose at 12.25 p.m.*

### 3168th MEETING

*Wednesday, 22 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)

[Agenda item 5]

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

1. Mr. NOLTE said that although he agreed with the list in draft article 4 of the narrow circle of officials who enjoyed immunity *ratione personae*, he thought the Special Rapporteur should have undertaken a closer analysis of State practice to establish that result. Such an analysis would have revealed that there was recent State practice suggesting that other government officials might also enjoy immunity *ratione personae* due to their representative functions, but that such practice was not sufficiently confirmed to draw clear conclusions regarding *lex lata*. That point should be explained in the commentary to the future text.

2. In addition to the close analysis of State practice that should have been carried out, existing international and national case law should also have been subjected to a critical evaluation. The Special Rapporteur cited a judgment of the Swiss Federal Criminal Court<sup>42</sup> several times, but it was of uncharacteristically poor quality, the decisive argument for denying residual immunity *ratione materiae* having been that it would be contradictory to affirm the

need to fight impunity and at the same time admit a wide interpretation of the rules on immunity *ratione materiae*. Just six months earlier, the International Court of Justice had rejected the same simplistic argument, in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. The Swiss Court's failure to address that judgment considerably weakened the value of its own ruling.

3. A general argument not put forward by the Special Rapporteur but mentioned by several members of the Commission was that while a restriction of the rules on immunity facilitated the fight against impunity, it must not undermine the maintenance of sustainable and peaceful international relations. The likely consequences of such a restriction and whether and how it would support the fight against impunity needed to be assessed. If a general exception to immunity *ratione personae* and immunity *ratione materiae* was permitted in cases where the accused was suspected of having committed international crimes, strong States would probably protect their officials by arranging special missions for them, whereas weak States would not be in a position to do so. The result would be a two-tier system that would expose the fight against impunity to accusations of double standards. Was that a risk worth taking?

4. A further consideration was whether it could be assumed that all national jurisdictions were sufficiently independent to prevent a "core crimes" exception from being abused for political purposes. He fully agreed that the perpetrators of international crimes must not go unpunished, but he was sceptical that that could be achieved by recognizing a general exception to the rules on immunity *ratione personae* and immunity *ratione materiae* in the case of alleged international crimes.

5. The procedural rules concerning immunity were so important that they could not be developed separately from the substantive delimitation of the different forms of immunity. The previous Special Rapporteur, Mr. Kolodkin, had wisely placed particular emphasis on the need for a State to invoke immunity *ratione materiae*. That position seemed to be supported by the practice of national courts. Although matters of immunity *ratione materiae* and procedural rules were not addressed in the current Special Rapporteur's second report (A/CN.4/661), they exemplified the interdependence of the substantive and the procedural aspects of immunity.

6. He welcomed the Special Rapporteur's intention to distinguish between the *lex lata* and *lex ferenda* approaches and hoped that meant that when formulating draft articles and the corresponding commentaries, the Commission would clearly indicate whether they were statements of *lex lata* or *lex ferenda*. A distinction between *lex lata* and *lex ferenda* had been advocated by the majority of States in the Sixth Committee the previous year and was also an element of the structured approach favoured by the Special Rapporteur. In his view, that implied that where a particular rule could not be clearly identified, it was necessary either to reaffirm, as *lex lata*, the principle from which the rule was an exception, or to postulate the rule as *lex ferenda*.

<sup>42</sup> *A. v. Ministère public de la Confédération* [BB.2011.140], decision of 25 July 2012.

7. He was pleased to note the Special Rapporteur's recognition that a structured approach required due account to be taken of the common features among the different facets of the rules on immunity. The most basic point of departure was that all rules on immunity, whether *ratione personae*, *ratione materiae*, procedural, criminal or civil, ultimately derived from State immunity and had been shaped by State practice. The statement that a person or an official enjoyed immunity should therefore not be taken too literally: it was ultimately the State that possessed immunity and its officials only enjoyed that immunity in a derivative way.

8. The report provided a good working basis for formulating general rules pertaining to the immunity *ratione personae* of officials from foreign criminal jurisdiction. However, formulating unnecessary definitions might prejudice the work on the topic. That matter and the various specific drafting suggestions made could be taken up in the Drafting Committee.

9. Mr. CANDIOTI said that he wished to reserve his position on two points raised by Mr. Nolte. First, the fight against impunity was not an end in itself, but an extension of the fight against grave violations of human rights. It was not being suggested that there should be immunity for heinous crimes, but rather that the Commission should not focus too much on the fight against impunity; that would be oversimplifying the debate, which was about upholding the values enshrined in international law and recognized as human rights.

10. Second, to his recollection, the Commission had never drawn such a clear distinction between *lex lata* and *lex ferenda* as was now being advocated. The Commission's mandate under its statute was the promotion of the progressive development of international law and its codification, and it had always worked on the basis that the two were complementary. All codification was essentially progressive development, although the latter implied taking account of new trends in the law.

11. Mr. GÓMEZ ROBLEDÓ said that, in general, he concurred with the Special Rapporteur's analysis of the scope of the topic and with the draft articles, in particular draft article 2. While he in no way questioned the Special Rapporteur's approach, outlined in paragraph 21, of excluding immunity before international criminal courts and specific immunity regimes from the scope of the study, he thought that surely, now that the international community had placed some normative restrictions on immunity before international criminal tribunals, that fact should be taken into account. As Mr. Caflich had remarked, immunities were on the decline *lato sensu*. The Special Rapporteur's plan to consider immunity within the system of values and principles of contemporary international law should meet with no objection. He had strong reservations, however, about ideas based on the doctrine of self-contained regimes, which had done so much harm in international law.

12. The purpose of the immunity regime was to achieve stable and secure international relations—a notion that should be taken up in a preamble to the draft articles. Both immunity *ratione personae* and immunity *ratione materiae* were pre-eminently functional, in that they

safeguarded the successful interaction of States. Hence the strong need for jurisdiction to be exercised and immunity to come into play as soon as a representative of the State was likely to be affected by an act of any type. The definition of "criminal jurisdiction" in draft article 3 (a) did not adequately emphasize the nature of the acts that might trigger the exercise of such jurisdiction. In draft article 3 (b), the description of the protection enjoyed by certain State officials should be expanded to include the inviolability of the person. Reference should perhaps also be made to the notions of respect and dignity mentioned in article 29 of the Vienna Convention on Diplomatic Relations.

13. In the light of the judgment in the *Arrest Warrant* case and United Nations treaty practice, he had now abandoned his view that immunity *ratione personae* might be enjoyed by any officials other than the members of the troika. He also thought that draft article 3 (c) should be revised to refer to a presumption that certain officials by virtue of their status had the function of representing the State. Like other members, he thought that there was no need for an official to be a national of the State represented.

14. He agreed with the concern expressed about draft article 5, paragraph 1, which might be interpreted as providing immunity for acts committed prior to holding office. Another important factor was the time that elapsed between an official's election and assumption of office, which in some States could be several months.

15. As for draft article 6, mention should be made, in the commentary, of monarchs, whose reign by definition was not subject to time limitations. Finally, in the definitions, he recommended that the Spanish term "*agente*" should be used instead of "*funcionario*".

16. Mr. HASSOUNA said that in general, he endorsed the scope of the draft articles and the approach taken in the second report. He looked forward to the Special Rapporteur's dealing in a future report with such complex issues as the definitions of "official" and "official act" and the question of international crimes.

17. In draft article 1, the word "certain", before "State officials", could be deleted, since "officials" did not refer to all State officials. In addition, greater clarity would be provided by replacing the verb "deal with" with "apply to" and deleting the opening "[w]ithout prejudice" clause.

18. For draft article 2, he suggested a more direct title such as "Privileges and immunities not affected by the present draft articles", followed by the "without prejudice" clause. The deletion of the word "Criminal" before "immunities" in draft article 2 (a) and (b) would emphasize the fact that the draft articles were not applicable when a more specific immunity regime was operative.

19. In draft article 3 (a), the wording "an act established as a crime or misdemeanour" might exclude from the scope of the draft articles offences that were not categorized as crimes or misdemeanours. That phrase should be deleted and a more general formulation used,

such as “acts which are needed in order for a court to establish and enforce individual criminal responsibility under the law of the State that purports to exercise jurisdiction”. The term “court” should be defined in order to ensure that the draft articles applied to any organ of a foreign State entitled to exercise judicial functions. The specification that “[f]or the purposes of the definition of the term ‘criminal jurisdiction’, the basis of the State’s competence to exercise jurisdiction is irrelevant” appeared to be implied by the definition itself and could be moved to the commentary.

20. The inclusion of the phrase “[i]mmunity from foreign criminal jurisdiction” in draft article 3 (b), a provision relating to the use of terms, was questionable. Given that it was the very subject of the draft articles, the implications of immunity from foreign criminal jurisdiction should instead be addressed in an operative provision. In draft article 3 (d), he suggested that the words “on the basis of the acts” should be replaced with “with respect to the acts”.

21. In draft article 4, the reference to “States of which they are not nationals” could have problematic consequences if an official had more than one nationality, as had been the case with former Peruvian President Alberto Fujimori. A formulation such as “other States” would be preferable.

22. The Special Rapporteur’s decision to limit the subjective scope of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs appeared well founded in view of the lack of consistent practice establishing that other high-ranking officials were also entitled to such immunities. However, given the support shown during the most recent session of the Sixth Committee for the possible extension of such immunity beyond the troika, it would seem advisable to delineate in further detail the kind and number of cases justifying the adoption of the stricter approach.

23. In draft article 5, although granting members of the troika immunity for acts committed “prior to” their term of office might seem unjustified, there was international case law in which the immunity enjoyed by serving members of the troika was referred to as “full” immunity, irrespective of the nature of the act, its timing or where it was performed. The rationale for such a rule should be explained in the commentary to the draft articles. Given that draft article 5, paragraph 2, and draft article 6, paragraph 1, both addressed the temporal scope of immunity *ratione personae*, they should be merged. The word “may” should be deleted in draft article 6, paragraph 2.

24. He did not think that the controversial issues in the draft articles should be settled in the plenary in preference to the Drafting Committee. The Committee had found acceptable solutions to similarly controversial issues in the past.

25. Mr. SINGH endorsed the Special Rapporteur’s methodology, as outlined in paragraph 7 (b) of her report, and agreed with her reasoning about the scope of the topic. However, he would prefer it to be expressly stated that

the draft articles did not apply to military personnel. He agreed on the need to avoid references to the nationality of the official; what mattered was the State that the official represented.

26. He shared the view that it might not be desirable to include definitions of the terms “criminal jurisdiction” and “immunity from criminal jurisdiction”. He did not agree with the statement in paragraph 48 of the report that immunity *ratione personae* and immunity *ratione materiae* had a common basis: the two types of immunity differed in their basis and components.

27. He agreed with the Special Rapporteur that the granting of immunity *ratione personae* to the members of the troika was now a rule of customary international law, but he was not convinced by her discussion of why other high-ranking officials should not benefit from such immunity. She seemed to base that conclusion on the presumption that, simply by virtue of their office, the members of the troika had full powers to act on behalf of their State. However, international practice did not rule out the possibility of granting immunity *ratione personae* to other high-ranking officials who would, of course, need to be confined to a narrow circle. The Special Rapporteur seemed open to considering criteria for membership in that circle but at the same time seemed to think that some special kind of immunity *ratione personae* would apply to the members. The suggestions in paragraph 68 of the report that a “new territorial element” characterized that specific type of immunity and that the concept of “official visit” needed to be taken into account required further explanation.

28. He agreed with the report’s conclusions on the material scope of immunity *ratione personae*. As to the temporal scope, although the words “prior to” in draft article 5 had led to some confusion, he agreed with the Special Rapporteur’s analysis.

29. He would be happy to see all of the draft articles referred to the Drafting Committee.

30. Ms. JACOBSSON endorsed the Special Rapporteur’s approach of providing an “operational tool”, as she put it in paragraph 13 of her report, to enable the Commission to move forward at the current session. The analysis of national court cases, which were of particular relevance to the work on the topic, needed to be carried out in the course of that work.

31. She raised two general points: First, she endorsed the Special Rapporteur’s choice of the expression “full immunity” (instead of “absolute”). Second, she believed that it was relevant to refer to “norms” and “values” as, for example, Judges Higgins, Kooijmans and Buergenthal had in their joint separate opinion in the *Arrest Warrant* case.

32. She agreed with the scope as set out in draft article 1, although the meaning of the word “certain” was not entirely evident. The “[w]ithout prejudice” clause was unnecessary in that article if the listing in draft article 2 was retained. In draft article 2 (c), she considered the formulation “other *ad hoc* international treaties” somewhat

imprecise and thought that the exclusion of military personnel covered by status-of-forces agreements should be mentioned. If agreements relating to special missions were not to be part of the topic, then an essential aspect of immunity, namely the right of States to issue guarantees of immunity unilaterally or *inter partes*, would be passed over in silence. Rather than the expansion of the categories of persons that enjoyed immunity *ratione personae*, it was the *ad hoc* agreements that should be encouraged. For example, a new procedure had been instituted, initially on an experimental basis, in the United Kingdom to clarify the cases when the Government consented to an official visit as a special mission.

33. She supported the inclusion of the definitions in draft article 3. The last sentence in draft article 3 (a) seemed redundant and could be dealt with in the commentary. In draft article 3 (b), the expression “by the judges and courts” did not cover all of the official acts that needed to be addressed. In some countries, criminal enforcement procedures were carried out by the police, the coast guard and prosecutors. Expanding the wording beyond “the judges and courts” would also address immunity from pretrial proceedings. In draft article 3 (c), the meaning of “certain” needed to be clarified.

34. She accepted the subjective scope of immunity *ratione personae* as reflected in draft article 4, but she agreed with others that the use of the term “nationals” was unfortunate. Given the close connection between the material scope and the temporal scope in immunity cases, she saw no need to transpose the reference to temporal scope from draft article 5, paragraph 2, to draft article 6.

35. As to the words “prior to” in draft article 5, paragraph 1, the question was whether the concerns raised could be resolved through the draft articles on immunity or had to be mitigated by other means, such as exceptions to immunity, tighter provisions on temporal scope or restricted categories of persons who could enjoy such immunity.

36. She supported sending all six draft articles to the Drafting Committee.

37. Mr. NOLTE said that while the distinction between *lex lata* and *lex ferenda* might not be so important when elaborating draft conventions, the current project was designed to be taken into account by national courts, which would need to know whether the text was to be viewed as customary international law.

38. Mr. CANDIOTI said that, in general, he agreed with the approach taken by the Special Rapporteur. The meaning of “*ad hoc*” in draft article 2 (c) could be clarified, and although he was not certain that explicit reference needed to be made to status-of-forces agreements, the text of the provision could be improved.

39. The definitions in draft article 3 were an important element of the project and reflected the Commission’s general practice. Definitions of “official” and “official act” in the upcoming third report would be extremely useful. Regarding draft article 3 (c), he agreed with

Mr. Forteau that immunity *ratione personae* was an exception to the sovereignty of the forum State. It should not be indiscriminately extended to all State agents.

40. The difference between immunity *ratione personae* and immunity *ratione materiae* was that the former flowed from the status of the person under international law, whereas the latter stemmed from his or her function. Immunity *ratione personae* was a vestige of the past: formerly the divine right of the king, it had subsequently been extended to the Head of State or Head of Government during their term of office, because they personified the State. He doubted whether Ministers for Foreign Affairs enjoyed such immunity, although they had immunity *ratione materiae* because they performed certain important functions and international acts. He would not, however, block the growing consensus on that point within the Commission. In draft article 4, the reference to nationality should be deleted. Immunity *ratione personae* should be confined to the troika, notwithstanding examples of national case law where it had been extended to other high-ranking State officials, including those on special missions.

41. All the draft articles proposed by the Special Rapporteur should be referred to the Drafting Committee.

42. Mr. GEVORGIAN said that he generally supported the approach outlined in paragraph 7 (b) but thought that care should be taken to retain a judicious balance in the formulation of proposals *de lege ferenda*. The idea expressed in paragraph 7 (c), namely that the relevant principles and values of international law should be taken into account, required clarification.

43. He agreed with Mr. Forteau that the State of nationality of the official was outside the scope of the topic and of the draft articles. Paragraphs 24 and 25 of the report seemed to be mutually contradictory. A balanced approach had to be taken to immunity from criminal jurisdiction, taking into account, when necessary, State practice concerning immunity from civil or administrative jurisdiction. In principle, given the different nature of national and international jurisdiction, immunity from international criminal jurisdiction lay outside the scope of the topic. Unlike the Special Rapporteur, he himself thought that the term “official” needed to be defined at the current stage of work on the draft articles, not later, when immunity *ratione materiae* was addressed.

44. He concurred with the distinction between immunity *ratione personae* and immunity *ratione materiae* outlined in paragraphs 47 to 53 of the report. The troika’s immunity *ratione personae* was a clearly established norm of international law, but the report did not contain enough factual evidence to support the view that immunity *ratione personae* was confined exclusively to the troika. Consideration should be given to including a number of senior State officials in the subjective scope of immunity *ratione personae*, on the basis of certain criteria. That approach would be consistent with the case law of the International Court of Justice and with State practice. The interesting issue of *de facto* Heads of State raised by Mr. Park could be addressed in the commentary to the draft articles.

45. In draft article 1, the word “certain” should be deleted, as had been suggested. He agreed with the approach taken in draft article 2, although there was a need for terminological consistency throughout the text. Accordingly, the word “Criminal”, in draft article 2 (a) and (b), should be deleted. The expression “*ad hoc*” in draft article 2 (c) was unnecessary. Although that provision must be understood as excluding military personnel from the scope of the draft, that important issue should be dealt with in a separate paragraph.

46. The definitions of “criminal jurisdiction” and of “[i]mmunity from criminal jurisdiction” in draft article 3 (a) and (b) were superfluous and might not include all the important elements. For example, why did draft article 3 (b) refer only to the exercise of criminal jurisdiction by judges and courts? Such jurisdiction was also exercised by law enforcement agencies which were entitled to initiate stages in criminal proceedings such as pretrial detention. The phrase “which directly and automatically assigns them the function of representing the State in its international relations” in draft article 3 (c) could be deleted. He questioned the formulation of the entire phrase after the words “by State officials” in draft article 3 (d). It might be advisable for the Special Rapporteur to clarify the normative elements of immunity *ratione materiae* in her third report. As for draft article 5, paragraph 2 clearly overlapped with article 6 and could be deleted or the two draft articles could be merged.

47. He had no objection to the referral of the draft articles to the Drafting Committee.

48. Mr. VÁZQUEZ-BERMÚDEZ noted that the scope of the topic should be limited to immunity from foreign criminal jurisdiction, although where feasible, State practice regarding immunity from civil or administrative jurisdiction should be taken into consideration. While immunity before international criminal tribunals or courts lay outside the scope of the topic, that did not mean that interpretative principles based on their case law had to be ignored. Similarly, while specific regimes did not come within the scope of the topic, the Commission could bear them in mind when that would be useful for its work.

49. Draft article 1 should be streamlined and the “[w]ithout prejudice” clause should be deleted. The term “certain” was problematical and should be deleted, leaving just a general reference to officials, with the following draft articles to specify which officials enjoyed immunity, for which acts and during which time frame. The definition of the term “official” was vital and should not be linked to the person’s nationality. Indeed, the reference to nationality in draft article 4 should be deleted.

50. Draft article 2 should be reformulated as a “without prejudice” clause. It would be better to speak, not of “other *ad hoc* international treaties”, but of the application of *lex specialis*, which would cover all the regimes listed in draft article 2. The Drafting Committee should be allowed some flexibility when dealing with the definitions of “criminal jurisdiction” and “[i]mmunity from criminal jurisdiction” in draft article 3. The last phrase of draft article 3 (a) would be better placed in the commentary. He understood paragraph 45 (c) of the report to mean

that, while a State official who enjoyed immunity could not be prosecuted in the forum State, that person was not exempt from individual criminal responsibility, and he or she could be prosecuted once immunity *ratione personae* had been lifted or had ended. However, if the forum State’s criminal laws covered crimes against humanity, they could be applied in specific cases as limitations on immunity. At some point the Commission would have to discuss such crimes as factors limiting immunity from criminal jurisdiction.

51. Turning to paragraphs 47 to 53 of the report, he concurred with the distinction made between immunity *ratione materiae* and immunity *ratione personae*. He also agreed that the basis of the troika’s immunity *ratione personae* was their function as representatives of the State in international relations, which they exercised without any need to produce express authorization from the State they represented. The list of persons who had immunity *ratione personae* was exhaustive, and such immunity could not be extended to other State officials, even those who held high office, who also played a role in international relations or travelled frequently. The troika’s representative function, with its basis in international law, should be expressly recognized in the definition of immunity *ratione personae*.

52. He agreed with draft article 4, subject to the deletion he had mentioned earlier. Draft article 5, paragraph 1, had to be read together with draft article 6, paragraph 1. Draft article 5, paragraph 2, seemed to be redundant in the light of the contents of draft article 6.

53. He supported the referral of all six draft articles to the Drafting Committee.

*The meeting rose at 1.05 p.m.*

### 3169th MEETING

*Thursday, 23 May 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Ms. Patricia O’Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited her to inform the Commission members of developments since the previous session in legal areas of interest to the Organization.

2. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Sixth Committee had discussed with interest the report of the International Law Commission on the work of its sixty-fourth session.<sup>43</sup> Consideration of chapter IV of the Commission's report on the work of its sixty-third session (Reservations to treaties)<sup>44</sup> had been deferred until the sixty-eighth session of the General Assembly. In its resolution 67/92 of 14 December 2012, the General Assembly had provided guidance on the Commission's further work.

3. The Sixth Committee had pursued its consideration of various subjects of interest to the Commission. After a break of one year, the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 had resumed its work on measures to eliminate international terrorism, and there were plans to set up a Sixth Committee working group on that subject. The Secretary-General had prepared three reports containing Governments' views on "The scope and application of the principle of universal jurisdiction".<sup>45</sup> It was, however, still too early to determine what the final outcome of deliberations in that area would be. Work was also continuing on the item "Criminal accountability of United Nations officials and experts on mission", although it seemed that Member States were not yet ready to draft a binding instrument. The item "The rule of law at the national and international levels" was receiving increasing attention. A high-level meeting of the General Assembly which had been devoted to it at the initiative of the Sixth Committee had culminated in the adoption of the declaration contained in resolution 67/1 of 24 September 2012, which reaffirmed the importance of the rule of law for political dialogue and cooperation among States. The contribution made by the International Law Commission to advancing the rule of law through the progressive development and codification of international law had been commended on that occasion. The subject of the thematic debate of the Sixth Committee at the sixty-eighth session of the General Assembly would be "The rule of law and the peaceful settlement of international disputes".

4. The Office of Legal Affairs continued to provide active support for the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law and for the expansion of the United Nations Audiovisual Library of International Law. Some major developments had taken place with regard to the item "Administration of justice at the United Nations".<sup>46</sup> In resolution 67/241 of 24 December 2012, the General Assembly had recalled that the tribunals must have recourse to general principles of law and the Charter of the United Nations, within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances. Furthermore, it had requested the Secretary-General, in consultation with the Internal Justice Council and other relevant bodies, to prepare a code of conduct for legal representatives who were external to the Organization. Since 2009, the United Nations Dispute Tribunal

had issued more than 800 judgments and the United Nations Appeals Tribunal had delivered almost 300. Some judgments had affirmed, for example, that the Secretary-General could dismiss staff members who had been found guilty of engaging in sexual harassment and that procedural irregularities did not automatically render a selection flawed if the candidate challenging the process had no real chance of being selected. Those new precedents would have a significant impact on the development of the Organization's administrative and management policies and on the advisory role of the Office of Legal Affairs.

5. It was incumbent upon the Office of the Legal Counsel to advise the Secretary-General and other key Secretariat departments on various matters concerning international peace and security. It had thus played a central role in facilitating cooperation between the United Nations and the International Criminal Court while, at the same time, protecting the Organization's vital interests. The Court had delivered its two first decisions<sup>47</sup> in the previous 12 months and was expected to issue a third decision<sup>48</sup> in the coming months. In all three cases, which had concerned the Democratic Republic of the Congo, the United Nations had produced a considerable body of evidence and had likewise provided administrative and logistical support for investigators on the ground. The International Criminal Court, for its part, by bringing justice for countless victims of armed conflict was contributing to the efforts of the United Nations to foster peace, development and respect for human rights in the Democratic Republic of the Congo. The Court had been criticized for completing only two trials in the more than 12 years of its existence, but it had to be remembered that it was concerned with "live" conflicts, a factor which considerably complicated all aspects of the process. The United Nations, which had helped to set up five international criminal tribunals, knew how complex such cases were, if only on account of the huge geographical regions or the long periods involved. The Court was currently exercising its jurisdiction over eight conflict situations in the world and was accepted without reservations as the centrepiece of a global system of criminal justice through which the international community was endeavouring to end impunity and strengthen the rule of law.

6. Turning to the sanctions regimes established by the Security Council, she explained that the Council had adopted a number of resolutions which sought to ensure that the procedures for placing individuals and entities on sanctions lists and for removing them from those lists were fair and transparent. The post of an independent and impartial Ombudsperson, responsible for making recommendations on requests for delisting, had been created and that person's mandate had then been considerably strengthened. Nevertheless, a growing number of individuals and entities were lodging successful complaints with regional and national courts all over the world, in which they argued that their inclusion on the list established pursuant to resolutions 1267 (1999) and 1333 (2000) of 15 October 1999 and 19 December 2000, respectively, infringed their fundamental human rights, including their right to due process. The Office of

<sup>43</sup> *Yearbook ... 2012*, vol. II (Part Two).

<sup>44</sup> *Yearbook ... 2011*, vol. II (Part Two), chap. IV, and *ibid.*, vol. II (Part Three).

<sup>45</sup> A/65/181, A/66/93 and Add.1 and A/67/116.

<sup>46</sup> Available from [www.un.org/law/avl/](http://www.un.org/law/avl/).

<sup>47</sup> *Lubanga* and *Ngudjolo Chui* cases.

<sup>48</sup> *Katanga* case.

the Legal Counsel was closely monitoring those cases, especially the *Kadi* and *Nada* cases and was concerned about the impact which they might have on Member States' obligations under Chapter VII of the Charter of the United Nations and under international human rights law and, for European States, under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. Although sanctions regimes continued to give rise to concerns with regard to human rights, it was to be hoped that the improvements which had been made to them, the effects of which were already being felt, would greatly enhance fairness and transparency.

7. The previous year, the Office of the Legal Counsel had received numerous requests for advice in connection with peacekeeping operations. For example, after the Security Council's adoption of resolution 2098 (2013) of 28 March 2013 establishing an "Intervention Brigade" responsible for carrying out targeted offensive operations unilaterally or jointly with the *Forces armées de la République démocratique du Congo* (Armed Forces of the Democratic Republic of the Congo (FARDC)), Guatemala had expressed concern that the neutrality and impartiality of the Organization's peacekeeping activities might be compromised by those operations. The risk was that, through the tasks given to the Intervention Brigade, the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) might become a party to the armed conflict in that country, in which case international humanitarian law would apply. That might mean that the military personnel of MONUSCO and any person participating directly in hostilities would lose their protected status under the Convention on the Safety of United Nations and Associated Personnel.

8. Security Council resolutions were making increasingly frequent reference to the human rights due diligence policy governing United Nations support for non-United Nations security forces, which had been introduced by the Secretary-General in 2011.<sup>49</sup> For example, in resolution 2098 (2013), the Council expressly called upon the Intervention Brigade strictly to comply with that policy in joint operations with the FARDC. The Office of the Legal Counsel, which had played a central role in formulating that policy, was continuing to provide advice regarding its application. By providing support for non-United Nations security forces, which was happening with growing frequency, the United Nations ran the risk of becoming unwittingly implicated in violations of international law, as events in the Democratic Republic of the Congo in 2009 had shown. In accordance with that policy, based on the Charter of the United Nations, the law of international responsibility and international humanitarian law, any United Nations entity which contemplated or decided to provide such support must assess the situation and, if there were any substantial grounds for believing that there was a real risk of a breach of humanitarian law, human rights law or refugee law and that it was not possible to eliminate or reduce that risk to an acceptable level, it must refrain from providing that support. If the entity concerned decided to furnish support, it must put in place measures

for closely monitoring the conduct of the non-United Nations security forces and if it then received information giving sufficient grounds for suspecting that members of those forces were committing violations of humanitarian law, human rights law or refugee law, it must take immediate steps in order to end, suspend or withdraw its support if those violations continued.

9. The year 2012 had been very busy for the Division for Ocean Affairs and the Law of the Sea, because a series of events had been organized to celebrate the thirtieth anniversary of the opening for signature of the United Nations Convention on the Law of the Sea. In the field of maritime security, acts of piracy off the coast of Somalia had decreased considerably and, in conformity with article 100 of the United Nations Convention on the Law of the Sea, States had cooperated in repressing piracy. The international community must, however, pursue its efforts because the legislation of many States still did not fully reflect the provisions of the Convention.

10. As for the activities of the Treaty Section, she said that three new instruments had been deposited with the Secretary-General: the Protocol to Eliminate Illicit Trade in Tobacco Products; the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change; and the Arms Trade Treaty. In 2013, the annual Treaty Event ceremonies would be held from 24 to 26 September and from 30 September to 1 October, during the sixty-eighth session of the General Assembly. At the ceremonies in 2012, 40 States had deposited 60 instruments of ratification, acceptance or accession.

11. As she would be taking up a new position in the near future, in conclusion she wished to say how enriching her experience as the United Nations Legal Counsel had been and how much importance she, as a lawyer, had attached to her annual visits to the Commission. In her future capacity of the Permanent Representative of Ireland to the United Nations Office at Geneva, she would continue to follow closely the Commission's work and would strive to promote it.

12. The CHAIRPERSON thanked the United Nations Legal Counsel for her statement and invited the members of the Commission to make comments, or ask questions.

13. Sir Michael WOOD said that the Audiovisual Library of International Law was indeed a valuable source of information which deserved as much support as possible. He wished to know if the Office of Legal Affairs often referred to the draft articles on the responsibility of international organizations adopted by the Commission in 2011.<sup>50</sup> Lastly, he suggested that in 2014 the Treaty Section should celebrate the tenth anniversary of the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property, in order to encourage ratification of that instrument.

14. Ms. JACOBSSON said that she approved of the choice of the subject of the thematic debate "The rule of

<sup>49</sup> A/67/775-S/2013/110.

<sup>50</sup> *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88; the articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are reproduced in the annex to General Assembly resolution 66/100 of 9 December 2011.

law and the peaceful settlement of international disputes”, which was of particular interest to the Commission, since this was a topic that the Commission might want to address in the future. She asked whether, in that respect, the United Nations Legal Counsel could provide further information which would be of assistance to the Commission when it responded to the General Assembly resolution on the rule of law.

15. Mr. PETER wondered if there was a custom whereby the United Nations could perform certain of its activities which had legal consequences without a written rule, in accordance with an oral tradition, and what the actual practice was. He also wished to know if it was normal that the rules and regulations issued by the United Nations applied retroactively. Lastly he enquired about the legal status of the International Law Seminar.

16. Mr. HASSOUNA asked the United Nations Legal Counsel what had been the biggest challenge that she had encountered during her term of office, what had been the achievement of which she had been proudest and what, in her view, were the strong points and the weak points of the Commission.

17. Mr. PETRIČ asked why work on the convention against terrorism was progressing so slowly when terrorist acts were still being committed all over the world. He noted that, in her statement, the United Nations Legal Counsel had spoken at length about the International Criminal Court and wondered if the fact that many *ad hoc* tribunals were coming to the end of their work might contribute to the Court’s universal reach.

18. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the draft articles on the responsibility of international organizations were extremely important and useful and that the Organization had already referred to them when examining complaints regarding cases of cholera in Haiti. She knew of no United Nations activities which were conducted without rules, nor of any retroactive application of rules and regulations concerning individual rights. The International Law Seminar had been in existence for more than 50 years and its legal basis could be regarded as secure. International law lay at the heart of all the Organization’s strategic and political activities. Throughout her term of office, at the express request of the Secretary-General, she had participated in all meetings concerned with strategic and political issues and she considered that to be proof of the importance which the Organization attached to the development of international law. The number of situations in which the opinion of the Office of Legal Affairs had been requested at an early stage had increased since 2009, and had concerned, for example, the bombing of Gaza, the flotilla incident, chemical weapons in the Democratic Republic of the Congo, Libya, Mali and Syria, as well as the changing nature of peacekeeping and the basic role of the United Nations.

19. One of the achievements of which she was particularly proud was the human rights due diligence policy in the context of support provided by the United Nations to non-United Nations security forces. The fact that those principles had already become an integral part of

the Organization’s action was having a very beneficial impact on its whole *modus operandi*. On the question of international criminal justice and, more precisely, how the United Nations applied the principles of the rule of law within the Organization and how it secured respect for international criminal justice despite the tensions which existed between peace and justice, the guidance on contacts with persons subject to an arrest warrant or summons issued by the International Criminal Court,<sup>51</sup> promulgated recently by the Office of Legal Affairs, established that United Nations officials must not have any relations with such persons, unless it was absolutely essential for the performance of their duties. That principle was very difficult to apply. To understand the problem, it was sufficient to think of the situation in Kenya, where the United Nations had an office and where Mr. Kenyatta and Mr. Ruto, both of whom had been charged with crimes against humanity by the International Criminal Court,<sup>52</sup> had been elected President and Vice-President respectively. It was, however, essential that the United Nations complied with the principle.

20. The Office of Legal Affairs was committed to giving all the requisite support to the Commission. Although the golden age of codification might perhaps be over, that was certainly not true of progressive development on which it should focus, since it was essential for the rule of law. Currently it would probably be wise to promote the Commission’s work and to give it greater publicity, because, in a troubled economic context, there seemed to be growing scepticism about its efficiency and credibility. The problem with the convention against terrorism was not legal but political, because States had still not managed to agree on a definition of terrorism and there was nothing to indicate that they might do so in the foreseeable future. As for the International Criminal Court and the *ad hoc* tribunals, financial constraints and the prospect of genuinely international justice did not encourage the international community to establish new tribunals of that kind, although it might prove necessary one day. As *ad hoc* tribunals were reaching the end of their mission, the International Criminal Court was currently the only permanent international criminal court, and it was very encouraging to see non-Member States cooperating with it. However, the African Union had decided to set up a new criminal court which would have jurisdiction over crimes under the Rome Statute of the International Criminal Court and also over the crime of being a mercenary and the crime of an unconstitutional change of government, although the latter element was highly controversial. The establishment of that tribunal was already raising a number of issues regarding the future of international criminal justice.

21. The CHAIRPERSON thanked the United Nations Legal Counsel whose visits had always been very useful and enriching, and he wished her every success in her new position.

*Ms. O’Brien (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) withdrew.*

<sup>51</sup> A/67/828-S/2013/210.

<sup>52</sup> The *Kenyatta and Ruto* cases.

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

[Agenda item 1]

22. The CHAIRPERSON said that he took it that the Commission wished to re-establish the Study Group on the most-favoured-nation clause, which had previously been chaired by Mr. McRae.

*It was so decided.*

23. Mr. FORTEAU, in the absence of Mr. McRae, read out the names of the Commission members who would form the Study Group on the most-favoured-nation clause: Mr. Cafilisch, Ms. Escobar Hernández, Mr. Hmoud, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez and Sir Michael Wood.

*The meeting rose at 11.35 a.m.*

**3170th MEETING**

*Friday, 24 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

**Immunity of State officials from foreign criminal jurisdiction (continued)\*\* (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)**

[Agenda item 5]

**SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)\*\***

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) thanked the members of the Commission for their comments and expressed her satisfaction at the high level of the debate. In order to adequately summarize the debate and respond to the questions raised by Commission members, she said that she would divide her statement into two parts, dealing first with a number of general matters raised and then with the comments directly related to the draft articles she had submitted to the Commission.

\* Resumed from the 3166th meeting.

\*\* Resumed from the 3168th meeting.

3. Turning first to general matters, she cited three sets of cross-cutting issues that had been brought up in relation to the report as a whole, namely (a) methodological aspects; (b) the treatment of international crimes in the draft articles and how they related to limits or exceptions to immunity; and (c) the definition of “official”.

4. In relation to the first issue, she recalled that her methodological approach had been broadly supported by the members of the Commission and in the debates of the Sixth Committee of the General Assembly. She pointed out, in particular, that the members of the Commission had expressed their support for continuing to approach the topic from the dual perspective of *lex lata* and *lex ferenda*, taking into consideration the Commission’s dual mandate of progressive development and codification of international law. However, she noted that nuanced views had been expressed with regard to the degree of emphasis that should be placed on the *lex lata* perspective. She herself had concluded that it was not possible to dissociate the two perspectives, given the special nature of the topic.

5. Still on the issue of methodological questions, she also drew attention to the debate that had again arisen at the current session on how the values and principles of international law should be dealt with under the topic of the immunity of State officials from foreign criminal jurisdiction. On that point, she noted that, although no members of the Commission had expressed outright opposition to taking values and principles into account, some had expressed concern that doing so would complicate the Commission’s work, or had pointed out that values *per se* could not be taken into consideration, as that would necessitate addressing their inclusion in existing international law. Other members of the Commission, meanwhile, had reiterated that the values and principles of contemporary international law were elements that should be taken into account in order to ensure that the outcome of the Commission’s work did not contradict current trends in contemporary international law. That group, representing the majority of Commission members, had pointed out that values and principles were not merely *desiderata* and expressions of will without any legal basis, but rather were reflected in existing norms. The debate had arisen in particular in connection with the question of how international crimes should be addressed under the topic and in respect of the existence of international criminal tribunals. Particular emphasis had been placed on the need to deal with the principle of combating impunity, which was undeniably linked to respect for human rights. Similarly, it had been pointed out that maintaining stable and secure international relations was in itself a value that should be preserved. In any event, the members of the Commission who had participated in the debate on those issues had pointed to the need to approach such values and principles in a balanced manner.

6. Third, she noted that the majority of Commission members had expressed their support for the step-by-step approach based on the successive identification and analysis of sets of issues which, although they were interrelated, needed to be considered separately. In particular, she said that quite a few members of the Commission had expressed the view that such an approach had already yielded tangible

results in the second report, with the presentation of draft articles that had given a strong impetus to the project. However, some members of the Commission had felt that the topic should be viewed as a whole and that its various constituent elements should be analysed as a whole. Those criticisms had been made in relation to two elements: the consideration of international crimes and the need to provide certain additional definitions, especially of “official” and “official act”. She had concluded that the Commission supported her method of work based on a step-by-step analysis of the issues, which she would continue to use in the future in order to allow the project to progress and avoid the risk of a circular discussion to which the supposedly more open and more balanced method of considering the issues as a whole might lead and which, in her view, the Commission would like to avoid.

7. Continuing on methodological matters, she drew attention to the fact that all members of the Commission considered an analysis of the practice and, in particular, of case law to be an essential element of the Commission’s work on the topic. In addition, she said that some members considered that the second report contained insufficient examples of practice and doctrine to justify the solutions proposed. She herself agreed with members of the Commission about the value of practice, particularly international and national case law, in addressing the issue. She reiterated that an analysis of the relevant national and international case law formed the basis of her second report. Given that the case law had been dealt with extensively in the memorandum of the Secretariat<sup>53</sup> and in the reports of the previous Special Rapporteur<sup>54</sup> and that the members of the Commission were more than familiar with it, she had not considered it necessary to reproduce it in full as part of her second report. The “critical mass” of national practice was sufficiently consolidated in relation to the issues the report dealt with, and she had considered that her current task was to provide new, supplementary arguments that could help advance the work on the issues included in the second report and, on that basis, to formulate draft articles.

8. To conclude on methodological matters, she highlighted the problem of working with multiple language versions and the need to take into account all the official languages. She recalled the statement made by one member in that regard and said she would call on the members of the various language groups for their linguistic expertise.

9. Second, in the context of general matters, she referred to international crimes and their relationship to the limits and exceptions to immunity. In that connection, she said that one member of the Commission had mentioned the need to analyse the opposability of international crimes in the context of immunity from international criminal jurisdiction, recalling that such an approach had been the original objective of the project and the justification for its inclusion in the Commission’s programme of work. It was that member’s opinion that that was the central

issue of the current topic and it could not be ignored. In addressing that member’s concern, she read out portions of her prior response to the same member at the sixty-fourth session,<sup>55</sup> in which she had stated that, in her view, only those crimes which were of concern to the international community as a whole, were egregious and were widely acknowledged as such could merit consideration in any discussion of possible exceptions. Such crimes might, at an initial stage of the analysis, include genocide, crimes against humanity and war crimes, as defined in the Rome Statute of the International Criminal Court. Other members of the Commission had stressed the issue of exceptions or limits to immunity and the need to uphold the instruments for combating impunity that had been established by the international community through hard-won battles in recent decades.

10. In responding to those concerns, she said that she fully shared the view expressed by several members of the Commission that the issue of immunity of State officials from foreign criminal jurisdiction could not be addressed without taking into account the progress made in recent decades in international law, particularly the contributions to international criminal law. She also agreed that the consideration of immunities would be incomplete and would not meet the needs of today’s international community if it omitted the issue of exceptions to immunity. It was not her intention to avoid debate on a central issue that was possibly the most controversial of those to be dealt with by the Commission under the topic of immunity of State officials from foreign criminal jurisdiction. However, in accordance with the methodological approach accepted by the Commission and the programme of work presented earlier, she would deal with the question of international crimes and whether they formed a limit or exception to immunity at a later date. It was a cross-cutting issue that must be considered in relation to both immunity *ratione personae* and immunity *ratione materiae*, and it therefore seemed advisable for the various normative elements that in general terms defined each of those categories of immunity to have been identified first. That methodological approach could in no way be interpreted as omitting the issue of exceptions or as indicating the role of exceptions or limits in relation to the various normative elements of each of the categories of immunity dealt with in the study.

11. The third general matter she wished to address was the definition of “official”. In that connection, she said that a number of members had pointed to the need to define that concept. Several found it advisable to use the term “agent” instead of “official” since it better reflected the category of persons whose immunity was to be described under the topic. The debate had shown that, in addition to the need to define “official”, there was another, no less imperative need, namely to distinguish between the two categories of persons who enjoyed immunity from foreign criminal jurisdiction. The first category consisted of the beneficiaries of immunity *ratione personae*, who were more fittingly described as “representatives of the State” in international relations. The second was the beneficiaries of immunity *ratione materiae*, for whom the term “official” was better suited, since the protection afforded

<sup>53</sup> A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

<sup>54</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

<sup>55</sup> See *Yearbook ... 2012*, vol. I, 3157th meeting, para. 3.

to them was granted by virtue of the functions they performed pursuant to the law of the State, irrespective of their involvement in international relations. With regard to the second category of persons, the “official act” was a key concept. She pointed out that, as she had announced previously, the concepts of “official” and “official act” would be central elements of her next report, in the context of the analysis of immunity *ratione materiae*.

12. She then turned her attention to the debates on each of the draft articles contained in her second report.

13. With respect to draft article 1, she said that, in general, it had been well received by the members of the Commission. However, some members had noted that several elements should be revised. For instance, it was suggested that the word “certain”, referring to State officials who enjoyed immunity, should be deleted, as it could be misleading. In addition, it had been suggested that the expression “[w]ithout prejudice” at the beginning of the draft article should be deleted. In both cases, she pointed out that the Drafting Committee could decide in the course of its work on the draft article whether those expressions should be deleted. With regard to the warning by one member that the term “jurisdiction” should not be used simultaneously to refer to the competence of the State and to judicial institutions, she pointed out that that observation could be taken up in relation to draft article 3, subparagraphs (a) and (b).

14. Finally, she pointed out that during the debate on the scope, as defined in draft article 1, reference had been made from various perspectives to the relationship between national criminal courts and international criminal courts, which should be taken into account even though the application of international criminal jurisdiction was not included in the scope of the draft articles. In that regard, one member had questioned whether it could be stated unequivocally that the draft articles would never apply to international criminal courts, bearing in mind the obligation of States to cooperate with those courts, for example in detaining accused persons with a view to bringing them before the international criminal courts. Another member had referred to the need to examine the nature of hybrid or internationalized courts in relation to that topic.

15. With respect to draft article 2, she pointed out that most of the members of the Commission had accepted it. However, some members of the Commission had expressed doubts about whether its content should be presented as an independent draft article, suggesting that it might be preferable to incorporate it as a second paragraph in draft article 1. Others had noted that the draft article could be deleted and its content transposed to the commentary to draft article 1. The two options would have to be considered by the Drafting Committee.

16. Although the statements made by the members of the Commission reflected a broad consensus on the content of the draft article, some members had raised the question of whether there should be an express mention of the issue of the immunity of the armed forces, given that such immunity was also subject to well-established practices. She pointed out that that category of immunity

was covered under subparagraph (c) of the draft article, which included “Immunities established under other *ad hoc* international treaties”. However, if the Commission deemed it appropriate, given the relevance of the issue, express mention could be made in that subparagraph to the immunity specifically applicable to military personnel. In any case, it would be necessary to differentiate sufficiently between the immunity granted to military personnel by virtue of status-of-forces agreements and that granted by virtue of specific agreements concluded by States for the realization of joint military exercises, for example, which more closely resembled headquarters agreements. With regard to the status granted to the military forces of a State when they were part of the military apparatus of an international organization, she pointed out that that fell into the category of a headquarters agreement with an international organization under which its officials and agents were granted privileges and immunities, which was already covered in draft article 2, subparagraph (b). Finally, she drew attention to the fact that if the immunity granted to military personnel was going to be treated individually, then the scenario of permanent military bases of a State in the territory of another State, which was normally regulated in military cooperation treaties, would also have to be taken into account. The Drafting Committee might consider it of interest to discuss the various possible options for referring to the specific scenario of the immunity from foreign criminal jurisdiction enjoyed by military personnel.

17. Responding to the request by some members of the Commission for clarification of the meaning of the expression “other *ad hoc* international treaties”, she said that the phrase referred to the international treaties that established specific immunity rules that could not be included under the special categories listed in subparagraphs (a) and (b) of draft article 2. One of the most important examples of such “*ad hoc* international treaties” related to military personnel, but that was not the only example in practice. For example, reference could be made to certain cooperation agreements that provided for the establishment of cultural centres, or for economic and technical cooperation, which were neither headquarters agreements nor agreements related to the establishment of diplomatic relations, yet they recognized certain privileges and immunities for some foreign officials assigned to such centres. In any case, the Drafting Committee could consider alternative wording to refer to that scenario.

18. With regard to the request by some members of the Commission for clarification of the subject of draft article 2, subparagraph (d), she said that it was a residual clause intended to refer to situations in which a State unilaterally and freely granted some form of immunity from foreign criminal jurisdiction to the officials of a third State present on its territory and which were not among the situations listed in subparagraphs (a), (b) and (c). Although such situations were not common, there were some examples in practice, namely the establishment of cultural centres or the hosting of international meetings in the territory of a State, where immunity was granted through a *note verbale* or a simple letter. Given that the practice was not widespread or standardized and that the

granting of immunity was the result of the free will of the State and not of the application of specific rules of international law, the Drafting Committee could decide whether it should be mentioned explicitly.

19. With respect to draft article 3, she said that it had elicited many comments, both of a general nature and in relation to each of the paragraphs of the draft article.

20. On a general level, the debate had centred on both the necessity and utility of a draft article containing definitions of the basic concepts that would be used throughout the text and on the time when the draft article should be adopted. Quite a few members of the Commission had expressed certain reservations on whether there was any need to have a draft article containing definitions of the concepts and terms used, particularly with regard to “immunity” and “criminal jurisdiction”. Some members of the Commission had noted that those concepts had not been defined in instruments that regulated immunity, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, but that had not impeded their proper functioning. Other members of the Commission, meanwhile, had argued that the definitions in question were of interest and that the Commission should not decline to define concepts that were essential to the subject. She had concluded that the definitions of “criminal jurisdiction” and “immunity from jurisdiction” remained of interest given that, as the debates had shown, those definitions raised important questions that needed to be addressed at an early stage of the project, such as the different meanings of the term “jurisdiction” (competence and court), the identification of the types of acts of the State for which immunity could be claimed and the related question of whether a situation could be characterized as immunity from jurisdiction or alternatively, also included elements characteristic of immunity from execution. All of those points warranted an in-depth debate by the Commission that was only possible by proposing definitions of the two basic elements at the core of the topic: criminal jurisdiction and immunity from criminal jurisdiction. That appeared to be the understanding of quite a few members of the Commission, their specific comments in relation to certain aspects of the proposed definitions notwithstanding.

21. On the other hand, she noted that, based on the statements of the members of the Commission, there did not appear to be any opposition to the inclusion in draft article 3 of a definition of immunity *ratione personae* and of immunity *ratione materiae*, irrespective of the content of each of the definitions. Some members of the Commission had suggested that new definitions should be added, particularly of the terms “official” and “official act”.

22. Consequently, she had concluded that it was useful to retain a draft article containing definitions of the terms used. Moreover, that was standard practice in similar texts prepared by the Commission and there did not appear to be any arguments in favour of breaking with a well-established practice. The draft article in question should be considered an open-ended text that would have to be revised as work on the topic progressed, in the light of future debates, and, in any case, on first reading of the draft articles as a whole.

23. With regard to the time when draft article 3 should be adopted, some members of the Commission had said that it would be preferable to do so at a later stage, once the Commission had had the opportunity to analyse the remaining draft articles that were going to be proposed. Other members of the Commission, however, thought that it would be of interest to consider the definitions even at that early stage of work on the topic. She pointed out that in reality, the two approaches were complementary. While it would be useful to propose definitions at the start of the work and thus to spark a debate that would shed light on future work and discussions, as draft article 3 was currently designed to do, it was also true that each of the definitions could be enriched with new definitions and the various comments and discussions, and would take on its full meaning following consideration of the draft articles as a whole.

24. She went on to refer to the comments made by some members of the Commission on each of the definitions contained in the four subparagraphs of draft article 3.

25. With respect to the definition of “criminal jurisdiction” (subparagraph (a)), some members had pointed out the need to avoid any confusion between the references to “competence” and “court”. Other members of the Commission had highlighted the need to make it sufficiently clear that the term “criminal jurisdiction” was to be understood in a broad sense, to include not only judicial procedures and acts in the strict sense, but also coercive acts that were of a related but non-judicial nature. One member of the Commission had referred to the need to incorporate the concept of inviolability into the draft article, while another had suggested that immunity should apply only to judicial acts and not to other measures that—in accordance with the internal law of the State—were solely administrative in nature.

26. In relation to criminal jurisdiction, there had also been a debate on whether to retain the term “competence” in the definition, which some members of the Commission felt was unnecessary, considering it sufficient to refer to procedures and acts that could be adopted by the State in the exercise of its criminal jurisdiction. In addition, some members considered that, for the purposes of draft article 3, the basis of the State’s competence was irrelevant, while others considered that the basis of the State’s competence to exercise its jurisdiction should be taken into account.

27. Some members of the Commission had expressed concern about the fact that the definition included the phrase “crime or misdemeanour”, which implied that minor offences would be taken into account, something that had not been the Commission’s intention when it had decided to address the topic. Conversely, another member of the Commission had declared that all types of criminal offences should be taken into consideration. She herself had pointed out that the confusion was probably simply the result of the difficulty of working on a text in various languages. In Spanish, the original language of the second report, the terms “*crímenes o delitos*” were reserved for the most serious criminal offences and by no means included minor criminal offences or infractions. With that caveat, she pointed out that the topic could be addressed more appropriately by the Drafting Committee.

28. With regard to the potential inconsistency that some members of the Commission saw in the use of the expressions “criminal jurisdiction” in subparagraph (a) and “foreign criminal jurisdiction” in subparagraph (b), she explained that “criminal jurisdiction” was an abstract category that only evoked the idea of immunity when qualified by the word “foreign”. Consequently, the qualifier “foreign” was only necessary with reference to the definition of immunity. That was the reason for the difference between the two paragraphs. The distinction was also justified by the fact that jurisdiction came into play prior to immunity. Although that assertion had been called into question by some members of the Commission, she had concluded that it was an irrefutable principle, given that—as stated by the International Court of Justice itself—the possibility of immunity could only be entertained when a State had jurisdiction, in other words, when it had competence in general and abstract terms to engage in acts that would lead to the determination of whether a given individual bore criminal responsibility. Furthermore, that logical *prius* had nothing to do either with the form in which the issue of immunity had to be approached in procedural terms (for example, claimed or not? Raised *ex officio*?) or with the consequences for the exercise of competence (such as limitation, suspension or loss of competence).

29. In response to the question about the origin of the definitions, she said that they were based on the documents used in the work on the topic to date, such as the memorandum by the Secretariat<sup>56</sup> and the reports of the former Special Rapporteur.<sup>57</sup>

30. In relation to the definition of “immunity” (subparagraph (b)), she noted that the members of the Commission had stressed the need to delete the word “certain” with reference to officials who enjoyed immunity. However, she drew particular attention to the fact that some members had noted a lack of consistency between the wording of draft article 1 (“exercise of criminal jurisdiction by another State”) and the wording of draft article 3, subparagraph (b) (“exercise of criminal jurisdiction by the judges and courts of another State”). In relation to that comment, she said that the divergence in the wording should be rectified by the Drafting Committee, favouring the version in draft article 1. Finally, she said that the Drafting Committee could also work on finding adequate wording to replace the word “protection” in that text, which some members of the Commission considered unclear.

31. With respect to the term “[i]mmunity *ratione personae*” (subparagraph (c)), she said that there had been no general objections to the definition, although two criticisms had been voiced. First, throughout the debate the members of the Commission had expressed the general view that the link to nationality was irrelevant in defining the persons who enjoyed immunity. Accordingly, she had concluded that, while it was true that the persons who were granted that type of immunity were generally nationals of the State they

served (and in some cases had to be), it was also true that the essential element was the function they carried out, which the State could assign to persons who did not hold its nationality. Consequently, the reference to nationality in the draft article should be deleted. Second, some members of the Commission had pointed out that the definition should emphasize the fact, not that the persons who enjoyed such immunity carried out the function of representing the State automatically in its international relations, but instead, that the immunity of such persons was derived from the position that they occupied within the State structure. However, the debate on that point had not been conclusive. Some members of the Commission had maintained that the functional approach should be reserved for immunity *ratione materiae*, while quite a few members had been in favour of including the description of those who enjoyed immunity *ratione personae* in the definition of immunity *ratione personae*, as that would differentiate it more clearly from immunity *ratione materiae*. Finally, she said that a few members of the Commission had considered the definition of immunity *ratione personae* to be superfluous in the light of draft article 4, while others thought that it should be retained, but in a simpler and more descriptive form that did not refer to the legal elements intrinsic to that category of immunity.

32. In relation to the definition of immunity *ratione materiae*, she said that some members of the Commission had noted that it might be useful to discuss it again in the light of the next report, in which the normative elements of that category of immunity would be analysed. In any case, some of the members of the Commission who spoke on that paragraph had expressed reservations about the use of the term “official acts” which, in their view, gave rise to the problem of how to deal with *ultra vires* and unlawful acts. Other members had suggested that the word “act” should be replaced with “conduct” to more adequately reflect the diversity of acts that could give rise to immunity, including omissions.

33. In relation to draft article 4 on persons who enjoyed immunity *ratione personae*, she said that there had been an intense and enlightening debate in which some progress could be discerned compared with the debate on the issue in previous years.

34. Most members had been in favour of including the Head of State, Head of Government and Minister for Foreign Affairs in the list of persons who enjoyed immunity *ratione personae*. The majority of members were of the view that that option reflected well-established practice and customary international law. In addition, for some members of the Commission it was the best, or least problematic, solution, and at all events, a balanced one. In that context, some members raised the possibility of taking into account the situation of *de facto* Heads of State or persons who performed such functions under a different title.

35. However, a few members of the Commission had expressed reservations about the draft article on the grounds that the list of persons who enjoyed immunity was excessively broad. In particular, it had been argued

<sup>56</sup> See footnote 53 above.

<sup>57</sup> See footnote 54 above.

that it could not be claimed that there was well-established practice, let alone customary law, that recognized immunity *ratione personae* for Ministers for Foreign Affairs. One member of the Commission had noted that the recognition of such immunity for Ministers for Foreign Affairs was founded more on policy considerations than on consolidated practice. However, it was argued that there was an emerging rule on the immunity of Ministers for Foreign Affairs which would make it possible to include them in the list of persons who enjoyed such immunity by way of progressive development.

36. Some members of the Commission thought that there should be an analysis of whether, in addition to the troika, a small group of high-ranking officials who were also involved in international relations and travelled frequently should also enjoy immunity *ratione personae*. In their opinion, there was no reason whatsoever for such officials to be treated differently from the Minister for Foreign Affairs. Furthermore, some members of the Commission had expressed an interest in the reference in her second report to the special missions regime, which might be of some assistance in protecting the acts of other high-ranking officials of the State who were called upon to travel abroad frequently and to participate in international relations.

37. On the latter point, she responded to a question by a member of the Commission on the reference in paragraph 68 to “the new territorial element” and to the concept of the “official visit” in the event that the Commission decided to extend immunity *ratione personae* to persons beyond the so-called troika. She said that this was a particular reference to the need to take into account the fact that the prerequisite for recognizing any form of immunity for other high-ranking officials should be official travel and their presence in the territory of a third State in that capacity.

38. Concerning draft article 5 on the acts covered by immunity *ratione personae*, she said that some members of the Commission had expressed reservations about presenting such immunity as “full” or “absolute”, arguing that the inclusion in the first paragraph of the draft article of all acts performed by the Head of State, Head of Government and Minister for Foreign Affairs, both private and official, raised questions about the compatibility of the draft article with current trends in contemporary international law in relation to the fight against impunity. Those members felt that international crimes should play a role in limiting the material scope of immunity *ratione personae*.

39. However, she pointed out that the majority of members of the Commission had stated that the inclusion of those categories of acts was in keeping with international law and well-established international practice. In addition, some members had noted that draft article 5, paragraph 1, as worded, did not preclude the possibility of assessing the role of exceptions to immunity at a later stage. She fully agreed with that approach to the topic.

40. Some members of the Commission had expressed doubts and concerns about the inclusion in the draft

article of a reference to acts committed by the persons who enjoyed immunity “prior to ... their term of office”. In their view, that phrase opened the door to impunity, as it did not take due account of the fact that the perpetrators of heinous crimes could absolve themselves of criminal responsibility simply by obtaining an appointment as Head of State, Head of Government or Minister for Foreign Affairs. Although she shared that concern, she said that immunity did not imply exemption from responsibility or a loss of competence. It was merely the temporary suspension of the exercise of jurisdiction while the person concerned held high office as Head of State, Head of Government or Minister for Foreign Affairs. Consequently, the reference to “prior” acts could in no case be interpreted as an open door to impunity. That view had been supported by a number of members of the Commission during the debate.

41. Concerning paragraph 2 of draft article 5, she said that some members of the Commission had considered it redundant, as it seemed to refer to the same situation that was covered in draft article 6, paragraph 1, and they had therefore proposed that it should be deleted or merged with draft article 6. She explained that the two provisions referred to different situations, but that the relationship between the two could be considered by the Drafting Committee in order to find wording that would avoid confusion. In any case, she said that the issue should at least be mentioned in the commentary to the draft article.

42. Still referring to the second paragraph of draft article 5, she responded to a question raised by some members of the Commission about the meaning of the expression “other forms of immunity”. She said that the expression should be read in conjunction with the phrase “in a different capacity” at the end of the paragraph, which referred to any new status acquired by a former Head of State, former Head of Government or former Minister for Foreign Affairs that enabled them to enjoy immunity *ratione materiae* based on the general regime provided for in that draft article or on one of the special regimes mentioned in draft article 2.

43. Finally, she recalled that various views had been expressed about the appropriateness of merging the two aspects (material and temporal) dealt with in draft articles 5 and 6, respectively.

44. Concerning draft article 6, she said that its content had been generally well received, the debate on its possible merger with draft article 5 notwithstanding. Only a few members of the Commission had drawn attention to the need to explicitly state what was understood by the beginning and the expiry of the term of office of the Head of State, Head of Government and Minister for Foreign Affairs and to the need to consider the special role of the monarch as Head of State. She said that such matters could be dealt with by the Drafting Committee.

45. In conclusion, she recommended that all the draft articles should be referred to the Drafting Committee, on the understanding that the Committee would have to take into consideration all the comments and opinions expressed during the debate in the plenary.

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

[Agenda item 1]

46. Mr. FORTEAU (Rapporteur), speaking on behalf of the Chairperson of the Drafting Committee, read out the list of members of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction.

*The meeting rose at 11.20 a.m.*

**3171st MEETING**

*Tuesday, 28 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON said that, after consultations concerning the possibility of including a new topic on the Commission's programme of work and the appointment of a new special rapporteur for that topic, he had noted that there was a consensus in favour of the topic "Protection of the environment in relation to armed conflicts". He therefore suggested that the topic should be included in the Commission's programme of work and that Ms. Jacobsson should be appointed Special Rapporteur. The topic would also be placed on the agenda.

*It was so decided.*

2. Ms. JACOBSSON thanked the members of the Commission for the trust which they had shown in appointing her Special Rapporteur and said that the following week she would present an informal document prior to drafting a preliminary report on the topic.

3. Mr. CANDIOTTI drew attention to the fact that a decision had still to be taken on whether to include the topic "Protection of the atmosphere" in the programme of work, as had been proposed at the sixty-fourth session.

4. The CHAIRPERSON said that he would hold consultations on that matter and inform the Commission of their outcome.

*The meeting rose at 10.10 a.m.*

**3172nd MEETING**

*Friday, 31 May 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

**Subsequent agreements and subsequent practice in relation to the interpretation of treaties (concluded)\* (A/CN.4/660, A/CN.4/L.813)**

[Agenda item 6]

## REPORT OF THE DRAFTING COMMITTEE

1. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted nine meetings to its consideration of the draft conclusions relating to the topic under consideration and had provisionally adopted five draft conclusions, contained in document A/CN.4/L.813, which read as follows:

*Draft conclusion 1. General rule and means of treaty interpretation*

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

*Draft conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation*

Subsequent agreements and subsequent practice under article 31 (3) (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

\* Resumed from the 3163rd meeting.

*Draft conclusion 3. Interpretation of treaty terms as capable of evolving over time*

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

*Draft conclusion 4. Definition of subsequent agreement and subsequent practice*

1. A “subsequent agreement” as an authentic means of interpretation under article 31 (3) (a) is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A “subsequent practice” as an authentic means of interpretation under article 31 (3) (b) consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

*Draft conclusion 5. Attribution of subsequent practice*

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

2. In draft conclusion 1, the Drafting Committee had chosen to set out the general aspects of the legal framework for treaty interpretation (paras. 1–2), to address the issue of subsequent agreements and subsequent practice (paras. 3–4) and finally to state that treaty interpretation was a single combined operation that placed appropriate emphasis on various means of interpretation (para. 5).

3. The Drafting Committee had opted for the term “means” rather than “elements” of interpretation, since “means” evoked the notion of a tool or instrument and described their function in the interpretation process with greater precision. That term also appeared in the text and title of article 32 of the 1969 Vienna Convention.

4. Paragraph 1 of the draft conclusion started with a sentence that referred to both article 31 and article 32 of the 1969 Vienna Convention, in order to clarify the general context for subsequent agreements and subsequent practice. The second sentence was a reminder that the rules contained in those articles applied as a matter of customary international law. The Drafting Committee had deemed a reference to article 33 of the Vienna Convention to be unnecessary for reasons that would be elucidated in the commentary, which would also discuss the customary status of the provisions on treaty interpretation contained in the Vienna Convention.

5. Draft conclusion 1, paragraph 2, reproduced the text of article 31, paragraph 1, of the 1969 Vienna Convention *in extenso*, given its fundamental importance for the topic. The Drafting Committee had deemed it appropriate to refer to subsequent agreements and subsequent practice, in order to establish that they formed an integral part of the general legal framework of treaty interpretation. The

text of article 31, paragraph 3 (a) and (b) of the Vienna Convention had accordingly been reproduced in draft conclusion 1, paragraph 3. The Drafting Committee had added paragraph 4, containing a reference to subsequent practice in a broader sense, namely as a supplementary means of treaty interpretation under article 32 of the Vienna Convention. The commentary would make it plain that that wider notion was limited to practice followed in the application of the treaty.

6. Paragraph 5 was a reminder that treaty interpretation constituted a single combined operation involving all the means of interpretation referred to in the preceding paragraphs. The text incorporated the Special Rapporteur’s ideas about appropriate emphasis being placed on the different means of interpretation. The Drafting Committee’s lengthy discussion of whether a reference to the nature of the treaty should be included would be reflected in the commentary.

7. The Drafting Committee’s discussions of draft conclusion 2 had focused on the meaning of the phrase “authentic means of interpretation”. The Committee had reworked the text to include a reference to article 31 of the 1969 Vienna Convention and had clarified the meaning of the term “authentic” by referring to subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as “objective evidence of the understanding of the parties as to the meaning of the treaty”, a phrase taken from paragraph (15) of the 1966 commentary to draft article 27 on the law of treaties.<sup>58</sup> The last part of draft conclusion 2 made it clear that any reliance on subsequent agreements and subsequent practice as authentic means of interpretation must comply with the general rule of treaty interpretation reflected in article 31 of the Vienna Convention.

8. For draft conclusion 3, after a lengthy discussion, the Drafting Committee had decided to focus on the role that subsequent agreements and subsequent practice might play in guiding an interpreter who had to determine whether the meaning of a treaty was static or might evolve over time. It indicated that reliance on subsequent agreements and subsequent practice might assist in determining whether the presumed intention of the parties to the treaty was to give a particular term a meaning that was capable of evolving over time. The commentary would explain that the phrase “presumed intention” referred to the intention of the parties as determined through the application of the various means of interpretation recognized in the 1969 Vienna Convention, and not simply on the basis of the *travaux préparatoires*.

9. The commentary would emphasize that draft conclusion 3 should be read, not as the adoption of a position as to whether a more contemporaneous or a more evolutive approach to treaty interpretation was appropriate, but as an indication that subsequent agreements and subsequent practice were considerations which might help the interpreter to assess whether the meaning of a treaty term, or rule, was capable of evolving over time, depending on the circumstances. The commentary would refer to the relevant case law of various international courts and tribunals which had engaged in evolutive interpretation, albeit in

<sup>58</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev. I, Part II, p. 221.

varying degrees, and which appeared to have followed a case-by-case approach in determining, through recourse to various means of treaty interpretation, whether a particular treaty term should be given a meaning capable of evolving over time. Furthermore, the commentary would indicate that this potential function of subsequent agreements and subsequent practice in guiding the interpretation of a term over time was to be regarded as part of the ordinary process of treaty interpretation and not as a separate or distinct method of interpretation.

10. The Drafting Committee had simplified the title of draft conclusion 4 by omitting the phrase “as means of treaty interpretation”. The body of the draft conclusion had been restructured so as to enunciate three definitions that corresponded to articles 31, paragraph 3 (a) and (b), and 32, of the 1969 Vienna Convention. Those definitions covered only subsequent agreements and subsequent practice arising after the conclusion of the treaty. It would be explained in the commentary that the phrase “conclusion of the treaty” was intended to refer to the moment at which the text of a treaty was established as definitive. The commentary would address the relevance of subsequent agreements and subsequent practice which had emerged between the conclusion of the treaty and its entry into force, including practice that might arise from the provisional application of the treaty.

11. The text of draft conclusion 4, paragraph 1, had been recast in order to establish a clear connection with article 31, paragraph 3 (a), of the 1969 Vienna Convention and to link the paragraph with draft conclusion 2. In the original version of draft conclusion 3, the qualifier “manifested” had accompanied the term “agreement” in order to distinguish a subsequent agreement between the parties under article 31, paragraph 3 (a), from a less formalized agreement established through subsequent practice by the parties in the application of the treaty under article 31, paragraph 3 (b). The Drafting Committee had omitted the qualifier but had inserted the word “reached” in order to signal that, although a “subsequent agreement” under article 31, paragraph 3 (a), of the Vienna Convention did not necessarily need to be formal, such an agreement presupposed a common act by the parties in agreeing on the interpretation of the treaty. The commentary would address that point and also provide examples to illustrate the distinction between a subsequent agreement by the parties and an agreement established through subsequent practice by the parties.

12. Draft conclusion 4, paragraph 2, provided a definition of “subsequent practice” under article 31, paragraph 3 (b), of the 1969 Vienna Convention. The opening words of that paragraph had been reformulated in order to highlight the distinction between subsequent practice as an authentic means of treaty interpretation and the “other” subsequent practice referred to in paragraph 3. The word “conduct” adequately conveyed the universe of possible subsequent practice, including tacit conduct. Since pronouncements constituted a form of conduct, it was unnecessary to refer specifically to them in the draft conclusion; an appropriate explanation to that effect could be included in the commentary. In order to remain faithful to the wording of article 31, paragraph 3 (b), of the Vienna Convention, the Drafting Committee had decided against

using the term “understanding” to distinguish between an agreement arising from subsequent practice and the “subsequent agreements” covered in article 31, paragraph 3 (a). The commentary would indicate the possible modalities of an agreement established through subsequent practice and explain how to distinguish between such an agreement and a subsequent agreement under article 31, paragraph 3 (a). In addition, the phrase “by one or more parties” had been deleted because the text now provided, not an abstract definition of subsequent practice, but one that was limited to subsequent practice as a means of authentic interpretation which established the agreement of all the parties to the treaty. The commentary would clarify that point. It was sufficient to mention in the commentary that the reference to “the parties” did not cover the possibility of subsequent practice of organs of international organizations in relation to their constituent instruments. At a later stage, the Commission would examine the possible role of those organs in the establishment of subsequent practice for purposes of treaty interpretation.

13. The purpose of the word “other” in draft conclusion 4, paragraph 3, was to indicate that the subsequent practice referred to in that paragraph was distinct from subsequent practice as a means of treaty interpretation within the meaning of article 31, paragraph 3 (b), of the 1969 Vienna Convention. The phrase “in the application of the treaty” had been inserted to harmonize draft conclusion 4, paragraph 3, with draft conclusion 1, paragraph 4, and thus qualify the type of conduct which might constitute “subsequent practice” for the purposes of treaty interpretation; the commentary would address that point. Finally, given that paragraph 3 addressed the broader notion of subsequent practice as a supplementary means of treaty interpretation, the Drafting Committee had retained the phrase “by one or more parties”, which indicated that, in order to serve as a subsidiary means of interpretation, a subsequent practice need not involve all parties to the treaty or establish an agreement between all parties regarding its interpretation. Paragraph 3 did not enunciate a specific requirement that the relevant practice should be “regarding the interpretation” of the treaty because, for the purposes of that paragraph, any practice in the application of the treaty that might provide some indication as to the manner in which the parties involved interpreted the treaty might be relevant as a supplementary means of interpretation. The commentary would clarify that point.

14. In draft conclusion 5, paragraph 1, the phrase “under articles 31 and 32” had been inserted to make it clear that that draft conclusion on attribution applied both to subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), and to subsequent practice as a supplementary means of interpretation under article 32. The phrase “in the application of a treaty” had been introduced for the sake of consistency with the definitions of “subsequent practice” provided in draft conclusion 4, paragraphs 2 and 3. In addition, the phrase “for the purpose of treaty interpretation” had been deleted in order to address concerns that the phrase might introduce an element of circularity into the provision. In response to the doubts expressed as to whether there was a need to establish rules of attribution that differed from those relating to State responsibility, the point had been made that the real question was not one of attribution, but of the relevance

of certain conduct to the process of treaty interpretation. Draft conclusion 5, paragraph 1, therefore referred to “any conduct ... which is attributable to a party to a treaty under international law”, without limiting such conduct to that of the organs of the State. In other words, it was intended to cover cases in which conduct that was not performed by a State organ within the meaning of article 4 of the articles on State responsibility<sup>59</sup> was nevertheless attributable, under international law, to a party to the treaty. By referring to “any” conduct in the application of the treaty which was attributable to a party to the treaty, paragraph 1 did not mean to suggest that such conduct necessarily constituted subsequent practice for the purpose of treaty interpretation. The use of the phrase “may consist” was intended to reflect that point, which would be also addressed in the commentary. That clarification was important in relation to the conduct of lower State organs which might not reflect, or might even contradict, the position of the organs of the State that were competent under internal law to express the position of the State in international relations with respect to a particular matter. Indeed, after an extensive discussion in the Drafting Committee as to whether that provision should specifically refer to the question of whether, or under which circumstances or conditions, the conduct of a lower organ of the State could be attributed to the State for purposes of treaty interpretation, the Committee had decided that the various complex issues and scenarios that could be envisaged would be better addressed either at a later stage of the work, or in the commentary, where concrete examples and appropriate references to relevant case law could be included.

15. Draft conclusion 5, paragraph 2, comprised two sentences. The first indicated that practice by non-State actors did not in itself constitute subsequent practice within the meaning of the 1969 Vienna Convention. The phrase “[o]ther conduct” had been introduced to clarify the distinction between the conduct contemplated in paragraph 2 and that contemplated in paragraph 1. At the same time, the second sentence of paragraph 2 recognized that conduct not covered by paragraph 1 might be relevant when assessing the subsequent practice of parties to a treaty. In paragraph 2, the phrase “assessing the subsequent practice” should be understood to encompass both the identification of subsequent practice and the determination of its legal significance. Appropriate explanations regarding the manner in which conduct that was not attributable to a party to the treaty might be relevant in assessing subsequent practice of the parties, as well as the possible interactions between such conduct and subsequent practice, would be provided in the commentary, together with examples and relevant case law.

16. The reference to “social practice” had been deleted because several members of the Commission had expressed concerns regarding the meaning and relevance of that term. The commentary would provide some indications as to the manner in which “social practice” had been relied upon, particularly in the case law of the European Court of Human Rights, in connection with treaty interpretation.

<sup>59</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40. The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

17. The CHAIRPERSON invited the Commission to adopt the text of draft conclusions 1 to 5, as provisionally adopted by the Drafting Committee on first reading and contained in document A/CN.4/L.813.

*Draft conclusions 1 to 5 were adopted with some minor editorial corrections.*

*The meeting rose at 10.50 a.m.*

### 3173rd MEETING

*Tuesday, 4 June 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON drew the Commission members' attention to the programme of work for the first two weeks of the second part of the Commission's session, which would be held from Monday, 8 July to Friday, 9 August 2013.

2. On the Monday afternoon of the first week, Mr. Valencia-Ospina, the Special Rapporteur on the topic “Protection of persons in the event of disasters”, would present his sixth report (A/CN.4/662). The debate on that topic would take place on the mornings of Tuesday to Thursday. The Special Rapporteur would sum up the debate on Friday morning. On Tuesday afternoon, informal consultations would be held on the topic “Protection of the environment in relation to armed conflicts”. On Wednesday morning, the Commission would receive the visit of representatives of the Council of Europe under the agenda item entitled “Cooperation with other bodies”. The Study Group on the most-favoured-nation clause would meet on Wednesday afternoon and the Working Group on the long-term programme of work would meet on Thursday afternoon.

3. During the second week, the Drafting Committee on protection of persons in the event of disasters would meet in the afternoons, from Monday to Wednesday. During the plenary meetings on Tuesday to Thursday morning, the Commission would consider the first report of Sir Michael Wood, Special Rapporteur on the topic “Formation and evidence of customary international law” (A/CN.4/663). The Gilberto Amado Memorial Lecture would take place on Wednesday afternoon. On Thursday morning, the

\* Resumed from the 3171st meeting.

Commission would receive the visit of the President of the International Court of Justice. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet on Thursday afternoon.

4. In accordance with the Commission's practice, the programme of work would be applied with the requisite flexibility, and any changes would be announced in advance in a plenary meeting.

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

*The meeting rose at 10.15 a.m.*

### 3174th MEETING

*Friday, 7 June 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

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

#### **Immunity of State officials from foreign criminal jurisdiction (concluded)\* (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)**

[Agenda item 5]

##### REPORT OF THE DRAFTING COMMITTEE

1. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted nine meetings to its consideration of the six draft articles proposed by the Special Rapporteur and referred to it by the Commission. The Committee had provisionally adopted three draft articles, contained in document A/CN.4/L.814, which read as follows:

##### PART I. INTRODUCTION

###### *Draft article 1. Scope of the present draft articles*

1. The present draft articles apply to the immunity of State officials\*\* from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

...

\* Resumed from the 3170th meeting.

\*\* The use of the term "officials" will be subject to further consideration.

##### PART II. IMMUNITY *RATIONE PERSONAE*

###### *Draft article 3. Persons enjoying immunity ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

###### *Draft article 4. Scope of immunity ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs prior to or during their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

2. The two paragraphs of draft article 1 reflected the substance of draft articles 1 and 2, as originally proposed by the Special Rapporteur, but contained a number of modifications. In draft article 1, paragraph 1, the phrase "Without prejudice to the provisions of draft article 2" had been deleted in view of the comments made in plenary. The qualifier "certain" in reference to "State officials" had also been deleted: the question of whether certain officials or all State officials were covered would be dealt with in specific draft articles elaborating the substantive content of immunity *ratione personae* and immunity *ratione materiae*. Furthermore, it had been agreed that the use of the term "officials" would be subject to further discussions on the precise meaning of the term and how best to convey that meaning in all the official languages of the United Nations.

3. There had been a detailed discussion on whether the draft articles should apply to the immunity of State officials "from the exercise of criminal jurisdiction by another State", as proposed by the Special Rapporteur, or more simply, "from the criminal jurisdiction of another State". Some members had considered that the words "in the exercise of" were crucial, and there was some concern that their deletion might give the impression that the scope of immunity was being broadened, while others felt that the phrase might appear to limit the scope of the draft articles. Some members had considered that those aspects could be dealt with in subsequent draft articles, as they involved substantive considerations that went beyond defining the scope of the draft articles. In the end, the phrase had been deleted, and it was understood that subsequent draft articles would address the substantive and procedural aspects of the topic.

4. A long road had been travelled before the Drafting Committee had settled on the current formulation of draft article 1, paragraph 2. It had ultimately been decided to incorporate draft article 2, using a succinct formulation. The Special Rapporteur had prepared a revised text, drawing upon the language of the original draft article 2, which listed the immunities not included in the scope of the draft articles. There had been broad agreement that this included immunities established in the context of diplomatic and consular relations and special missions

and in connection with missions to international organizations and delegations to international conferences. There had been a divergence of views on whether reference should be made to the immunity of international organizations and their agents. Although such immunity was governed by its own separate regime, which should not be prejudiced, situations might arise in which State officials were seconded to an international organization, and the two regimes might then overlap.

5. It had been recognized that there were other agreements between States that provided immunity from criminal jurisdiction, including those of a military nature relating to visiting and stationed armed forces. Although the immunity of visiting forces was established under customary international law, some members had expressed reluctance to do anything that might seem to broaden the scope of the “without prejudice” clause set out in draft article 1, paragraph 2. Similarly, while the practice of granting immunities unilaterally on an *ad hoc* basis had been recognized, the majority of the Drafting Committee had been reluctant to address that practice specifically in the text.

6. The Drafting Committee had devoted some time to the question of how best to draft the “without prejudice” clause. Since the draft articles dealt with the immunity of individuals, there had been some support for casting the formulations about the regimes left untouched by the draft articles in such a way that they also referred to individuals. Some members, however, had felt that the focus should be more on the source of the immunities than on the beneficiaries thereof.

7. In the course of further discussion, two options had been presented by the Special Rapporteur. One option had described the scope of the “without prejudice” clause in detail, while the second had been more concise. Although the second option had ultimately been considered too concise to allow for a proper understanding of the issues involved, it had been selected by the members of the Drafting Committee as the basis for further discussion. Following the preparation of a new text by the Special Rapporteur, some members had expressed concern that account had not been taken of regimes such as agreements on economic, cultural and technical assistance, while other members had been opposed to any additions that might appear to expand the provision. In the final analysis, the current text had been agreed upon, although some members had expressed reservations. The commentary would explain what was meant by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. An explanation would also be provided for the phrase “in particular”.

8. Turning to Part II of the draft articles, he noted, with reference to draft article 3, that the word “subjective” in the original title had been viewed by some members as confusing. It had been suggested that reference should be made to the “beneficiaries of” or “those covered by” immunity *ratione personae*, but the Drafting Committee had settled on the present title, “Persons enjoying immunity *ratione personae*”, as it best captured the specific purpose of the draft article.

9. Concern had been expressed in plenary with regard to the original reference to nationality. The Drafting Committee’s view was that the members of the troika enjoyed immunity *ratione personae* not on the basis of nationality, but because they held certain specific offices to which the draft article referred. It had therefore decided to omit the phrase “of which they are not nationals”. The word “foreign” had been added before “criminal jurisdiction”, and the commentary would explain what was understood by that term.

10. Although those were the only substantive changes made to the wording, the provisional adoption of draft article 3 had been preceded by a detailed discussion concerning the content. It had been proposed to reframe the text entirely or to include a “without prejudice” clause to indicate that the identification of the persons enjoying immunity in draft article 3 was without prejudice to the adoption in the future of exceptions to such immunity. Ultimately, the Drafting Committee had rejected those proposals, since the draft article merely identified the persons to whom immunity *ratione personae* applied, rather than what that immunity entailed.

11. As in the discussion on draft article 1, some members had expressed concern that the reference to immunity “from the exercise of” might prejudice the material scope of immunity from foreign criminal jurisdiction that was to be elaborated upon in other draft articles. Other members had favoured retaining the phrase, as it indicated that immunity from jurisdiction referred only to immunity from the exercise of jurisdiction, not to immunity from a State’s prescriptive jurisdiction. The Drafting Committee had in the end decided to retain the phrase, on the understanding that it might come back to the issue as the topic progressed. The commentary would further explicate those aspects.

12. Regarding the question raised in plenary as to whether the troika really constituted the sole State officials who enjoyed immunity *ratione personae*, he said that in provisionally adopting the text of draft article 3, which referred only to the troika, the Drafting Committee had recognized that other high-ranking officials of the State might benefit from immunity under rules of international law relating to special missions. The commentary to draft article 3 would clarify that point.

13. A reservation had been expressed on draft article 3 as a whole, and in particular, on whether the list of officials therein accurately reflected the state of the relevant international law. Although some members had favoured excluding Ministers for Foreign Affairs from the list, while others had favoured expanding the list to include officials such as ministers for defence, it had ultimately been decided that the list in draft article 3 was appropriate. The commentary would provide examples of State practice and reflect the divergence of opinions expressed in the debate in plenary.

14. Draft article 4 combined the substance of draft articles 5 and 6, as originally proposed by the Special Rapporteur. Initial comments in plenary had suggested that those two draft articles might be merged. In response to

those comments, the Special Rapporteur had prepared a new text, which read as follows:

“The immunity *ratione personae* from the exercise of foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.”

15. Reservations had been expressed in the Drafting Committee as to whether all persons who enjoyed immunity *ratione personae* should be treated equally, and there were divergent views on the question of how the acts of the persons enjoying immunity should be characterized. In its judgment in the *Arrest Warrant* case, the International Court of Justice had stated that no distinction could be drawn for purposes of immunity *ratione personae* between acts performed by a Minister for Foreign Affairs in an “official” capacity and those claimed to have been performed in a “private capacity”, or between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.

16. As to the question of whether the acts should be described as “private or official” or as “acts performed in an official or private capacity”, the latter wording was viewed as being more faithful to the language of the *Arrest Warrant* judgment. Despite the fact that analogous instruments, such as the Vienna Convention on Diplomatic Relations, did not qualify the acts they described as being “private” or “official”, it was felt that there would be value added to the provision if the acts were so qualified. It had also been noted that the material scope of immunity *ratione personae* could best be captured if it was preceded by a description of the temporal scope.

17. While the substance of draft article 6, paragraph 2, was generally considered useful in the overall scheme of the draft articles, its relevance to Part II had been questioned. It had been noted that the wording of the draft article seemed to prejudice matters that had a bearing on immunity *ratione materiae*. A suggestion had thus been made to include a brief “without prejudice” clause relating to immunity *ratione materiae*.

18. To advance the discussions further, another new text had been prepared by the Special Rapporteur. It read:

“1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

“2. The immunity *ratione personae* covers all acts, [whether private or official performed by] [whether performed in a private or official capacity by] Heads of State, Heads of Government and Ministers for Foreign Affairs prior to or during their term of office.

“3. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

“or

“3. The expiration of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.”

19. Paragraph 1 had generally been viewed favourably. In paragraph 2, a clear preference for following the language used in the *Arrest Warrant* case had tilted the scale towards the formulation “acts ... whether in a private or official capacity”. Of the two alternatives for paragraph 3, a preference had been expressed for the second, since it did not prejudice the outcome of the discussion on immunity *ratione materiae*.

20. The formulation of draft article 4 reflected those discussions. Paragraph 1 stressed the important point that immunity *ratione personae* was enjoyed only during the term of office of the holder. The commentary would explain that the word “acts”, which was considered better for the purposes of the draft articles than “conduct”, encompassed “omissions”.

21. Regarding draft article 2, on definitions, the Special Rapporteur had proposed for definition the terms “criminal jurisdiction”, “immunity from foreign criminal jurisdiction”, “immunity *ratione personae*” and “immunity *ratione materiae*”. In addition, suggestions had been made in plenary to define the terms “official” and “official acts”, which coincided with the Special Rapporteur’s plans to focus primarily on those two particularly complex issues in her third report. In the general exchange of views on draft article 2, some members had doubted the need to define all of those terms. It was observed that the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on special missions all dealt with criminal jurisdiction and immunity from criminal jurisdiction without defining the term “criminal jurisdiction”. However, the view was expressed that the particularity of the present topic might warrant a different approach.

22. Some members considered that there was no need to define immunity *ratione personae* and immunity *ratione materiae*, as the content and meaning of those terms would be determined in the substantive provisions of the draft articles. Furthermore, it was suggested that any attempt to define immunity *ratione materiae* at the current stage might prejudice the consideration of substantive matters in respect of that type of immunity, or that the definition of certain terms might preclude a meaningful discussion of possible exceptions to immunity. Other members considered that it would be useful to define immunity *ratione materiae* and, in order to maintain symmetry, also to define immunity *ratione personae*.

23. If definitions were to be included in the draft articles, a preference had been expressed for a “use of terms” text, rather than one entitled “definitions”. Attention was also drawn to the desirability of using as a model article 2, paragraph 3, of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which provided that the use of terms in the Convention was without prejudice to the use of those terms or to the meanings that might be given to them in other international instruments or in the internal law of any State.

24. It was observed that certain aspects of the proposed definitions could be used in the commentary or could form the substance of future draft articles. That could be the case with regard to inviolability which, according to some members, was a term that warranted definition. In view of the fact that immunity and inviolability were distinct concepts, some expressed the need for caution, while others were opposed to the consideration of inviolability in the context of the present topic.

25. The Drafting Committee had embarked on a preliminary exchange of views regarding the various definitions proposed by the Special Rapporteur, but views had remained divided. Specific comments had included suggestions on how the definitions might be improved and on alternative approaches to introducing the key concepts relating to the topic. Those proposals would be the subject of further reflection.

26. The CHAIRPERSON invited the Commission to adopt, on first reading, the text of draft articles 1, 3 and 4, as provisionally adopted by the Drafting Committee and as contained in document A/CN.4/L.814.

#### PART I. INTRODUCTION

Draft article 1 (*Scope of the present draft articles*)

*Draft article 1 was adopted.*

#### PART II. IMMUNITY *RATIONE PERSONAE*

Draft article 3 (*Persons enjoying immunity ratione personae*)

27. Mr. PETRIČ said that, in keeping with the views he had expressed in plenary and in the Drafting Committee, he was opposed to draft article 3, which was absolutely contrary to his understanding of immunity *ratione personae*.

*Draft article 3 was adopted, having noted the comment by Mr. Petrič.*

Draft article 4 (*Scope of immunity ratione personae*)

*Draft article 4 was adopted.*

*Draft articles 1, 3 and 4, contained in document A/CN.4/L.814, were adopted.*

28. The CHAIRPERSON said that the Special Rapporteur would prepare commentaries to the draft articles in time for their inclusion in the Commission's report to the General Assembly on the work of its sixty-fifth session.

29. Mr. CANDIOTI suggested that, given the many substantive matters to be clarified in the commentaries, Commission members should be provided with the text, for review and possible comment, well in advance of the end of the current session.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to that proposal but that if the Commission adopted such a practice with regard to the current topic, it should do the same with regard to all other topics.

31. Mr. CANDIOTI said that he shared the Special Rapporteur's view that the same practice should be followed with regard to all topics. During the sixty-third session, it had been suggested that the Commission should reconsider the practice of discussing commentaries to draft articles only at the time of the adoption of the Commission's annual report, when it was under pressure, and without sufficient time for members to study the commentaries carefully.<sup>60</sup>

32. Mr. VALENCIA-OSPINA said that while he supported the view that a change in the approach to draft commentaries should be applied across the board, the fact that some topics were discussed in the first part of the session and others in the second inevitably resulted in inequality, since the work on topics in the latter part of the session was subject to narrower time constraints.

33. Mr. KITTICHAISAREE said he agreed that it would be useful to be given an advance copy of the draft commentaries for review; however, members could not make anything other than general recommendations on substantive points, and the special rapporteurs should be given sufficient leeway as to how to incorporate those recommendations.

*The meeting rose at 11.05 a.m.*

<sup>60</sup> *Yearbook ... 2011*, vol. II (Part Two), para. 379.



## SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-FIFTH SESSION

*Held at Geneva from 8 July to 9 August 2013*

### 3175th MEETING

Monday, 8 July 2013, at 3.10 p.m.

Chairperson: Mr. Bernd H. NIEHAUS

*Present:* Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON read out the programme of work for the first two weeks of the second part of the Commission's sixty-fifth session, which had been revised to take into account requests made under the agenda item entitled "Cooperation with other bodies".

#### Protection of persons in the event of disasters (*continued*)\*\* (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR

2. The CHAIRPERSON invited the Special Rapporteur, Mr. Valencia-Ospina, to introduce his sixth report on the protection of persons in the event of disasters (A/CN.4/662).

3. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, contrary to usual practice, but in order to keep the report short, he had not included a summary of the

Sixth Committee's discussion of the chapter in the Commission's annual report to the General Assembly on the protection of persons in the event of disasters, especially as the Secretariat had provided a summary of that discussion in document A/CN.4/657. Since 2007, when the topic was included in the Commission's programme of work,<sup>61</sup> 16 draft articles (1 to 15 and 5 *bis*), containing general provisions or dealing with intervention in the event of disasters, had been adopted. From the very outset of his work, he had communicated his intention to tackle the most important aspects of the broad field of disaster management, ranging from prevention and preparedness to assistance and relief efforts. In 2008, in his preliminary report, he had suggested, with regard to the scope of the topic *ratione temporis*, that work on the topic should extend to all three phases of a disaster situation, but that it seemed legitimate to give particular attention to aspects relating to prevention and mitigation of a disaster as well as to provision of assistance in its immediate wake.<sup>62</sup> Accordingly, the sixth report dealt with the prevention, mitigation and preparedness activities which, as the Secretariat had indicated in its memorandum, lay at different points of the continuum of actions undertaken in advance of a disaster.<sup>63</sup>

4. Prevention, mitigation and preparedness had long been part of the discussion relating to natural disaster reduction and, more recently, to disaster risk reduction. In temporal terms, preparedness straddled two areas of disaster risk reduction and disaster management: the pre-disaster phase and the post-disaster phase. The goal was to respond effectively and ensure more rapid recovery when disasters struck. Mitigation had come to be understood as aiming at structural or non-structural measures to limit the adverse effects of disaster. Since, by definition, mitigation and preparedness entailed the taking of measures prior to the onset of a disaster, they could properly be regarded as specific manifestations of the overarching principle of prevention which lay at the heart of international law.

\* Resumed from the 3173rd meeting.

\*\* Resumed from the 3162nd meeting.

<sup>61</sup> *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 375.

<sup>62</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598, p. 155, para. 66.

<sup>63</sup> A/CN.4/590 and Add.1-3 (mimeographed; available from the Commission's website, documents of the sixtieth session), para. 27.

5. In the past few decades, the international community had come to an awareness to the fundamental importance of disaster prevention or, to use more up-to-date terminology, risk reduction. The Office of the United Nations Disaster Relief Coordinator had been set up in 1971.<sup>64</sup> In 1987, in its resolution 42/169 of 11 December, the General Assembly had recognized “the responsibility of the United Nations system for promoting international co-operation in the study of natural disasters of geophysical origin and in the development of techniques to mitigate risks arising therefrom, as well as for co-ordinating disaster relief, preparedness and prevention, including prediction and early warning” systems (eighth preambular paragraph). It had decided to designate the 1990s as the International Decade for Natural Disaster Reduction (para. 3).<sup>65</sup> During the Decade, it had adopted 11 more resolutions on the subject, including resolution 46/182 of 19 December 1991, in which it had recommended that “[s]pecial attention should be given to disaster prevention and preparedness by the Governments concerned, as well as by the international community” (annex, para. 8). In the same year, 1991, it had endorsed a proposal to convene a world conference on natural disaster reduction, which had taken place in Yokohama, Japan, from 23 to 27 May 1994.<sup>66</sup> In the Yokohama Message, the 148 participating States had affirmed that “[d]isaster prevention, mitigation, preparedness and relief are four elements which contribute to ... the implementation of sustainable development”, recommending that States “should incorporate them in their development plans and ensure efficient follow-up measures at the community, national, subregional, regional and international levels” and calling for further improvements in early warning. They had affirmed that “[d]isaster prevention, mitigation and preparedness are better than disaster response in achieving the goals and objectives of the Decade” and urged States to “develop and strengthen national capacities and capabilities and, where appropriate, national legislation for natural and other disaster prevention, mitigation and preparedness”.<sup>67</sup>

6. The International Strategy for Disaster Reduction was launched in 1999,<sup>68</sup> reflecting a major shift, from the traditional emphasis on disaster response, to disaster reduction, and seeking to promote a “culture of prevention”.<sup>69</sup> In December 2003, the General Assembly had decided to convene a world conference on disaster reduction in 2005.<sup>70</sup> The Conference had been held in January 2005 in Kobe, Japan, and had resulted in the adoption of the Hyogo Declaration 2005 and the Hyogo Framework for Action 2005–2015.<sup>71</sup> In 2006, the General Assembly had

adopted resolution 61/198 of 20 December, in which it had noted the proposed establishment of a global platform for disaster risk reduction (para. 15). That institution had held four sessions since then, most recently in May 2013. At the conclusion of the last session, chaired by Switzerland, the Chairperson stated in his summary that

[t]here is growing recognition that the prevention and reduction of disaster risk is a legal obligation, encompassing risk assessments, the establishment of early warning systems, and the right to access risk information. In this regard, the progressive development and codification [by the International Law Commission] of international law concerning the “Protection of persons in the event of disasters” is highly relevant and welcome.<sup>72</sup>

7. The dual-axis approach that he had adopted was central to the study of the topic. Just like the disaster-proper phase, the pre-disaster phase implied rights and obligations both horizontally (the rights and obligations of States in relation to one another and the international community) and vertically (the rights and obligations of States in relation to persons within their territory and control). Based on an in-depth analysis of the principle of prevention in international law; multilateral, international, regional and bilateral instruments; and the implementation by States of risk reduction measures in their territories by adopting laws and policies on risk assessment, collection and dissemination of risk information, land use controls, construction standards, insurance, funding, community preparedness and education and early warning systems, he was now proposing two new draft articles, 5 *ter* (Cooperation for disaster risk reduction) and 16 (Duty to prevent).

8. With reference more specifically to protection in the event of disasters, the existence of an international legal obligation to prevent harm, both in its horizontal and vertical dimensions, found support in human rights law and environmental law. The principle of prevention in the environmental context was based on the common law principle of *sic utere tuo ut alienum non laedas*. Declared by the International Court of Justice in the *Corfu Channel* case, that principle was well established in international law and had been applied as early as 1941 in the *Trail Smelter* arbitration. In 2001, the Commission had analysed, in the context of prevention of transboundary harm from hazardous activities,<sup>73</sup> the “well-established principle of prevention”.<sup>74</sup> Referring expressly to the Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”)<sup>75</sup> and the Rio Declaration on Environment and Development (“Rio Declaration”),<sup>76</sup> it had concluded that “[p]revention

18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolutions 1–2.

<sup>72</sup> UNISDR, *Proceedings: Fourth Session of the Global Platform for Disaster Risk Reduction, Geneva, 19–23 May 2013: Invest Today for a Safer Tomorrow*, p. 13 (available from [www.preventionweb.net/](http://www.preventionweb.net/)).

<sup>73</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

<sup>74</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 148, paragraph (4) of the general commentary.

<sup>75</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I, p. 3.

<sup>76</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations

<sup>64</sup> General Assembly resolution 2816 (XXVI) of 14 December 1971.

<sup>65</sup> See also General Assembly resolution 44/236 of 22 December 1989.

<sup>66</sup> General Assembly resolution 46/149 of 18 December 1991, para. 3.

<sup>67</sup> Report of the World Conference on Natural Disaster Reduction (A/CONF.172/9 [and Add.1], chap. I, resolution 1, annex II, paras. 2, 3 and 7 (c)).

<sup>68</sup> General Assembly resolution 54/219 of 22 December 1999.

<sup>69</sup> United Nations Office for Disaster Risk Reduction (UNISDR), “What is the International Strategy?” ([www.unisdr.org/who-we-are/international-strategy-for-disaster-reduction/](http://www.unisdr.org/who-we-are/international-strategy-for-disaster-reduction/)).

<sup>70</sup> General Assembly resolution 58/214 of 23 December 2003, para. 7.

<sup>71</sup> Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan,

of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution”.<sup>77</sup>

9. The principle of prevention in environmental law was based on two separate, but to some degree related, obligations: due diligence and the precautionary principle. Due diligence, which was the standard basis for prevention, was an obligation of conduct rather than of result. It had been elucidated by the International Court of Justice in the *Pulp Mills on the River Uruguay* case, among others, and by the European Court of Human Rights in *Öneryıldız v. Turkey* and *Budayeva and Others v. Russia*. For the Commission, the obligation of due diligence had two main characteristics: the degree of care in question, which was the care expected of a “good Government”, and the degree of care that was proportional to the hazardousness of the activity involved. The duty of due diligence accordingly required States to take all “necessary” or “appropriate” measures to uphold the principle of prevention. The idea of “appropriate measures” was duly reflected in draft article 16. As to the precautionary principle, it flowed from the more general obligation to prevent any environmental harm.

10. Similarly, in the field of human rights, the positive obligation of States to respect and safeguard human rights included the obligation to prevent human rights violations. As the Inter-American Court of Human Rights had emphasized, “This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights”.<sup>78</sup> In his preliminary report on the topic, he had given examples of the human rights relevant in the event of disasters.<sup>79</sup> Thus, an international obligation to prevent and mitigate disasters arose from States’ universal obligation to ensure rights such as the right to life, food and medical care, to cite only a few. International jurisprudence had highlighted that approach particularly well in relation to the right to life. The decisions of the European Court of Human Rights in the cases just mentioned, which confirmed the duty to prevent, were noteworthy for a number of reasons: the Court had articulated the same duty irrespective of whether the disaster was natural or human-made; it had faulted the States concerned for failing to prevent the harm, mirroring the obligation in various international instruments to take “appropriate” or “necessary” measures to reduce the risk of disaster; and lastly, the Court had suggested that the duty to prevent was triggered when a disaster became foreseeable, mirroring the foreseeability requirement within the principle of due diligence. In the *Öneryıldız v. Turkey* case, the Court had affirmed that the right to life lay down “a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction” (para. 71) and stressed that this entailed “above all a primary duty on the State to

put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life” (para. 89). Draft article 16, in line with that finding, called on States to adopt measures “to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established”.

11. Having analysed international environmental law and international human rights law, he then turned to the examination of multilateral and bilateral instruments on disaster risk reduction. Only two global instruments directly addressed disaster preparedness, prevention and mitigation: the Framework Convention on civil defence assistance and the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. However, there were other instruments on the prevention of specific disasters, such as nuclear or industrial accidents. All those instruments imposed on States the duty of due diligence by obliging them to take “necessary” or “appropriate” measures. He had also examined numerous regional and subregional instruments that directly addressed disaster risk reduction as well as about 20 bilateral treaties that included the obligation to take disaster prevention and response measures.

12. Lastly, he had undertaken an analysis of national policy and legislation which revealed that States were addressing disaster risk reduction, in line with the Hyogo Framework for Action 2005–2015, and were acknowledging their obligation to take preventive measures. There were three objectives in disaster prevention efforts: risk prevention through risk assessment, collection and dissemination of risk information and land use controls; mitigation of harm using construction standards and insurance; and preparedness based on an institutional framework, funding, community preparedness and education and early warning. Some of those components were taken up in draft article 16, paragraph 2, which provided examples of appropriate measures: “the conduct of multi-hazard risk assessments, the collection and dissemination of loss and risk information and the installation and operation of early warning systems”.

13. Mr. MURASE said he agreed that the principle of prevention entailed both horizontal and vertical obligations upon States to prevent and mitigate ecological disasters. However, he believed that the various facets of the principle needed to be elaborated more fully and, rather than treating it as a categorical norm, its flexible nature should be emphasized. In relation to environmental harm, the principle of prevention presupposed a degree of certainty about the likelihood that a risk would materialize—the criterion of “foreseeable” risk introduced in the *Trail Smelter* arbitration. Measures taken in furtherance of the principle were intended to avert disasters whose probability of occurring could be objectively assessed, normally on the basis of scientific analysis. It would be unreasonable to consider that States had an international legal obligation to anticipate and prepare for damage in the case of natural disasters. That was not to say, however, that the principle of prevention was never applicable to that type of disaster. Certain natural disasters such as earthquakes and hurricanes tended to occur cyclically, and States in the affected regions should be expected to take preventive measures. Nevertheless, prudence dictated the need to

publication, Sales No. E.93.I.8), vol. I: *Resolutions Adopted by the Conference*, resolution 1, annex I, p. 2.

<sup>77</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 149, paragraph (5) of the general commentary.

<sup>78</sup> *Velásquez Rodríguez v. Honduras*, judgment (merits) of 29 July 1988, para. 175.

<sup>79</sup> A/CN.4/598 (see footnote 62 above), p. 149, para. 26.

avoid the indiscriminate application of the principle to disasters that overwhelmed the best predictive powers that modern science could provide.

14. Turning to environmental hazards that were anthropogenically influenced or created, he said that the principle of prevention could generally be viewed as the source of States' obligation to anticipate and avert such hazards. However, they were under no obligation to act prophylactically in every instance where the risk of an incident existed. The requirement of due diligence that imbued the principle of prevention was a shifting paradigm that balanced the likelihood of harm against the "significance" of the specific harm. In other words, significant harm that had a low probability of occurring must be avoided due to the potentially serious ramifications, whereas relatively negligible damage that had a high probability of occurring did not necessarily need to be counteracted. That was a detail that the Special Rapporteur had overlooked but which nonetheless must be taken into consideration when giving shape to the binding quality of the principle of prevention.

15. The prevention principle was thus a nuanced norm that could be adjusted to differing contexts within international law. As the Special Rapporteur noted, it was in human rights law and environmental law that the principle was most strongly manifested as an obligation, but it did not have the same normative weight in those two contexts. The norms on which the report focused in the realm of human rights law, above all, the right to life, were directly relevant to the topic under consideration, namely the protection of *persons* in the event of disasters. On the other hand, the pertinence of international environmental norms was much more attenuated, especially as the Special Rapporteur did not expressly mention its link to harm to people. If the Commission was to maintain an anthropocentric focus in the project, it needed to be more mindful of how the principle of prevention functioned in distinct areas and of the varying obligations it engendered in those areas. It must not be viewed as an omnibus rule to be used for all purposes.

16. He had serious reservations about the "precautionary principle" cited in the Special Rapporteur's sixth report. He disagreed with the assertion (para. 60) that the principle of prevention stemmed from the precautionary principle and that the latter qualified as a State "obligation". First, the issue of whether the adoption of measures by a State to ward off a potential environmental hazard was actually a "principle" or fell into the less stringent category of "approach" (Rio Declaration) had not yet been resolved in international law. It would therefore be better not to label the concept a "principle", in order to win the approval of as many States as possible. Second, he had doubts about whether the precautionary principle was actually a source of the prevention principle. The two concepts were fundamentally different: whereas prevention was premised on the idea of calculable and verifiable risk, precaution was predicated entirely on the notion of scientific uncertainty. Third, the precautionary principle did not have the status of an obligation for States. The International Court of Justice had yet to recognize a precautionary "principle", the International Tribunal for the Law of the Sea had not accepted it and the organs of the European Convention on Human Rights had shown

a marked reluctance to apply such a "principle", or even "approach", in deciding cases involving ecological damage. The Commission should therefore classify the precautionary "principle" as something decidedly less than an "obligation" that States were compelled to fulfil.

17. Lastly, he thought there was a need for more specificity concerning the meaning of the "responsibilities" and "accountability mechanisms" alluded to in draft article 16. Since the subject of the draft article was States, it could be assumed that the "responsibilities", in the plural, corresponded to State responsibility, in the singular. As for "accountability" mechanisms, it was a bit unsettling that the expression, which was used only once in the entire report (para. 100), should constitute a key phrase in the text.

18. He had no general comments to make on draft article 5 *ter* and was in favour of sending the draft articles to the Drafting Committee.

19. Mr. KITTICHAISAREE said that since the topic under consideration was a new field of international law, it was appropriate to address it based on analogies with other fields. In his report (paras. 6–8), the Special Rapporteur recalled the relationship between prevention, mitigation and preparedness and noted that mitigation and preparedness could be regarded as concrete manifestations of the overarching principle of prevention that lay at the heart of international law (para. 40). However, given that the report stated that the principle of prevention stemmed from two distinct but interrelated State obligations, namely due diligence and the precautionary principle, it was striking to note that draft article 16 mentioned neither of those two elements. He therefore suggested that paragraph 1 of the draft article should be rewritten and that mention should be made in paragraph 2 of knowledge management and education as well as reduction of the underlying risk factors.

20. Mr. AL-MARRI thanked the Special Rapporteur for having grounded his work in an analysis of State practice worldwide. Within governmental institutions, prevention, management and mitigation of the effects of disasters were accompanied by the prevention of transboundary harm from hazardous activities and, in general, by the protection of the environment. Sustainable development was the cornerstone of all disaster management policy and entailed a certain degree of public awareness-raising, with due respect for freedom of expression and domestic law. As to the obligation to prevent, it was incumbent upon States in the context of good governance, as was the analysis of the environmental impact of development projects that were all too often carried out against the wishes of the local population. The importance of international cooperation, including for States that suffered the adverse effects of certain transboundary development activities, must also be recalled. Such cooperation must be carried out with a view to strengthening the competencies of beneficiary countries.

21. Mr. TLADI said he agreed with the substance of draft articles 16 and 5 *ter* and recommended that they both should be referred to the Drafting Committee. However, he would have preferred the report to take a more nuanced approach on certain points, and he agreed

with Mr. Murase that an unduly broad approach to the principle of prevention should be avoided.

22. He recalled his earlier remark that the Commission's work pertaining to the relationship between the affected State and third States should be conceptualized in terms of cooperation rather than rights and duties. That was why he had reservations about the dual-axis approach mentioned in paragraph 36 of the report. While he accepted that there was a vertical relationship of rights and duties between an affected State and its population, he did not believe that there was any basis in customary international law, practice or policy to posit a horizontal relationship of rights and duties in the interaction of affected States and third States.

23. He remained unconvinced that in the field under consideration, a horizontal axis was supported by the duty under international law to prevent harm, as provided for in various international instruments and case law. While the principle was firmly entrenched in international law, it was applied in a completely different context, namely in ensuring that the activities carried out in one State did not cause harm to another State. The sources cited, including those relating to sustainable development, were likewise not applicable by analogy to the topic under consideration.

24. He had no doubt that there was a duty to prevent. However, in the context of inter-State relations, it operated exclusively with respect to transboundary harm. On the other hand, in the context of the vertical relationship between a State and its population or persons within its territory, the question of what was the source of the duty remained unresolved. Unlike the Special Rapporteur, he did not think the basis of the duty could be found in international environmental law. For reasons he had already discussed, the principle of prevention applied only in the context of transboundary harm. International human rights law might be a more viable basis, although a State could be fulfilling its obligations under international human rights instruments and still not be in a position to effectively manage a disaster. By the same token, it would be going too far to suggest that a State that was less well prepared than it could be was in violation of the right to life due to the occurrence of a disaster, particularly a natural disaster. The test of human or natural origin of a disaster had to be taken into account. Draft article 16, correctly, did not do so. It would be better to view the duty to prevent, in the context of the protection of persons, as a corollary of sovereignty, and not as emanating from either human rights law or environmental law.

*The meeting rose at 5.10 p.m.*

## 3176th MEETING

*Tuesday, 9 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Has-souna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree,

Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE SECRETARY-GENERAL OF  
THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed Mr. Rahmat Bin Mohamad, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to address the Commission.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that, because the topics being studied by the Commission were of great importance to AALCO, a half-day special meeting on selected items on the Commission's agenda had been scheduled during the organization's fifty-second annual session, to be held in New Delhi in September 2013. At the current meeting, he wished to convey the views of his organization's member States on three topics, namely immunity of State officials from foreign criminal jurisdiction, protection of persons in the event of disasters, and formation and evidence of customary international law.

3. Although the immunity of State officials from foreign criminal jurisdiction, which was based on the principle of the sovereign equality of States, was already a well-established rule of treaty law and customary international law, the Commission's study of the topic was timely, owing to recent controversy surrounding the issue of whether the immunity of State officials should prevail over the duty to prosecute and punish individuals responsible for international crimes.

4. AALCO agreed with the Special Rapporteur that the topic must be approached from the dual perspective of *lex lata* and *lex ferenda*. It was vital, however, that before the topic took its final form, the Commission should clearly indicate which elements were statements of *lex lata* and which reflected *lex ferenda*. The concepts of immunity *ratione materiae* and immunity *ratione personae* helped to clarify the scope of the immunity enjoyed by various categories of State officials.

5. Immunity before international courts was already sufficiently delimited by the relevant international instruments. Moreover, diplomatic and consular immunity and the immunity of international organizations had undergone considerable development in treaty law and customary law. There was therefore no need for the Commission to consider those regimes. While the distinction between personal and functional immunity had been generally accepted in legal theory and reflected in legal practice, it was still of vital relevance when ascertaining which persons were covered by immunity. The Special Rapporteur had rightly concluded that it was impossible to find cogent arguments in favour of extending immunity *ratione personae* to officials

outside the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs.

6. Turning to the sixth report on the protection of persons in the event of disasters (A/CN.4/662), he said that the concept of protection had been derived from human rights law and environmental law, which embodied the due diligence and the precautionary principles. In the sphere of disaster risk reduction, he emphasized the importance of the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response and the Africa Regional Strategy for Disaster Risk Reduction.<sup>80</sup> Despite the fact that many AALCO member States had adopted national legislation or guidelines and had set up regulatory bodies to deal with the prevention of, preparedness for and mitigation of disasters, pre-disaster preparedness remained very limited, and funding for such activities remained a challenge. Technology transfer should accordingly be addressed as a means of supporting post-disaster relief and rescue operations. However, the offering of assistance should be voluntary, not compulsory, and the principle of non-intervention in the internal affairs of the assisted State had to be respected by the State offering the assistance.

7. Turning to the topic of formation and evidence of customary international law, he said that notwithstanding the great increase in the number and scope of treaties, customary international law, comprising practice and *opinio juris*, remained an important source of international law. The nature and relative importance of those two constituent elements was a contentious issue, because there was no clear-cut rule on how much consent or how much consistent State practice was required for the formation of customary law. In the view of AALCO, several issues had to be addressed: the identification of State practice; the nature, function and identification of *opinio juris*; the relationship between those two elements; the manner in which new rules of customary international law emerged; the role of “specially affected States”; the time element and the density of practice; whether the criteria for the identification of a rule of customary law might vary according to the nature of the rule or the field to which it belonged; the “persistent objector” theory; treaties and the formation of customary international law; and lastly, the significance of resolutions of international organizations as possible evidence of customary international law.

8. Determining the existence of customary international rules and understanding the underlying processes required a knowledge of international practices and, most importantly, of whether such practices were produced by the will of the international community in general or of particular States. AALCO considered that the diverse practices of States from different civilizations should be taken into account when deciding whether a principle or a rule was customary in nature. Furthermore, as subjects of international law, intergovernmental organizations participated in the process of developing customary international law in the same manner as States. Hence it was of

the utmost importance for the Commission to be alive to the possibility that such organizations might facilitate the creation of State practice that might ultimately crystallize into customary law.

9. He assured the Commission of his organization’s ongoing cooperation in its work.

10. Mr. EL-MURTADI SULEIMAN GOUIDER thanked the Secretary-General of AALCO for his remarks on three of the Commission’s topics, as they would certainly enrich its work.

11. Mr. KITTICHAISAREE, responding to the comments just made on immunity of State officials from foreign criminal jurisdiction, suggested that AALCO look more carefully at the judgment of the International Court of Justice in the *Arrest Warrant* case, where the Court had held that it was an established rule of international law that some high-ranking State officials outside the troika enjoyed personal immunities. In his opinion, those senior officials enjoyed immunity because they were on a special mission. Although not many States were parties to the Convention on special missions, several non-State parties adopted that position when they welcomed visits from officials from other States. When the time came for the Commission to consider exceptions to immunity, it would be faced with the difficult task of trying to achieve a balance between State sovereignty and protection of the interests of victims of serious human rights violations.

12. The Secretary-General of AALCO had rightly recalled that international human rights law and environmental law formed part of the basis for the Commission’s work on the protection of persons in the event of disasters. Since the latter was a new field of law where there was no ironclad precedent to underpin the draft articles, they had to be predicated on other areas of law. Asian countries desperately needed such a regime as guidance in times of disaster.

13. On the formation and evidence of customary international law, he considered that it would be hard to prove the existence of consistent or virtually uniform State practice and *opinio juris* in a world comprising 193 sovereign States. AALCO could therefore greatly assist the Commission by compiling evidence of such practice and opinion in its member States in order to demonstrate the existence of international customary law, at least at the regional level.

14. Given that AALCO had a number of regional arbitration centres, he wondered if it considered that the issue of fair and equitable treatment in international investment law would be an appropriate topic for consideration by the Commission. Would it be in favour of the Commission studying the topic of the protection of the atmosphere?

15. Mr. VÁZQUEZ-BERMÚDEZ wished to know what key factors had contributed to the success of the five AALCO arbitration centres in resolving trade and investment disputes. Did such factors include the cost of arbitration or the fact that they were regional initiatives? Had the adaptation of the rules of the United Nations Commission on International Trade Law lent greater flexibility to dispute settlement? As the Union of South

<sup>80</sup> Adopted by the 10th Meeting of the African Ministerial Conference on the Environment, held at Sirt, Libyan Arab Jamahiriya, 26–30 June 2004; see *Africa Regional Strategy for Disaster Risk Reduction*, July 2004 (available from [www.unisdr.org/we/inform/publications/](http://www.unisdr.org/we/inform/publications/)).

American Nations was contemplating the drafting of a treaty establishing a centre for the settlement of investment disputes as an alternative to the Permanent Court of Arbitration or the World Bank's dispute resolution mechanisms, he was eager to learn more about the experience of AALCO in that area.

16. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that the success of the AALCO regional arbitration centres could possibly be ascribed to the fact that each one served the needs of the countries in the region where it was located. Nevertheless, the centres faced the challenge of retaining their neutrality and independence from government control. His organization would be happy to help the Commission to investigate the reasons for their success. It would be a good idea for the Commission to take up the topic of fair and equitable treatment in international investment law, because it was of great importance for both host and investing countries, particularly when they were developing countries. AALCO would likewise be pleased to see the Commission embark on the topic of the protection of the atmosphere.

17. Although his organization had not yet received comments from its member States on immunity of State officials from foreign criminal jurisdiction, he thought that most of them favoured a conservative approach and were against the extension of that immunity to officials outside the troika. As AALCO might in future formulate some model laws on the protection of persons in the event of disasters, he invited all the Commission's members to attend the organization's fifty-second annual session in New Delhi in order for them to express their views on that subject and more especially on the implementation of such protection. Lastly, he said that AALCO could compile evidence of customary international law in the shape of practice and *opinio juris* at the regional level among its member States.

18. Mr. HASSOUNA said that the traditional visit to the Commission of the Secretary-General of AALCO attested to the strong relations between the two bodies. His comments on three of the topics currently on the Commission's agenda provided a better understanding of the positions of Asian and African countries. Expressing thanks for the invitation to attend the upcoming annual session of AALCO, he said that it would be useful for its conclusions to be communicated to the Commission so that it was fully informed prior to its meetings with AALCO during the sessions of the Sixth Committee. It would also be beneficial for AALCO not only to express its views on issues currently on the Commission's agenda but also to propose new topics for its long-term programme of work.

19. He called on AALCO to urge its member States to respond to the Commission's questionnaires asking for their opinions on the various topics under discussion, as it was important that the views of African and Asian countries should be taken into account. Research and publications by AALCO would also enrich the Commission's understanding of the views of its member States on different topics of international law.

20. Sir Michael WOOD said that it was particularly useful to hear the views of AALCO on topics when they were still at an early stage of consideration. He would be interested to learn how views expressed on behalf of member States were reached. He would also welcome some account of the other matters that AALCO was working on apart from Commission-related topics. States should be encouraged individually or collectively to publish their practice in order to provide a better view of developing practice worldwide. It was important to have groups from the African and Asian regions contributing to universal international law rather than just to regional law.

21. Mr. MURPHY said that it was extremely helpful for the Commission to receive input from an organization like AALCO that represented so many member States. With regard to the Commission's project on the protection of persons in the event of disasters, he would be interested to hear more about the organization's concerns that the obligation upon States to undertake measures to reduce the risk of disasters should be characterized more as a voluntary undertaking than as a legal duty. In his view, the issue could be approached as a legal duty, subject to several conditions. Draft article 16 on the duty to prevent disasters contained a reference to "appropriate measures", and other conditions such as financial capability and the availability of technology might be included. The other possibility would be to present the issue in the form of a voluntary norm, and he asked how AALCO considered that the norm should be crafted.

22. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that his organization had not yet received any responses from its member States about whether the adoption of measures to reduce the risk of disasters should be viewed as a legal duty or a voluntary undertaking, and the views he had expressed were simply those of the organization's Secretariat. There were of course many new topics that the organization would like the Commission to take up, but it would be preferable to focus first on ongoing topics and the new topic of customary international law.

23. Further activities must certainly be undertaken to promote the progressive development of international law. His organization had recently launched the *AALCO Journal of International Law*, which dealt with contemporary issues and could be consulted on the AALCO website.<sup>81</sup> There had been a very encouraging response from member States to the first two volumes. Contributions were accepted from member and non-member States, and contributions from Commission members would be most welcome. Despite its limited budget and resources, AALCO was also about to launch two research projects, one on the statehood of Palestine and another on unilateral sanctions.

24. As to how the views expressed on behalf of member States were formulated, he said that apart from the annual sessions, other meetings with member States, to which non-member States and international organizations were also invited, were held to provide an outlet for discussion

<sup>81</sup> [www.aalco.int](http://www.aalco.int), "Publications", *AALCO Journal of International Law*.

and deliberation on common issues and concerns. Representatives of the organization also attended meetings such as the Assembly of States Parties to the Rome Statute of the International Criminal Court. There was no shortage of material to collect on State practice and *opinio juris*. One potential focus area could be the work of AALCO itself, such as its development of the law of the sea.

25. Mr. VALENCIA-OSPINA said that the work of AALCO on subjects like the treatment of refugees, on which it had developed the Bangkok Principles,<sup>82</sup> was extremely important. The Commission welcomed the role played by AALCO as a forum enabling African and Asian member States to express their opinions on issues being discussed by the Commission, both during the drafting process and once the texts were finalized. He appreciated the interest of African and Asian States in the project on the protection of persons in the event of disasters, for which he was Special Rapporteur. He welcomed the Secretary-General's references to the ASEAN Agreement on Disaster Management and Emergency Response, a pioneering instrument, and to the need to take inspiration from human rights law and environmental law. He hoped to be able to contribute in some way to the new AALCO model law on the protection of persons in the event of disasters.

26. Mr. CANDIOTI welcomed the interest shown by AALCO in the work of the Commission and the efforts made by its member States to develop international law. He noted with satisfaction that AALCO supported the inclusion of the topic of protection of the atmosphere on the Commission's agenda. He also welcomed what the Secretary-General had called the rather conservative attitude of AALCO member States to any extension of immunity from criminal jurisdiction to officials outside the trioka: that was in fact a modern approach, given the need to combat impunity.

27. He agreed with other members that the Commission would welcome proposals from AALCO on priority topics that it should discuss. He expressed the hope that the two bodies would continue meeting together during the sessions of the Sixth Committee. He also called on AALCO for support in ensuring that the texts submitted by the Commission to the General Assembly were actually adopted, rather than being deferred indefinitely. For instance, the Commission hoped that there would be some action on its draft articles on the law of transboundary aquifers<sup>83</sup> during the next session of the General Assembly.

28. Ms. ESCOBAR HERNÁNDEZ said that AALCO had a very important role to play in the codification and progressive development of international law and could be an important ally of the Commission. She would be interested to learn more about how AALCO reached a consensus position on a particular topic. She would also

welcome further information on the issues that AALCO considered to be of the greatest importance.

29. On the immunity of State officials from foreign criminal jurisdiction, for which she was the Special Rapporteur, she welcomed information on how her second report (A/CN.4/661) had been received by AALCO member States and the special interest they had shown in the topic.

30. She supported Mr. Hassouna's suggestion that the Commission should receive in writing the conclusions adopted by AALCO at its upcoming annual session and future meetings. AALCO should continue to encourage its member States to participate actively in the debates in the Sixth Committee, which provided an insight into their views on various topics. The Commission would be grateful for the support of AALCO in encouraging member States to respond to its annual questionnaires: the current relatively low response rate gave rise to uncertainty among special rapporteurs as to certain elements of State practice. The Commission would be interested to hear about the follow-up given by AALCO to the various items on its agenda.

31. Mr. AL-MARRI expressed the hope that cooperation between the two bodies would continue in the future. He drew attention to the work of the Cairo Regional Centre for International Commercial Arbitration and requested information about cooperation with the Gulf States in the sphere of arbitration and in the establishment of legal bodies.

32. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that AALCO had initiated and would follow up on plans to step up cooperation among its member States, in particular the Gulf countries. Steps were being taken to improve the AALCO website by adapting it to the practical needs of member States and making it more interactive. He invited the members of the Commission to attend the forthcoming fifty-second annual session of AALCO, which would be held in New Delhi in September 2013.

33. The CHAIRPERSON thanked Mr. Mohamad for his remarks and his responses to the various questions put by Commission members, which were a reflection of their lively interest in the activities of AALCO.

**Protection of persons in the event of disasters  
(continued) (A/CN.4/657, sect. B, A/CN.4/662,  
A/CN.4/L.815)**

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

34. The CHAIRPERSON invited the Commission to continue its consideration of the sixth report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/662).

35. Mr. PARK said he agreed with the Special Rapporteur that the scope of the topic *ratione temporis* should comprise not only the disaster response phase but also the

<sup>82</sup> "Final text of the AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees", as adopted on 24 June 2001 at the AALCO's 40th session, New Delhi (available from the AALCO website: [www.aalco.int](http://www.aalco.int)).

<sup>83</sup> The text of the draft articles on the law of transboundary aquifers, with commentaries thereto, adopted by the Commission at its sixtieth session (2008), is reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

pre- and post-disaster phases. However, it was somewhat worrying to see that no clear distinction was drawn in the report between natural and industrial disasters in the context of disaster prevention, mitigation and preparedness. Despite the existence of a set of rules that applied to both types of disasters, they displayed clear dissimilarities, the main one being that in industrial disasters, there was a so-called “perpetrator” who had caused or contributed to the occurrence of the calamity. In addition, the legal regime pertaining to industrial disasters placed heavy emphasis on the obligations of notification and compensation that were incumbent not only on an installation’s operators, but also on the State in whose territory the installation was located. Conversely, the State within whose territory or under whose jurisdiction a natural disaster occurred usually bore little or no responsibility for the disaster.

36. The existence of differences between the rules applicable to natural and to industrial disasters in the response phase was a clear indication that distinct sets of rules should apply to the various types of disasters in the pre-disaster phase. However, no such distinction had been reflected in draft article 16 on disaster prevention.

37. He wished to raise three issues related to the foregoing points. First, how should the principle of prevention be characterized—as giving rise to *erga omnes* obligations or to obligations that were subject to progressive realization depending on a State’s economic development? The human rights listed in paragraph 46 of the report as being relevant in the event of a disaster entailed obligations that, in his own view, were a mixture of the two categories. Clearly, however, States, especially developing countries that had limited financial and human resources, could not ensure the realization of all of those rights in the pre-disaster phase.

38. Second, one of the fundamental principles of environmental law was the “differentiated responsibility” approach, which took into consideration the economic situation of developing countries. However, in paragraph 64 of his report, the Special Rapporteur appeared to exclude that approach by stating that a State’s economic level could not discharge it from its obligation of due diligence.

39. Third, with respect to the issue of climate change discussed in paragraph 50 of the report, he questioned whether it was appropriate to apply the same duty of prevention to disasters with a swift onset, such as floods, earthquakes or volcanic eruptions, and to those, such as climate change, whose onset was slow.

40. With regard to terminology, he said that the reference in paragraph 36 to the “dual-axis approach”, encompassing the rights and obligations of States “vertically” in relation to persons within a State’s territory and control, placed undue emphasis on the State’s sovereignty over its nationals and might be misconstrued to imply some sort of superiority over persons who were potential victims of disasters. The report also appeared to place too much emphasis on mitigation in the sense of preparedness, namely measures taken prior to the onset of a disaster, whereas such measures were important also in the response and post-disaster phases. In draft

article 16, paragraph 1, after the word “measures”, he proposed inserting the phrase “within the capacity of each State” and redrafting the rest of the sentence to clarify what was meant by the expression “responsibilities and accountability mechanisms”.

41. With regard to draft article 5 *ter*, he recalled that the meaning of the duty to cooperate in the pre-disaster phase in order to reduce the risk of disasters was not the same for a natural disaster as for an industrial one, and the nature of the duty might vary, depending on whether the disaster had a sudden or a gradual onset. More generally, he questioned the necessity of adopting a separate draft article for cooperation during the pre-disaster phase, since article 5 was comprehensive enough to apply to all three disaster phases.

42. Mr. FORTEAU said that unlike other members of the Commission, presumably, he was not in the least bit troubled by the excessive length of the report compared to the brevity of the two draft articles proposed. The formulation of general rules on prevention was entirely appropriate, given that the two new texts covered all disasters, both natural and human-made, justifying the development of a single standard sufficiently flexible to cover all types of disasters. Moreover, the Commission’s definition of disasters in draft article 3, adopted in 2010, was limited to the most serious disasters: calamitous events resulting in great human suffering and large-scale damage. In such situations, international human rights law and international environmental law converged in order to protect the vital interests of the international community. The Special Rapporteur’s approach also had the advantages of fitting easily into the existing framework of general international law and of being in line with the Commission’s previous work on the topic. Nevertheless, the two articles proposed were too succinct: they needed to be fleshed out and, in some places, reformulated.

43. The wording of article 16 was problematic in that prevention was both its overarching subject and one of its components. The formulation failed to draw the necessary distinction between mitigation of a disaster, meaning prevention of its occurrence, and mitigation of the effects of a disaster, meaning reduction of the effects of a disaster following its occurrence. It was difficult to know which meaning was intended. Moreover, the types of preventive measures undertaken before a disaster and aimed at reducing its potential effects, such as seismic stability regulations, were not covered by the phrase “to reduce the risk of disasters” and could better be described as reduction of the effects of disasters. There was also the fact that efforts to mitigate the effects of a disaster were not limited to the field of prevention, but were also employed in the post-disaster phase. Moreover, in paragraph 48 of his report, the Special Rapporteur associated mitigation with a legal obligation in respect of disaster relief, and not with the duty of prevention. Those considerations confirmed his view that mitigation of the effects of a disaster was not restricted to prevention but extended beyond it, perhaps justifying the inclusion of a separate draft article on the subject.

44. Article 16 failed to include several aspects of practice cited in paragraphs 38 and 51 to 53 of the

report, such as the temporary evacuation of people and property, effective deterrence of threats of disaster and the need to take preventive and necessary measures when a natural hazard was “clearly identifiable”, the latter threshold being more stringent than the Special Rapporteur’s “foreseeability requirement”. Draft article 16 might also include a more explicit reference to an obligation to adopt national legislation in order to give effect to the duty to prevent. Lastly, something should be added about the regime for the duty to prevent: what constituted a violation of that duty and what the consequences might be in terms of the State’s responsibility. Although the Special Rapporteur touched on the matter briefly in paragraph 161 of his report, it merited fuller consideration. The questions that might be raised included what constituted a causal link in the event of a disaster, whether a State could be blamed for not having foreseen or prevented a disaster and what type of reparation might be envisaged. Although certain Commission members and States preferred to focus on cooperation, if the duty to prevent was to be defined rigorously, those questions needed to be answered.

45. In principle, he had no problem with draft article 5 *ter*. However, the text was not specific about the kinds of measures that States must take to reduce the risk of disasters, and he questioned whether risk reduction was entirely synonymous with prevention. The fact that mitigation had not been covered in either draft article 5 *bis* or 5 *ter* was undoubtedly a gap that needed to be filled.

46. In conclusion, he pointed out the potential inconsistency in the fact that draft articles 6, on humanitarian principles in disaster response, and 7, on human dignity, were currently formulated solely in terms of disaster response, and not of prevention.

47. With those comments, he supported the referral of the two draft articles to the Drafting Committee.

48. Mr. TLADI said that he had some doubts concerning the grounds on which Mr. Forteau was advocating a single standard for both natural and human-made disasters, namely that this was consistent with the Commission’s previous work on the topic and with general international law. He was not convinced that that was indeed the case.

*The meeting rose at 1.05 p.m.*

### 3177th MEETING

*Wednesday, 10 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma,

Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Cooperation with other bodies (*continued*)

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVES  
OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Lijnzaad, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Olsen, Secretary of CAHDI. He said that the Commission attached great importance to its cooperation with the Council of Europe, particularly with CAHDI, and he invited Ms. Lijnzaad to present the activities undertaken by CAHDI since the Commission’s last session.

2. Ms. LIJNZAAD (Council of Europe) expressed her appreciation for the fact that every year, the International Law Commission invited CAHDI to provide an update on its work. CAHDI was an intergovernmental committee that brought together, twice a year, the legal advisers on public international law of the Ministries of Foreign Affairs of member States of the Council of Europe as well as of a significant number of observer States and international organizations. CAHDI examined questions related to public international law, conducted exchanges, coordinated the views of member States and provided opinions at the request of the Committee of Ministers or other steering committees.

3. At its forty-fourth meeting, CAHDI had adopted comments on Recommendation 1995 (2012) of the Parliamentary Assembly entitled “The International Convention for the Protection of All Persons from Enforced Disappearance”.<sup>84</sup> In that Recommendation, the Parliamentary Assembly had invited the Committee of Ministers to consider launching preparations for negotiations in the framework of the Council of Europe on a European convention on enforced disappearance, pointing out four shortcomings in the International Convention for the Protection of All Persons from Enforced Disappearance. In its comments,<sup>85</sup> CAHDI had stressed that this Convention was a recent text and that the shortcomings had already been pointed out during discussions with the United Nations. Many speakers had also stressed that such an initiative might be seen to undermine efforts to promote universal acceptance of the Convention, which, on the contrary, should be supported. In its reply<sup>86</sup> to the Recommendation of the Parliamentary Assembly, the Committee of Ministers had taken into account the comments made by CAHDI.

<sup>84</sup> Adopted on 9 March 2012 (available from <http://assembly.coe.int>, “Documents”).

<sup>85</sup> CAHDI, meeting report, 44th meeting, Paris 19–20 September 2012 (CAHDI (2012) 20), appendix V (available from [www.coe.int](http://www.coe.int)).

<sup>86</sup> CAHDI, document CM/Del/Dec(2013)1159, appendix 9 (available from [www.coe.int](http://www.coe.int)).

4. In September 2012, Sir Michael Wood, in his personal capacity, had briefed CAHDI on the most recent work of the International Law Commission and of the Sixth Committee.
5. At the close of the French Chairpersonship of CAHDI, the French Ministry of Foreign Affairs and the Public International Law Division of the Council of Europe had organized a conference on “The judge and international custom” (Paris, 21 September 2012) in which a number of international judges had participated. The proceedings of the conference had been issued in two different publications.<sup>87</sup>
6. In its capacity as European Observatory of Reservations to International Treaties, CAHDI regularly considered declarations and reservations to conventions concluded within and outside the Council of Europe and reviewed the reservations made to United Nations conventions. CAHDI compiled information on reservations and declarations to enable member States to react to them and, to a certain extent, to coordinate their reactions. By sharing their views on potential difficulties, they might be encouraged to regularly review their own reservations or declarations.
7. CAHDI also maintained three databases on the immunities of States and international organizations; the organization and functions of the Office of the Legal Adviser in the Ministry of Foreign Affairs; and national measures for the implementation of United Nations Security Council sanctions and respect for human rights. The members of CAHDI had shown increased interest in the databases as the year progressed.
8. In March 2013, at its forty-fifth meeting, CAHDI had begun the consideration of a new topic entitled “Service of process”, which was part of the broader discussion on immunities of States and, more specifically, on whether the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) was part of customary law. The early discussions had concerned the translation of court documents and the role of embassies in the service of process. A questionnaire on State practice in that area would allow relevant information to be collected to further enrich the CAHDI database.
9. As a forum for discussion on questions of international law, CAHDI also maintained contacts with the legal services of other international organizations and entities. On that basis, CAHDI had had exchanges in the past few months with the International Institute of Humanitarian Law, the Organization for Security and Co-operation in Europe and the Permanent Representation of Liechtenstein to the Council of Europe.
10. In conclusion, she underscored the contribution made by CAHDI to improving relations between States and developing international law.
11. The CHAIRPERSON thanked Ms. Lijnzaad for her remarks and invited Ms. Olsen to make a statement.
12. Ms. OLSEN (Council of Europe) said that she would outline the recent activities undertaken by the Council of Europe in the area of public international law.
13. She began by recalling the priorities of the latest Chairpersonships of the Committee of Ministers, which had included strengthening the implementation of the conventions of the Council of Europe. The complete list of those conventions drawn up by the Secretary General of the Council had resulted in a report that CAHDI had participated in preparing. In follow-up to that report, the Committee of Ministers had adopted a series of decisions on the promotion and management of the Council of Europe’s conventions, something that would be followed closely by the steering and *ad hoc* committees; the participation of non-member States in conventions; and the dialogue on reservations with a view to possible withdrawal.
14. With regard to the activities of the Treaty Office, she drew attention to the adoption, in June 2012, of the Fourth Additional Protocol to the European Convention on Extradition, aimed at strengthening international co-operation in that area. In addition, the draft Council of Europe convention against trafficking in human organs, prepared by the Committee of Experts on Trafficking in Human Organs, Tissues and Cells, was currently under consideration. The process of updating the Convention for the protection of individuals with regard to automatic processing of personal data, launched in 2011, was entering its final phase, and the Committee of Ministers had to take a position on the mandate of the *ad hoc* committee on data protection tasked with undertaking formal negotiations on a protocol to amend the Convention. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms had been adopted by the Committee of Ministers on 16 May 2013 and was open for signature. The amendments it contained affected both the provisions on the interpretation of the Convention and the procedural or organizational rules. Draft protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provided for the possibility that the highest national courts might obtain opinions from the European Court of Human Rights on pending cases, should also soon be open for signature.
15. Draft legal instruments to establish the modalities of the accession of the European Union to the European Convention on Human Rights had been developed in the framework of negotiations between the Steering Committee for Human Rights of the Council of Europe and the European Union in the “47+1” Group. The instruments in question were a draft agreement on accession, accompanied by a draft explanatory report, and a draft amendment to the Rules of the Committee of Ministers for the supervision of the execution of judgments. The Court of Justice of the European Union had yet to state its position on the drafts.
16. Lastly, she said that the CAHDI website had been redesigned in order to make it more accessible to both specialists and the general public.

<sup>87</sup> *The Law and Practice of International Courts and Tribunals*, vol. 12, No. 2 (2013), E. Lijnzaad and Council of Europe (eds.); and *The Judge and International Custom/Le juge et la coutume internationale*, Brill/Nijhoff (upcoming publication). The proceedings of the Conference are available from [www.coe.int](http://www.coe.int).

17. The CHAIRPERSON thanked Ms. Olsen for her statement and invited members of the Commission to comment.

18. Mr. VALENCIA-OSPINA emphasized the importance of the cooperation between the Commission and CAHDI. It allowed States to express their individual views on topics on the Commission's agenda, and in so doing strengthened the relationship between the Commission and the Sixth Committee and contributed to the consistent implementation of the Commission's texts by the member States of the Council. He welcomed the information provided on the conference held in September 2012 and thanked the organizers.

19. Sir Michael WOOD asked whether CAHDI maintained close relations with other regional bodies that performed similar functions, such as AALCO, and whether it informed the international community, particularly the United Nations, about its work. He suggested that CAHDI might see what it could do to promote ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property, particularly in 2014, which marked the tenth anniversary of its adoption.

20. Mr. KITTICHAISAREE, noting that European countries faced a growing influx of asylum seekers, asked whether the Council of Europe had considered changing its position with regard to the expulsion of aliens. In the light of other recent events, he asked whether CAHDI had looked at the international legal regimes that might be applicable to the situation in the Syrian Arab Republic, especially in the context of the responsibility to protect, or that might help to preserve a balance of interests between the protection of security and the protection of privacy.

21. Ms. LIJNZAAD (Council of Europe) emphasized that CAHDI was first and foremost a forum for discussion, and very rarely took decisions. There was always an item on international humanitarian law on the agenda of CAHDI meetings, but as they were held only twice a year, the discussions were somewhat removed from current events. Furthermore, they focused primarily on international law in the context of the activities of the Council of Europe. The issue of asylum seekers and economic migrants came under the competence of the European Union rather than that of the Council of Europe. All matters related to privacy were debated in forums other than CAHDI, such as the Steering Committee on Media and Information Society and the Consultative Committee set up by virtue of the Convention for the protection of individuals with regard to automatic processing of personal data. The relations CAHDI maintained with other regional bodies were subject to the procedures established by the Council of Europe with regard to the participation of non-member States in the work of its bodies and working groups, which somewhat limited the opportunities for exchange. CAHDI did not generally seek to promote its own work, but it would, indeed, be helpful for the Sixth Committee to be informed of what had been done and what publications were available. It was not for CAHDI to promote the United Nations Convention on Jurisdictional Immunities of States and Their Property, especially as there was no consensus on that instrument among the member States of the Council of Europe; however, the issue was debated at all CAHDI meetings.

22. Mr. SABOIA agreed that CAHDI should have more contact with other regional bodies and regretted that this was not possible. He noted with satisfaction that CAHDI was in favour of universal ratification of the International Convention for the Protection of All Persons from Enforced Disappearance rather than of trying to draft a European equivalent, and that it had also supported the work in Kampala of the Review Conference of the Rome Statute of the International Criminal Court on giving the International Criminal Court jurisdiction with respect to the crime of aggression. He also welcomed the work done on the Additional Protocols to the European Convention on Extradition and the draft Council of Europe convention against trafficking in human organs, which were important subjects. Another important issue was the service of court documents in foreign States, which was often such a slow and complex process that it was an obstacle to judicial cooperation and even to the fight against impunity.

23. Mr. NOLTE asked why a different approach had been adopted in the draft agreement on the accession of the European Union to the European Convention on Human Rights as compared to the International Law Commission's approach in its draft articles on the responsibility of international organizations:<sup>88</sup> specifically, the draft agreement contained a clause that appeared to contradict the approach taken by the Commission in draft article 17 as well as the position adopted by the European Court of Human Rights in the *Bosphorus* judgment. In his own view, the approach adopted in the draft agreement constituted *lex specialis* compared with the Commission's draft articles.

24. Mr. ŠTURMA said that the interaction between the Commission and CAHDI was particularly important given that both bodies dealt with the codification and progressive development of the law, one at the international level and the other at the regional level. He endorsed Mr. Nolte's questions concerning the draft agreement on the accession of the European Union to the European Convention on Human Rights and would welcome further information on draft protocol No. 16 to that Convention.

25. Ms. LIJNZAAD (Council of Europe) agreed that the contacts between CAHDI and other regional institutions were helpful and were always feasible: it was simply necessary to move in the direction of more informal contacts. With regard to the service of court documents in foreign States, CAHDI had asked all of its participating States, both members and observers, to provide information on their practice, including references to relevant legislation and court decisions, preferably with links to databases.

26. The accession of the European Union to the European Convention on Human Rights was a matter dealt with by the Steering Committee for Human Rights of the Council of Europe and its counterpart body in the European Union. The issue of the responsibility of international organizations did not appear to have arisen specifically. It should be borne in mind that it was a very unusual situation—given that the 28 members of the European

<sup>88</sup> *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are reproduced in the annex to General Assembly resolution 66/100 of 9 December 2011.

Union were all already parties to the Convention—and the main concern expressed in the debates, particularly by the member States of the Council that were not members of the Union, was how the presence of a member of the Council that was an international organization rather than a State might disturb the structural balance.

27. Ms. OLSEN (Council of Europe) said that draft protocol No. 16 to the European Convention on Human Rights had been submitted to the Parliamentary Assembly of the Council of Europe, which had issued its opinion in June 2013. The opinion, which was available on the Assembly's website,<sup>89</sup> contained all of the requested information on the Protocol.

28. Mr. PETRIČ noted with satisfaction the organization of the conference on “The judge and international custom” and the publication of the proceedings. In the current era of globalization, national courts, including constitutional courts, increasingly referred to international law, but while the use of treaty law was widespread, knowledge of customary international law remained limited in some regions. He asked whether CAHDI might encourage States to pay greater attention to the work of the Commission, given that the response rate to the Commission's requests for information was generally very low. CAHDI might also give some consideration to the fact that, in the light of the strengthening of democratic principles and civil society, human rights were now under threat less from States and more from non-State actors, particularly organized crime. Consideration should also be given to the issue of respect for privacy, as there was still a great deal of legal uncertainty in that area, particularly regarding legal persons.

29. Mr. PARK requested further information on the four shortcomings that the Parliamentary Assembly of the Council of Europe claimed to have discerned in the International Convention for the Protection of All Persons from Enforced Disappearance. He would also be interested to learn more about any consultations that were held between CAHDI and the legal advisers of the European Union, and whether there were ever conflicts of jurisdiction between the European Court of Human Rights and the Court of Justice of the European Union. Lastly, with regard to the implementation of United Nations Security Council sanctions, he asked whether there was any compilation of legal opinions on that matter or information from member States.

30. Ms. ESCOBAR HERNÁNDEZ asked whether, as part of the redesign of the CAHDI website, there were any plans to include a section specifically on the immunity of State officials from foreign criminal jurisdiction in the database on State immunities. If so, she wished to know whether it would be possible to set up a system to which the members of the Commission could have access for the exchange of information with States, as the Commission received few responses from States to its questionnaires.

31. Ms. LIJNZAAD (Council of Europe) said that CAHDI would endeavour to encourage member States to reply to the Commission's questionnaires. Human rights

violations committed by non-State actors fell within the scope of the Commission on Crime Prevention and Criminal Justice based in Vienna and of specific working groups of the Council of Europe rather than of CAHDI. Replying to Mr. Park, she referred him to Recommendation 1995 (2012) of the Parliamentary Assembly of the Council of Europe on the International Convention for the Protection of All Persons from Enforced Disappearance, and said that the legal advisers of the European Union participated in the meetings of CAHDI and vice versa. The jurisdiction of the European Court of Human Rights was based on the European Convention on Human Rights, whereas the jurisdiction of the Court of Justice of the European Union derived from the Treaty on European Union, but the two bodies worked together increasingly often as human rights were being incorporated into the constitutions of the European countries.

32. Ms. OLSEN (Council of Europe) said that access to the CAHDI database on State immunities was public and that CAHDI would include the issue of the immunity of State officials from foreign criminal jurisdiction in its discussions on immunity.

33. The CHAIRPERSON thanked the representatives of the Council of Europe.

**Protection of persons in the event of disasters  
(continued) (A/CN.4/657, sect. B, A/CN.4/662,  
A/CN.4/L.815)**

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

34. Mr. EL-MURTADI SULEIMAN GOUIDER said that he had listened with interest to the comments made by the members of the Commission and agreed with many of them. All of the views expressed would help to enrich the work of the Special Rapporteur. He was in favour of referring the two draft articles contained in the sixth report of the Special Rapporteur (A/CN.4/662) to the Drafting Committee to be reworked, taking into account the comments and proposals that had been made.

35. Sir Michael WOOD said that he had not been a member of the Commission when the topic under consideration had been placed on the agenda. Since it was fairly atypical, raised many issues and seemed to have raised misgivings among States and others, he welcomed the great efforts made by the Special Rapporteur, which had enabled the Commission to reach the end of its first reading of the set of draft articles. Given that the Special Rapporteur's sixth report dealt with eminently practical matters, the Commission should not let differences over issues of principle stand in the way of finding practical solutions. The sections on the historical development of the concept of disaster risk reduction, international cooperation on prevention, and national policy and legislation were of great interest and amply substantiated the draft articles proposed. Like others, he had doubts about the section on prevention as a principle of international law, although those doubts were not directly related to the text of the draft articles. However, he was sure that the Special Rapporteur would take into account the views

<sup>89</sup> Opinion 285 (2013) of 28 June 2013 (available from <http://assembly.coe.int>, “Documents”).

expressed during the debate when it came to preparing the commentaries. In doing so, he might find that there was no great need to cover the legal issues addressed in that section, which were not central to the overall project.

36. He agreed with much of what had been said by Mr. Murase, Mr. Park and Mr. Tladi, particularly the concerns expressed by Mr. Tladi with regard to the dual-axis approach recommended in paragraph 36 of the report. The title of the section in question—“Prevention as a principle of international law”—encapsulated the problems he had with that part of the report. What was meant by “principle of international law” in that context, given that unlike “rule”, the term “principle” had many meanings, some quite vague? And what was meant by “prevention”? Prevention by whom, and of what? The mention in paragraph 40 of “the overarching principle of prevention, which lies at the heart of international law” did little to clarify matters for the Commission, and nor did the reference in paragraph 41 to “an international legal obligation to prevent harm, both in its horizontal and vertical dimensions”, which “finds support in human rights law and environmental law”.

37. Each of the many examples given by the Special Rapporteur of the use of the word “prevent” in legal and other texts was taken from a very specific context; each had a particular object, and was subject to particular interpretation. They could not easily be grouped together to form an overall “principle of prevention”. Mr. Murase had said much that he himself would have wished to say about the references to environmental law, particularly with regard to the precautionary principle. Mr. Park had drawn attention to the statement, in paragraph 50 of the report, that “[t]he existence of an obligation to mitigate has been recently addressed in relation to climate change”, which seemed out of place in a section dealing with human rights and did not appear to be well supported by the authorities cited by the Special Rapporteur. The two cases cited in paragraph 51—*Öneryıldız v. Turkey* and *Budayeva and Others v. Russia*—could hardly be said to lead to a general obligation for States to take appropriate steps to prevent and mitigate disasters in less predictable situations. Mr. Tladi had also shown that the judgments of the European Court of Human Rights could not be read as establishing a “general principle to prevent” under international law—still less could one rely on separate or dissenting opinions or passages from the writings of doubtless learned authors. Mr. Park, like others, had emphasized the need to distinguish human-made disasters from natural disasters and had drawn attention to the statement in paragraph 53 of the report that the European Court of Human Rights had “articulated the same duty regarding natural and man-made disasters”. That was not how he himself had read the judgment in *Budayeva and Others v. Russia*, particularly since in paragraph 135, the Court stated that operational choices in terms of priorities and resources needed to be taken into consideration and must be “afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature”.

38. In conclusion, he believed that the wording of the two draft articles could be improved significantly, and he looked forward to working with the Special Rapporteur and the members of the Drafting Committee to that end.

He therefore supported referring draft articles 16 and 5 *ter* to the Drafting Committee.

*The meeting rose at 12.45 p.m.*

### 3178th MEETING

*Thursday, 11 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Protection of persons in the event of disasters (continued) (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the sixth report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/662).
2. Mr. SABOIA said that, unlike other members of the Commission, he thought that the Special Rapporteur had drawn well-founded conclusions about the current legal framework for prevention, risk reduction, preparedness and mitigation of disasters, the duties to prevent and cooperate and the principle of due diligence. He had solidly established the pertinent analogies to human rights law and environmental law. The dual-axis approach he had adopted was perfectly valid for the current stage of consideration of the topic. Brazilian domestic legislation took the same approach.
3. Concern had been expressed with regard to the Special Rapporteur’s alleged failure to draw a distinction between natural and human-made disasters: true, it might have been useful to examine the distinction more closely. Insufficient attention had purportedly been paid to differences in the capabilities of States. Yet the Special Rapporteur had clearly stated that the duty to prevent and the principle of due diligence had to be seen in the light of the economic, scientific and technological level of a country, although a State’s economic level could not discharge it from its responsibilities. In the work on the topic, emphasis should be placed on poverty and lack of development as obstacles to adequate prevention, preparedness, mitigation and post-disaster reconstruction. Haiti was a dramatic example of a

country caught in a vicious circle of poverty and disasters that had thwarted its efforts at economic and social recovery. Express mention should be made, either in the draft articles or in the commentaries, of risk reduction for particularly hazardous industrial activities that could harm human health or life, such as the dumping of toxic waste in impoverished peripheral areas. Land-use regulations and construction standards were also important factors in risk reduction, although they were frequently disregarded due to negligence or corruption on the part of the authorities.

4. With regard to the two draft articles, which should be referred to the Drafting Committee, he suggested the inclusion in draft article 16 of a reference to appropriate monitoring of the implementation of the measures and to the need to consult with and take into account the needs of the local population. He favoured the retention of the references to responsibilities and accountability mechanisms.

5. Mr. HMOUD said that the Special Rapporteur's assessment of the various legal instruments indicated that States placed broad emphasis on preparing for disasters, mitigating their effects and reducing risk. However, the key question was whether there was a principle of customary international law or an emerging norm on the obligatory nature of disaster prevention. It was also important to determine whether there was any legal principle that would be inconsistent with developing a rule on prevention. Even if there was no legal impediment, it had to be demonstrated that there was a need for such a rule in the context of the protection of persons in the event of disasters. The wide range of existing instruments indicated that positive acts by States to reduce the risk of disasters were expected and needed, but did not show the need for a separate general rule that created any obligation for States outside the existing frameworks and mechanisms. A mere two cases before the European Court of Human Rights were clearly not sufficient to indicate that need. There did not seem to be a direct link between the various principles of international human rights law and environmental law cited in the report and a rule on the prevention of disasters. It was not sufficient to argue that because the principle of prevention existed in a certain field of the law, it existed, or should exist, by analogy, in other areas of law.

6. International instruments like the International Covenant on Civil and Political Rights imposed no obligations upon States to prevent disasters. They did require States to prevent human rights violations by third parties, but disasters could not be said to be third parties or, *per se*, to violate human rights. It was argued in paragraph 46 of the report that the supposed duty to prevent or mitigate a disaster arose from States' universal obligation to ensure certain general rights, such as the right to life and food, clothing and shelter. However, in order for that duty to arise in the context of a disaster, there had to be direct consequences for such rights, something that was not established in the report. In addition, the Human Rights Committee's general comment—of dubious legal value—on article 6 of the Covenant<sup>90</sup> referred only to foreseeable

disasters. The argument about the right to an adequate standard of living under article 11 of the International Covenant on Economic, Social and Cultural Rights also lacked a link to the supposed obligation to prevent disasters. The most plausible basis for establishing a duty to prevent came from the reasoning advanced by the European Court of Human Rights in the *Öneryıldız v. Turkey* and *Budayeva and Others v. Russia* cases to the effect that a duty might exist in relation to foreseeable disasters and that failure by the State to take feasible measures in such situations might be considered a violation of the right to life.

7. Environmental law and protection in disaster situations were two entirely separate fields of law, and the principles operative under the former did not carry over into the latter. He did not see how the precautionary principle in environmental law, for example, could be applied to risk reduction in the context of disasters. The same was true of due diligence, although it could be used to assess whether a State had made its best efforts to reduce the risk of disaster.

8. He agreed with the Special Rapporteur that the duty to cooperate in connection with prevention was part of the overall duty to cooperate set out in draft article 5. It would be illogical to accept that principle for disaster relief but not in relation to risk reduction, mitigation and preparedness.

9. In closing, he said that he supported sending the two draft articles to the Drafting Committee. While the duty to prevent did not have sufficient legal underpinning for codification, it might nonetheless be appropriate for progressive development if confined to foreseeable disasters.

10. Mr. ŠTURMA said that certain concepts used in the draft articles and in the report, such as prevention, precaution, damage, risk, responsibility and accountability, had not been clearly defined, and some theoretical conclusions did not follow from the documents and cases cited. While he agreed with the emphasis on the principle of prevention as a key element of the topic, he also agreed with the critical comments made by Mr. Murase, Mr. Tladi and others.

11. He shared the concerns expressed about the use of the dual-axis approach, involving horizontal and vertical obligations, without sufficiently defining the obligations. While he could accept that a State had certain obligations to its population in the event of a disaster, in other words vertical obligations, he had some doubts about the horizontal dimension, namely in relations between the affected State and third States.

12. The Special Rapporteur had based his arguments on international human rights law and environmental law, but although there were some similarities, the structure of obligations was not the same. In the field of human rights, the best basis for State obligations was sovereignty. International environmental law seemed *prima facie* to be a solid basis for the obligation of prevention, but many legal arguments that were valid in the context of transboundary harm could not be transferred to the relation between the affected State and third States in the event

<sup>90</sup> Report of the Human Rights Committee, 16th session (1982), general comment No. 6 on article 6 (Right to life), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, p. 93.

of disasters. He was not sure that there were any general legal obligations in respect of prevention, cooperation and assistance outside the context of special treaty regimes.

13. While the principle of prevention was certainly a part of international law *de lege lata*, the precautionary principle seemed to be *lex ferenda*, although it might have developed into positive legal obligations in particular regimes. Although prevention was also a key concept in the context of protection of persons in the event of disasters, the precautionary principle was hardly applicable, particularly in the event of the natural disasters that often took the form of *force majeure*.

14. If the Commission restricted itself to a very general restatement of the obligation of prevention, it might not be necessary to distinguish between different kinds of risks and disasters, since preventive measures were advisable in all cases, although they had to be reasonable and appropriate to the nature of the risks involved. However, differentiation was extremely important when it came to the legal consequences of the failure to comply with the obligation of prevention. On that subject, the report and draft article 16 were far from clear. One problem might be that a distinction was not made between the obligation to reduce the risk of disasters and the obligation to mitigate the effects of disasters. Another problem seemed to reside in the different nature of risks and disasters. The failure of a State to fulfil its preventive obligation entailed greater legal consequences in cases of industrial and other human-made risks and disasters than in cases of unpredictable and unavoidable natural disasters.

15. The responsibility and accountability mechanisms should be clarified. It was not entirely clear whether draft article 16 referred to State responsibility or international liability, or perhaps civil liability under internal law. The concept of accountability did not necessarily amount to State responsibility for internationally wrongful acts.

16. In spite of his critical comments, he supported referring draft articles 16 and 5 *ter* to the Drafting Committee.

17. Mr. CAFLISCH said that the Special Rapporteur's sixth report revealed the existence of a considerable body of national and international rules, mechanisms and institutions in the field of disaster prevention and described the impact that recourse to them, or lack of such recourse, could have on individuals. The available mechanisms might well serve as the basis for the development of comprehensive rules. Although the report conveyed the impression that the topic was a relatively well-known field of study, the task ahead of the Commission was only partly one of codification, in his opinion.

18. The Special Rapporteur had rightly included the international protection of human rights, in particular the right to life, among the pillars of international law upon which the project should rest, the very title of which contained the phrase "protection of persons", giving it a human rights dimension. In paragraphs 51 to 53 of his report, the Special Rapporteur discussed two cases of the European Court of Human Rights that established a link between the right to life and the duty of States to protect

persons from life-threatening disasters. Citing portions of the relevant judgments, he expressed the hope that they would provide a solid basis for a rule that imposed on States a duty of prevention, mitigation and compensation when, in the face of life-threatening natural or human-made disasters, a State had not taken the necessary, feasible steps to prevent them or to mitigate their effects. It seemed appropriate to include in the commentaries to draft articles 16 and 5 *ter* the ideas outlined on that point by the Special Rapporteur.

19. The law of transboundary relations, the principle of *sic utere tuo ut alienum non laedas*, the precautionary principle, the principle of due diligence and the provisions of national and international instruments cited in the report provided an adequate basis for the draft articles proposed by the Special Rapporteur. Although there were still some doubts about the existence of a general customary rule in the area of prevention, he was in favour of referring both draft articles to the Drafting Committee.

20. Mr. MURPHY said that the chapter on prevention of the Special Rapporteur's sixth report presented a terminological problem: it was entitled "Prevention", and draft article 16 was entitled "Duty to prevent", even though they both addressed not only prevention, but also mitigation and preparedness. In his view, the broad term that covered all three was not "prevention" but "risk reduction". As noted in paragraph 37 of the report, prevention was distinct from mitigation and preparedness, each of which lay at different points of the continuum of actions undertaken in advance of a disaster. Given that many of the instruments cited in the report used the term "disaster risk reduction" when referring to the three concepts, he encouraged the Special Rapporteur to consider changing the title of draft article 16 to read: "Duty to undertake measures for disaster risk reduction", which would also parallel the title of draft article 5 *ter*. The term "disaster risk reduction" could be used in the commentaries when referring collectively to the three concepts.

21. A second problem was that he did not find the sources cited in the section on prevention as a principle of international law to be compelling evidence of the existence of a duty of disaster risk reduction. That section focused exclusively on prevention, but the sources did not directly support a duty relating to mitigation or preparedness. Even with respect to prevention, however, the arguments given were unconvincing: to suggest that prevention was *per se* a general principle of international law was an unduly broad assertion. Any principle of prevention must have the effect of preventing a specific thing, such as transboundary environmental damage. Moreover, prevention was analysed in the context of international environmental and human rights law, but no explanation was given as to exactly how that type of prevention related to prevention under the current topic and whether the conditions to be met in the other contexts also applied in the current context. Even if many States had accepted obligations regarding the well-being of their nationals under the International Covenant on Economic, Social and Cultural Rights, those obligations were conditioned in article 2 of the Covenant in very important ways, only one of which appeared in draft article 16: the caveat of taking "appropriate" measures.

22. Similarly, it was quite a leap to assert that a State's treaty obligation not to arbitrarily deprive persons of life supported a general duty to prevent disasters, or more broadly, to undertake disaster risk reduction measures. At best, the statements by the Human Rights Committee and the decisions of the European Court of Human Rights cited in the report supported the narrow proposition that, in the context of the specific provisions of the relevant treaties, a State must take appropriate measures to prevent life-threatening, foreseeable and imminent disasters. Yet none of those conditions was reflected in draft article 16.

23. International environmental law was primarily concerned with the prevention of transboundary harm or harm to common areas, such as the seas, and not with harm within national boundaries. Most international environmental treaties and case law, as well as the Commission's 2001 draft articles on prevention of transboundary harm from hazardous activities,<sup>91</sup> had no direct bearing on the way a State acted internally with regard to its own environment. Although there were some exceptions in international environmental law, the Convention on biological diversity being a prime example, such exceptions seemed to prove the general rule that States pursued their internal environmental policies as they wished, provided that they did so in a manner that was consistent with their treaty commitments and that did not cause significant harm to other States.

24. The section on prevention as a principle of international law broached subjects on which there were sharply contrasting views. The precautionary principle provided that in the event of the threat of serious or irreversible damage, a lack of full scientific certainty must not be used as a reason for postponing measures to prevent environmental degradation. That principle, too, was subject to caveats, and its meaning and effect continued to generate disagreement. The Special Rapporteur should therefore not place much reliance on the precautionary principle.

25. He also had doubts about anchoring a duty of disaster prevention to instruments that were specifically geared towards addressing climate change. Doing so would suggest that the Commission's project was directly concerned with long-term climate change, not with sudden and unforeseen events, as was in fact the case.

26. In short, rather than to use international human rights law and international environmental law to prove the existence of a legal duty with regard to disaster risk reduction, it would be better simply to recognize that a duty of preventive action existed in other fields of international law and to view them as possible analogies. Any duty to undertake measures of disaster risk reduction arose, not from other areas of international law, but from the extensive State practice that related specifically to disaster risk reduction. The sections of the report on international cooperation on prevention and on national policy and legislation were full of examples of States signing instruments and adopting laws that demonstrated their acceptance of important obligations with respect

to disaster risk reduction. That was where the duty expressed in draft article 16 should be anchored. If those examples of State practice could be regarded as revealing the emerging acceptance of a duty to prevent, then the Commission could indeed put forward that duty in draft article 16, but not without a careful explanation of its reasoning in the commentary.

27. Attention had to be paid to the sources of the duty to prevent when establishing the contours of that duty. Some disaster risk reduction measures were found in instruments related solely to human-made disasters, while other measures applied only to natural disasters. For that reason, natural and human-made disasters could either be covered jointly by draft article 16, or addressed in separate articles. It might be prudent to introduce in draft article 16 wording such as "with a view to protecting persons", so as to maintain the focus on protection of persons and not to inadvertently expand the scope to environmental protection.

28. Careful consideration should be given to the list in draft article 16, paragraph 2, of the types of actions that a State should undertake in the pre-disaster phase. The various regional and global instruments and national laws mentioned in the sixth report contained a wide range of measures which were equally as effective as the three specific actions currently identified in that paragraph. Perhaps a different list should be drawn up or a generic term such as "appropriate measures" used, with the commentary spelling out what was meant.

29. The Special Rapporteur's analysis of bilateral treaties dealing with the obligation to cooperate, when read in conjunction with the memorandum by the Secretariat,<sup>92</sup> supported the idea that cooperation extended beyond disaster relief to disaster prevention, mitigation and preparedness. The contents of draft article 5 *ter* should therefore be incorporated into draft article 5 *bis*, by simply inserting at the beginning of the list of activities in which States should cooperate the phrase "the taking of measures intended to reduce the risk of disasters".

30. Mr. FORTEAU, responding to comments from members who apparently considered that, since the principle of prevention was drawn from environmental law, it concerned only transboundary harm and therefore fell outside the scope of the draft articles, said that paragraph (5) of the commentary to draft article 1 provisionally adopted by the Commission at its sixty-second session made it clear that a disaster did not have to be transboundary in nature in order to trigger the application of the draft articles.<sup>93</sup> It was therefore quite appropriate to rely on the principle of prevention in the draft articles.

31. Mr. PETER said that, unlike many of the dry, abstract topics studied by the Commission, the protection of persons in the event of disasters had great immediacy and relevance in daily life. Since the Commission had embarked upon its consideration of that subject, hundreds of disasters had caused death and destruction, at great cost to national economies, especially in developing countries.

<sup>91</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. The articles on prevention of transboundary harm from hazardous activities, adopted by the Commission at its fifty-third session, are reproduced in the annex to General Assembly resolution 62/68 of 6 December 2007.

<sup>92</sup> A/CN.4/590 and Add.1–3 (mimeographed; available from the Commission's website, documents of the sixtieth session), para. 26.

<sup>93</sup> *Yearbook ... 2010*, vol. II (Part Two), p. 185, para. 331.

Those factors lent urgency to the Commission's work to develop rules regulating disaster situations.

32. The terms of reference restricted the focus of the topic to activities aimed at the prevention and mitigation of the effects of disasters and the provision of humanitarian relief in their wake and did not allow for investigation of the causes of disasters. Moreover, the definition of a disaster in draft article 3 did not facilitate the search for ways to avoid disasters. Different kinds of disasters called for different kinds of intervention in terms of prevention and mitigation. Only when the real causes of disasters were perceived could effective modes of prevention be developed. The majority of recent disasters could be ascribed to human activity and climate change and had had disproportionate effects on the developing countries in terms of deaths and property damage.

33. Although the Commission had handled the issue of international cooperation for disaster relief very well in draft articles 5 to 15, it had yet to examine the consequences of assistance. The following issues should be tackled in the commentaries. First, the State providing assistance might deliberately use it as an opportunity to interfere in the internal affairs of the disaster-stricken State: fear of such interference could lead to the refusal of help. Second, negligence by the providers of assistance could also have damaging effects.

34. Bilateral agreements on disaster relief and cooperation in disaster prevention required closer scrutiny by the Commission. Some of the agreements mentioned in paragraphs 76 to 81 appeared to be of questionable value, and clarification of their efficacy was required.

35. He had no objections to the two draft articles proposed in the sixth report, or to their referral to the Drafting Committee. He hoped that the next report would contain some draft articles and commentaries on the causes of disasters, an analysis of various types of disasters and suggestions regarding means of preventing them and mitigating loss.

*The meeting rose at 11.30 a.m.*

### 3179th MEETING

*Friday, 12 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Later:* Mr. Pavel ŠTURMA (Vice-Chairperson)

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Tribute to the memory of Sir Ian Sinclair, former member of the Commission

1. The CHAIRPERSON said that he had received the sad news of the death, on 8 July, of Sir Ian Sinclair. Sir Ian had been a member of the Commission from 1982 to 1986. He had served as legal adviser to the Foreign and Commonwealth Office of the United Kingdom and to the delegation of the United Kingdom at numerous international conferences. He had also been a member of the Institute of International Law and had published many books on public international law, including one highly regarded book on the Vienna Convention on the law of treaties<sup>94</sup> and another on the International Law Commission.<sup>95</sup> The Chairperson proposed that the meeting of 17 July be dedicated to the memory of Sir Ian Sinclair.

*It was so decided.*

*At the invitation of the Chairperson, the members of the Commission observed a minute of silence.*

### Protection of persons in the event of disasters (continued) (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

2. Mr. PETRIČ said that he agreed with Mr. Peter that the topic under consideration was important and urgent. The central concern was the protection of persons, although there were many other related elements, such as State sovereignty, certain general aspects of human rights, protection of the environment and sustainable development. In essence, therefore, the draft articles and related commentaries should be concerned with the protection of persons. It was in the light of that core element that the Special Rapporteur, in his report (A/CN.4/662), had recommended the adoption of a dual-axis approach, which had provoked a number of reactions. Whatever name it was given, the approach should continue to be based on the horizontal rights and obligations of the affected State and the assisting States or entities, such as international organizations, and on the vertical rights and obligations of the State *vis-à-vis* the persons to be protected—in fact, it could be considered to be a triangular approach, since the affected State and the assisting entities should act jointly and in good faith for the benefit of those affected, namely the victims of the disaster, who were at the top of the triangle.

3. The Special Rapporteur's sixth report was excellent and well structured. In the section on prevention as a principle of international law, the Special Rapporteur had compiled the sources of international law on which the "duty to prevent" was based. In that connection, he considered that the title of draft article 16 should be reworded and he supported the suggestion made by Mr. Murphy in that regard. The sources for the draft

<sup>94</sup> *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, Manchester University Press, 1984).

<sup>95</sup> *The International Law Commission* (Cambridge, Grotius, 1987).

article were to be found in human rights law, as had been mentioned by several members, but also in the practice of States and in their sovereign responsibility to provide for the well-being and security of their citizens. There was therefore no need to refer to international environmental law and the law relating to transboundary harm, as that would be an unnecessary deviation from the protection of persons, even though environmental degradation did, of course, have an impact on the lives, rights and dignity of persons.

4. At the outset, the draft articles had focused on protection at the time of a disaster; the Commission had then, logically, gone on to the pre-disaster phase, which covered preparedness and preventive measures, and would later deal with the post-disaster phase, while ensuring there again that it did not move too far away from its original purpose. Possibly in draft article 16 and the commentaries thereto, emphasis should be placed on local circumstances, initiatives and resources, both human and material. The most effective preventive and remedial measures in the event of disasters often proved to be those that took account of local experience, knowledge, resources and participation.

5. In conclusion, he believed that draft article 16 was well balanced and solidly based on State practice, although paragraph 2 was perhaps not necessary, as it would be preferable to include the measures it mentioned in the commentary. At the same time, draft article 5 *ter* could more appropriately be included in draft article 5 *bis* on forms of cooperation. Of course, it would be for the Drafting Committee, to which he recommended referring the two proposed draft articles, to decide.

6. Mr. SINGH said that, in addition to the efforts of ASEAN, the Asia-Pacific Economic Cooperation forum and the South Asian Association for Regional Cooperation, referred to in paragraphs 94 to 96 of the report, mention could be made of the Regional Integrated Multi-hazard Early Warning System for Africa and Asia set up in 2009, in the aftermath of the 2004 Asian tsunami, to generate and exchange early warning information and build capacity for preparedness and response to transboundary hazards.

7. With regard to the section on prevention as a principle of international law, about which several members had expressed doubts, he shared the concerns expressed regarding the dual-axis approach to the topic and the emphasis on horizontal rights and obligations. He agreed with Mr. Park on the need to distinguish between natural and industrial disasters, to which different rules and principles applied, as the legal regimes applicable to natural disasters were based on the humanitarian perspective rather than the principle of legal responsibility. Similarly, in the post-disaster phase, different levels of protection would be required in the case of natural and industrial disasters. The preventive measures required must also take into account the capabilities of States, depending on the availability of the necessary resources and expertise.

8. He also shared the doubts raised by Mr. Murase with regard to the Special Rapporteur's assertion in paragraph 57 that the principle of prevention stemmed from

the precautionary principle and that the latter qualified as a State "obligation". Admittedly, in the *Gabčíkovo-Nagymaros Project* case and the case concerning *Pulp Mills on the River Uruguay*, the State had not taken the necessary measures to stop transboundary harm, but that was not directly relevant in the case of disaster prevention. He agreed with Sir Michael that the sections of the report on the historical development of the concept of disaster risk reduction, international cooperation on prevention, and national policy and legislation were sufficient to justify the draft articles, and that there was no need to cover, in the commentaries, the issues addressed in the section of the report on prevention as a principle of international law, which were not central to the topic. Further, draft article 6, entitled "Humanitarian principles in disaster response", which had been provisionally adopted by the Commission, was already the basis for the duty to cooperate in all phases of a disaster.

9. In conclusion, while he believed that the two texts required some drafting changes, in particular draft article 16, paragraph 1, in which the words "undertake to" at the beginning of the sentence should be replaced with a clearer verb, and the phrase "to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established" should be deleted, he supported referring the two draft articles proposed by the Special Rapporteur to the Drafting Committee.

10. Mr. VÁZQUEZ-BERMÚDEZ said that the work undertaken under the Hyogo Framework for Action<sup>96</sup> was continuing at the international level in the context of preparations for the Third United Nations World Conference on Disaster Risk Reduction, which was to be held in Japan in 2015. The obligation of States to adopt appropriate measures to reduce the risk of disasters, which the Special Rapporteur had recalled in draft article 16, was based entirely on recent developments in the international community, within the United Nations framework. There had also been new developments at the bilateral, regional and multilateral levels, as many cooperation agreements related to the prevention and reduction of disaster risk had been developed, particularly the 2000 Framework Convention on civil defence assistance. There were also international instruments on industrial accidents and nuclear safety that required the adoption of appropriate measures to prevent accidents and mitigate their consequences. The Special Rapporteur had commendably recognized States' due diligence obligations in terms of preventing accidents that could turn into disasters.

11. That said, he believed that the issue of environmental protection was not at all extraneous to the topic under consideration. Even though the title of the topic placed emphasis on the protection of persons, as pointed out by Mr. Murphy, the fact remained that protection of the environment often reduced disaster risk—given that environmental damage could increase disaster risk. Furthermore, the definition of disasters adopted by the Commission also covered large-scale environmental damage, such as forest fires and oil spills like the one in

<sup>96</sup> Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, 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. I, resolutions 1–2.

the Gulf of Mexico, as recalled by Mr. Peter. Therefore, there should be no confusion between catastrophic events that could bring about a disaster and disasters themselves. Thus, a volcanic eruption was not a disaster but rather a catastrophic event, since if the population living in the vicinity of the volcano was evacuated in time, the event was not a disaster. Prevention therefore consisted not of ensuring that a catastrophic event did not take place, but rather of ensuring that it did not result in a disaster such as large-scale loss of life.

12. International and regional initiatives, the many binding and non-binding instruments and State legislation and practice in adopting measures and implementing systems for disaster risk reduction appeared in fact to constitute a rule of customary international law concerning the obligation to take appropriate measures to prevent disasters. The Special Rapporteur had mentioned that rule in draft article 16, the title of which should, as noted by Mr. Murphy, be amended so as better to reflect the content of the provisions. Although certain members had expressed doubts with regard to the meaning or scope of draft article 16, paragraph 1, it seemed clear to him that the phrase “by adopting appropriate measures to ensure that responsibilities and accountability mechanisms be defined” did not refer to the international responsibility of the State but to the responsibilities and accountability of institutions within States before, during and after disasters. However, the phrase could certainly be amended to make it clearer. Lastly, draft article 5 *ter* was amply justified and could be made into a new paragraph of draft article 5 *bis* within the more general framework of the duty to cooperate. He therefore supported referring the two draft articles to the Drafting Committee.

13. Mr. GEVORGIAN noted that the issues addressed in the section on prevention as a principle of international law had generated some controversy. For instance, the precautionary principle, far from being a universal principle of international law, was rather a principle of a sector of law, specifically environmental law. However, that branch of law mainly governed transboundary harm rather than the protection of persons. State practice hardly seemed to recognize the precautionary principle as a principle of customary law or even general international law. The appropriateness of the Special Rapporteur’s dual-axis approach was therefore open to question. There was most certainly a horizontal obligation to prevent transboundary harm, but customary international law did not confirm an equivalent obligation with respect to the protection of persons, which fell rather within the scope of cooperation. The vertical obligation to prevent, meanwhile, derived from the principle of national sovereignty. With regard to due diligence, while the foreseeability criterion was important, the quality of the measures taken by States should also be taken into account.

14. Turning to draft article 16, he said that the reference to accountability mechanisms and institutional arrangements in paragraph 1 could be deleted. The list of examples in paragraph 2 seemed ill advised, given the risk of excluding other important measures. As mentioned by other members, the title would have to be reconsidered. Draft article 5 *ter* could be merged with draft article 5 *bis* as there was no need to devote a specific article to cooperation in

the area of prevention. Nevertheless, he supported referring the two draft articles to the Drafting Committee.

15. Ms. ESCOBAR HERNÁNDEZ said that the pre-disaster phase was crucial. The protection of persons could be ensured all the more efficiently if States undertook serious efforts in terms of risk prevention, preparedness for disasters and mitigation of their effects. However, those three aspects—prevention, preparedness and mitigation—were not analysed with the requisite clarity in the sixth report, nor were they sufficiently differentiated, from the legal standpoint, in terms of whether the disaster was natural or human-made, since those two types of scenario implied differences in scope for action and therefore different obligations. Nor was their position in international law clear. When it related to the protection of persons under the jurisdiction of a State, the “duty to prevent” was a vertical obligation that did not yet have any basis in international law. While the analysis of States’ legislative practice showed a trend towards the establishment of prevention and response mechanisms, and there were also expressions of the duty to prevent in international environmental law and international human rights law, a general duty to prevent that would entail a duty to prevent natural disasters could not be inferred from those sector-specific obligations. It would seem more appropriate to link prevention to the duty to cooperate, even though that duty was only horizontal.

16. She endorsed the content of draft article 5 *ter*, although it could simply be made an additional paragraph of the more general article on cooperation. As to draft article 16, not only should the title be reconsidered, but a distinction should be drawn between individual and collective measures to be taken by States, and the three areas of such action should be more clearly differentiated by standardizing the measures that came under each area. Nonetheless, the two proposed draft articles could be referred to the Drafting Committee.

17. Mr. HASSOUNA said that he would address several issues that had not received sufficient attention. In line with the purpose of the draft articles, mention should be made of the important role that communities could play in designing prevention strategies. Under international environmental law, notably in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, there was an increasing focus on public participation in environmental decision-making. It was true that the Special Rapporteur had referred to the need for information sharing to reinforce prevention, but only in terms of the flow of information from the State to the people. Under the principle of due diligence, States had to carry out environmental impact assessments before undertaking any project, which often involved consultations with the affected communities. Accordingly, there could be a reference to the need to consult with affected communities in designing prevention strategies. It could thus be stated in draft article 16, paragraph 2, that the appropriate measures should be taken in consultation with all relevant actors and stakeholders.

18. Some members had argued that compliance with the precautionary principle should not be considered a component of prevention, as it did not amount to an

obligation. There was no consensus on the issue in international jurisprudence. However, it was interesting to note that, in the *Southern Bluefin Tuna Cases*, the International Tribunal for the Law of the Sea had ordered provisional measures on the ground that they were urgently required despite the prevailing scientific uncertainty with regard to the situation at issue; the Tribunal had thus applied the precautionary principle without explicitly using the term. More recently, in its advisory opinion on the *Responsibilities and obligations of States with respect to activities in the Area*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea had stated that the “precautionary approach” (para. 135), which was being recommended in a growing number of international treaties, was developing into a norm of customary international law. There was thus room for progressive development of the law in that regard. The Special Rapporteur would, however, have to explain the difference between the “precautionary approach” and the “precautionary principle”, which had a more binding character.

19. It had also been argued that the precautionary principle was primarily applied in its horizontal dimension, and that there was no basis in customary international law for its vertical application. However, jurisprudence and treaty law showed that there was extensive implementation by States, in practice, of the obligation of prevention *vis-à-vis* their populations. Again, in the absence of any confirmed rule of customary law, one possible solution lay in the progressive development of the law. Doubts had been expressed about whether it was appropriate to include climate change within the scope of the topic. While it was true that the phenomenon required different forms of action, in terms of both prevention and mitigation of its effects, climate change was the disease, so to speak, and its symptoms were natural disasters. There was a cause-and-effect relationship between the two, and prevention of climate change contributed to reducing disasters.

20. Turning to draft article 16, he said that the three phases of prevention would have to be clarified, at least in the commentary. Emphasis should also be placed on the obligation of due diligence, which was mentioned only with reference to “appropriate measures”, and it should be made clear in the commentary that it was not an obligation of result—States must only exert their best efforts to prevent disasters. In paragraph 1, it was unclear whose responsibility and whose accountability were being described. It also seemed to be implied that institutional arrangements were necessary prerequisites to taking prevention measures. Only three examples of measures were listed in paragraph 2, although there were many others, such as awareness-raising and improvement of construction standards, which could usefully be mentioned, at least in the commentaries. The content of the draft article was broader in scope than its title. In the light of draft article 5 *ter*, draft article 1 should be amended on second reading to include the pre-disaster phase in the scope of the draft articles. In conclusion, he said that he supported referring the two draft articles to the Drafting Committee.

21. Mr. MURASE, referring to the *Southern Bluefin Tuna Cases*, said that it should be borne in mind that the International Tribunal for the Law of the Sea had later overturned the decision on the provisional measures to

which Mr. Hassouna had referred, so that it could hardly be invoked in support of the strict application of the precautionary principle.

*Mr. Šturma (Vice-Chairperson) took the Chair.*

22. Mr. NOLTE congratulated the Special Rapporteur on his impressive, broad-based analysis and said that the two draft articles he had presented were on the right track. However, he shared the scepticism of other members of the Commission with regard to the proposition that international law recognized a general principle of prevention. The title of draft article 16 referred very generally to the “duty to prevent”, but the body of the text was much more specific. It would therefore be preferable, as had already been suggested, to refer to the “duty to undertake measures for disaster risk reduction”, perhaps with a supplementary reference to mitigation. The title of draft article 16 could then be “Duty to undertake measures for disaster risk reduction and mitigation”.

23. He considered that it was not solely the practice of States and organizations with respect to disasters that underpinned the duty to reduce risks but that the human rights dimension of the topic under consideration deserved the importance rightly attached to it by the Special Rapporteur. Unlike some other members of the Commission, he did not believe that the specific duties to prevent risks that were established in human rights law and jurisprudence concerned only foreseeable disasters. As early as 1982, the Human Rights Committee had emphasized, in its general comment No. 6 on the right to life, that the protection of that right required that States adopt positive measures.<sup>97</sup> Today, it was widely recognized that this requirement also applied to other human rights. Of course, the scope and content of that obligation depended to a large extent on the economic possibilities and legitimate policy choices of States. However, the importance of certain rights, such as the right to life, meant that positive protection measures could and must be expected from all States, including measures to reduce the risk of events that were not specifically foreseeable. Drawing a parallel with national legislation on the risks of fire or murder, which covered abstract (not specifically foreseeable) risks, he said that while States had a wide margin of appreciation in terms of specific measures to be taken in those areas, they could not dispense with them entirely. As appeared to have been mentioned earlier, the fundamental duty of the State to take measures to protect the lives of persons under its jurisdiction derived not only from the right to life but also from the very purpose of the State.

24. He also believed that the strongest source for the duty to take risk reduction measures was the “supreme” human right, the right to life, and that source was complemented by the duty to protect that also derived from other fundamental rights. The practice referred to by the Special Rapporteur appeared therefore in fact to constitute a form of implementation of those human rights, thus serving to put into clear perspective the difference between natural and human-made disasters.

<sup>97</sup> Report of the Human Rights Committee, 16th session (1982), general comment No. 6 on article 6 (Right to life), *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V, p. 93, para. 5.

25. On the other hand, he agreed that international environmental law was a secondary source for the general duty to take measures for disaster risk reduction, and that the basic concepts of damage, harm, risk, prevention and precaution should be clearly defined. However, while international environmental law was a secondary aspect of the topic under consideration, which was focused on the protection of persons, it was pertinent as far as disasters with a transboundary dimension were concerned, and by reason of its function of protecting the collective assets of humanity.

26. Draft article 16 should not focus too narrowly on certain specific means of disaster risk reduction, but rather should present them as examples which “in particular” might be “appropriate measures” to be taken by States.

27. In conclusion, he agreed with Mr. Forteau that it was necessary to adopt wording which, while establishing a uniform standard, left enough space for States to determine their priorities and the “appropriate” measures they intended to take.

28. Mr. CANDIOTI, commending the quality of the Special Rapporteur’s work and his detailed analysis of practice, agreed with other members that the topic was highly specific and of immediate concern to the international community. He fully supported the inclusion of the principle of prevention and welcomed the way it was presented in the draft articles. The analysis of the link between the topic under consideration and international human rights law seemed particularly pertinent, as did the analysis of the link between the topic and international environmental law, which, quite rightly, was not limited simply to the issue of transboundary harm.

29. The definition of disasters agreed by the members of the Commission covered natural and human-made disasters, and it was essential to take account of that dual dimension, as illustrated by the issue of climate change. Examples of recent disasters showed that natural contributing factors were very often supplemented by human factors.

30. He believed that it was essential to consider whether the principle of prevention was a general principle of law or merely a principle of environmental law. There were two aspects to the implementation of that principle, both of which were dealt with in the report: one related to the occurrence of the disaster itself and the other to its prevention or the mitigation of its effects. The work that the Commission intended to undertake on the protection of the atmosphere, a topic included in its long-term programme of work, would be particularly relevant in terms of disaster risk reduction.

31. He approved the substance of the draft articles as a whole. However, he suggested rewording article 16, paragraph 1, so as to address not only States specifically or potentially affected by disasters but all States in general. The concept of “accountability” also seemed to raise some questions in that it could not be translated into Spanish or French without reference to the idea of “responsibility”, which covered a variety of aspects, including aspects of a moral nature. While the term “accountability” should

not necessarily be excluded, its scope should therefore be defined in the context of draft article 16. In fact, it might be preferable to refer to the concept in the context of the measures mentioned in paragraph 2 of the article, which in any case could be complemented by additional examples of prevention measures drawn from the report.

32. The wording of article 5 *ter* on cooperation should also be clarified, and prevention and preparedness should be mentioned in addition to risk reduction.

33. In conclusion, he suggested that the time had perhaps come to organize the draft articles into chapters so as to make subsequent work easier.

*The meeting rose at 12.35 p.m.*

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### 3180th MEETING

*Tuesday, 16 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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#### Cooperation with other bodies (*continued*)<sup>\*</sup>

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVE OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Pichardo Olivier, member of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. PICHARDO OLIVIER (Inter-American Juridical Committee) said that the IAJC, which was headquartered in Rio de Janeiro, Brazil, served as the advisory body of the Organization of American States (OAS) on juridical matters under the Charter of the Organization of American States. After providing an overview of the functions and current membership of the Committee, which was composed of 11 jurists, he said that in 2012, the IAJC had held two regular sessions and had adopted final reports<sup>98</sup> on a number of topics. Incorporated in the reports were a statement of principles for privacy and personal data protection in the Americas, a guide to principles regarding

<sup>\*</sup> Resumed from the 3177th meeting.

<sup>98</sup> See the annual report of the Inter-American Juridical Committee to the forty-third regular session of the General Assembly of the OAS (OEA/Ser.Q CJI/doc.425/12), of 10 August 2012.

cultural diversity in the development of international law and a guide to principles of access to justice in the Americas. The latter contained proposals on the training and selection of judges, the modernization of the judicial system, observance of due process, alternative justice mechanisms and the recognition of multiculturalism.

3. In its reports, the IAJC had also adopted a draft model act on simplified stock companies, which was based on a successful Colombian initiative and proposed a lower-cost hybrid form of corporate organization that streamlined formalities for incorporation. Another document included in the reports was a guide for regulating the use of force and protection of people in situations of internal violence that did not qualify as armed conflict. The guide provided a legal framework for responding to such violence and addressed the legitimate use of force and respect for non-derogable rights. Noteworthy among the principles contained therein were the following: democracy was indispensable to the exercise of fundamental freedoms; States had the duty to provide protection and security to persons within their territory who were threatened by violence; when law enforcement officials used force, they must at all times respect the principles of legality, necessity and proportionality; and States had to guarantee the right to humane treatment of persons involved in or affected by situations of internal violence.

4. The IAJC had designated rapporteurs for four new topics: general guidelines for border integration, to develop legal models to facilitate bilateral integration; immunity of States, to clarify the status of public officials and international organizations in transnational litigation; electronic customs receipts for agricultural products, involving the modernization of customs procedures; and inter-American judicial cooperation, to further relations between judicial personnel in OAS member States and disseminate decisions handed down by their judicial authorities.

5. At its second regular session in 2012, the IAJC had decided to continue in 2013 its work on sexual orientation, gender identity and expression and on model legislation on the protection of cultural property in the event of armed conflict. At its March 2013 session, it had completed its report on the model legislation, which set standards for general, specific and heightened protection of cultural assets and proposed measures for signalling, identifying and listing such assets. It also addressed questions relating to attribution of responsibility for damages and monitoring compliance with obligations. The report had been submitted to the OAS Permanent Council. The IAJC had also decided to submit to the Council a preliminary report on sexual orientation, gender identity and expression, which explained the legal implications of those notions and incorporated principles of non-discrimination derived from national, regional and universal instruments. Information had been requested from OAS member States on relevant national legislation and case law.

6. Among the items to be addressed during the forthcoming session of the IAJC, in August 2013, were border integration, immunity of States and international organizations, and electronic customs warehouse receipts for agricultural products. New items on the agenda included inter-American judicial cooperation, corporate

social responsibility in the area of human rights and the environment in the Americas. With regard to the issue of sexual orientation and the new item on corporate responsibility, the IAJC had requested information on existing national legislation and case law. It had also sent out a questionnaire in order to determine how member States' legal systems dealt with the immunities of States and international organizations.

7. With a view to promoting international law in the region, the thirty-ninth Course on International Law had been held in Rio de Janeiro, Brazil, from 6 to 24 August 2012. Its main theme had been law and present-day international relations. The theme of the fortieth edition of the Course, which would be held alongside the August 2013 meeting of the Inter-American Juridical Committee, would be 40 years of promoting international law.

8. In keeping with the objective of establishing more direct forms of cooperation between the IAJC and the Commission, he invited the latter to send one of its members to address a plenary meeting of the IAJC during its forthcoming session in August 2013.

9. Mr. CAFLISCH asked whether, in addressing issues related to jurisdictional immunities of States, the Committee intended to base its work on the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, the text of which had been elaborated by the Commission,<sup>99</sup> and whether it intended to encourage OAS member States to ratify it.

10. Mr. CANDIOTI said that the law of jurisdictional immunities was multifaceted and had been studied extensively by the Commission. He asked whether, in its work on that topic, the IAJC planned to address the topic from a general angle or to review a specific aspect of immunity that was covered by existing international treaties.

11. Ms. JACOBSSON asked how the work of the IAJC on the development of model legislation concerning the protection of cultural property in the event of armed conflict would relate to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols.

12. Mr. PICHARDO OLIVIER (Inter-American Juridical Committee) said that the Committee had taken up the topic of immunity of States and international organizations only recently and was at the information-gathering stage, having just sent out questionnaires to the respective Ministries of Foreign Affairs of OAS member States. Its goal was to take stock of existing national legislation, with a view to its harmonization, as well as to remove obstacles to accession to the United Nations Convention on Jurisdictional Immunities of States and Their Property. Most OAS member States had not ratified that instrument, and some lacked any related legislation whatsoever. The work of the IAJC was not aimed at drafting a new convention on the immunity of States and international organizations, but rather at encouraging the development in the Americas of clear and harmonized rules. The IAJC had

<sup>99</sup> *Yearbook ... 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

just begun to develop model legislation concerning the protection of cultural property in the event of armed conflict, so he could not provide any information on progress yet.

13. Mr. KITTICHAISAREE, referring to the efforts of the Working Group of the Sixth Committee on the scope and application of the principle of universal jurisdiction, enquired about the position of the IAJC on the subject. Was universal jurisdiction justifiable under international law? Did it have a legal basis under customary international law? He also enquired as to the position of the IAJC on the current state of international law on asylum and the course that its future development should take.

14. Mr. SABOIA said that the approach of the IAJC differed from that of the Commission in that its topics were formulated more as progressive development than as codification. He requested additional information on the topic of privacy and the protection of personal data in the Americas.

15. Mr. MURPHY noted that the IAJC topic of corporate social responsibility and human rights had strong implications for the conduct of non-State actors. He would be interested to know what the IAJC envisaged as the final product of its work.

16. Mr. PICHARDO OLIVIER (Inter-American Juridical Committee) said that there was a long-standing tradition in Latin American countries of looking favourably on the issue of asylum; they even recognized forms of asylum that were not recognized in other parts of the world, such as diplomatic asylum. All OAS member States had acceded to international treaties governing asylum; therefore, efforts should focus on harmonizing the ways in which those treaties were implemented in the various States.

17. In its work on the two topics of privacy and personal data protection and of corporate social responsibility and human rights, the aim of the IAJC was not to formulate new conventions but rather to collect information on whatever national legislation member States had enacted in those areas. After the respective rapporteurs had prepared their preliminary reports, non-binding guidelines would be submitted for approval to the OAS General Assembly, which would determine the form in which OAS member States would apply them.

18. Mr. PETRIČ said that national, regional and international courts had defined what was meant by the privacy of natural persons, but the privacy of legal persons represented a large grey area. He asked whether that aspect of privacy was being considered in the IAJC study. He also asked whether its work on cultural diversity focused on or included indigenous cultures.

19. Mr. PARK commended the IAJC for its work on the guide for regulating the use of force and protection of people in situations of internal violence that did not qualify as armed conflict, which clarified a number of grey areas to which international humanitarian law did not apply. The question, however, was whether it was in fact possible to balance the contradictory interests of protecting democracy

and protecting national security. Noting that the work of the IAJC on sexual orientation would have a major social and political impact, he asked whether it had had difficulty in reaching consensus on that issue.

20. Mr. GÓMEZ ROBLEDO asked what effect would be given to the IAJC report on situations of internal violence that did not qualify as armed conflict, an issue also being dealt with by the ICRC. He suggested that it would be helpful for the IAJC to share such projects with other interested bodies.

21. Mr. PICHARDO OLIVIER (Inter-American Juridical Committee) said, with regard to privacy and personal data protection, that the intention was to present a statement of principles for approval by the OAS General Assembly. He would pass on the comments made by the members of the Commission to the rapporteurs on the topic.

22. One of the objectives of the work of the IAJC on cultural diversity was to take account of the indigenous groups in the Americas and how their human rights, including those related to their languages, beliefs, customs and traditions, should be protected. The draft guide to principles had been proposed to the OAS General Assembly but would not be publicized until a decision on it had been taken.

23. The IAJC had had no difficulty in reaching consensus on its preliminary report on sexual orientation, gender identity and expression.

24. Regarding situations of internal violence that did not qualify as armed conflict, it was true that the ICRC had also dealt with the issue, but given the sensitivity of the topic, it had not yet adopted a final proposal. Cases of such violence arose frequently in the Americas, and the IAJC had been of the view that it, too, should make recommendations. Its guide was intended to encourage States to create domestic norms to ensure that situations of internal violence were resolved in line with certain established principles.

25. Ms. ESCOBAR HERNÁNDEZ, referring to the work of the IAJC on the immunity of States and international organizations, asked whether it had considered carrying out a parallel exercise on the immunity of State officials from foreign criminal jurisdiction. The Commission would certainly welcome information on the situation in the Americas in that regard. She asked at what stage the IAJC was in its work on asylum and requested clarification of whether the intention was to emphasize diplomatic asylum, which was the speciality of the inter-American system, or rather to establish the links between that system and the general system of territorial asylum. Had the issue of asylum been considered in connection with the phenomenon of refugees? Noting that many of the issues dealt with by the IAJC were also being addressed by other legal bodies and international organizations, she asked whether any cooperation mechanisms had been established.

26. Sir Michael WOOD joined others in emphasizing the importance of the United Nations Convention on

Jurisdictional Immunities of States and Their Property and expressed the hope that the Committee would urge States to consider ratifying that instrument. In his view, the immunity of international organizations was a separate, but perhaps related, issue. At a recent conference at the University of Leiden, the general theme had been the need, not to change the existing regime for immunity of international organizations, but to improve their internal mechanisms for ensuring accountability. He would be interested to know the prospects for consideration of that subject by the IAJC. He asked whether it systematically included an item on the work of the Commission as part of its agenda.

27. Mr. CANDIOTI said that he would also be interested to know the position of the IAJC on the principle of universal jurisdiction under discussion by the Sixth Committee. He encouraged the IAJC to give its opinion on the activities of the Commission; the Commission would also welcome proposals on new topics to be included on its agenda.

28. Mr. VÁZQUEZ-BERMÚDEZ, referring to the work of the IAJC on the protection of cultural property in the event of armed conflict, said that he would be interested to know more about the format for cooperation with the ICRC. Did the IAJC receive contributions from other organizations, including NGOs, on that and other issues?

29. Mr. PICHARDO OLIVIER (Inter-American Juridical Committee) said that there were currently no plans to address the issue of immunity of State officials from foreign criminal jurisdiction. The IAJC made a distinction between asylum and refugee status. In the region, the Cartagena Declaration on Refugees<sup>100</sup> had been adopted to clarify the situation, but it had not been signed by all countries and, in any case, was not binding on States. In working on the issue of asylum, the IAJC cooperated closely with the Office of the United Nations High Commissioner for Refugees.

30. The IAJC operated on the basis of consensus. Its method of work was to assign topics to rapporteurs, and if consultation with OAS member States was required, a questionnaire was sent to them in order to collect the relevant information. However, the response to such questionnaires was not always as prompt or satisfactory as the Committee would like. In general, the IAJC endeavoured to maintain regular interaction with member States through their missions in Washington, D.C.

31. He agreed that the United Nations Convention on Jurisdictional Immunities of States and Their Property was a major achievement and should ideally be ratified by States. In fact, one of the objectives of the IAJC project on the immunity of States and international organizations was to understand the reasons for non-ratification. Some States in the region were calling for modification of the immunity regime for international organizations, but he

would pass on Sir Michael's suggestion about instead improving internal accountability mechanisms.

32. The annual visit of the IAJC to the Commission was intended to inform the Commission of the issues being dealt with, to forge closer ties between the two bodies and to avoid duplication of effort. Unfortunately, the IAJC did not have a great deal of information on the Commission's work. He invited members of the Commission to participate in the sessions of the IAJC, to make suggestions and to report on their own work.

33. With regard to the discussions in the Sixth Committee on the principle of universal jurisdiction, he said that States determined their own positions and expressed them at the State level, not through the IAJC.

34. The model law on cultural property in the event of armed conflict had been drafted taking into account the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols and in close cooperation with the ICRC.

**Protection of persons in the event of disasters (continued)** (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

35. Mr. VALENCIA-OSPINA (Special Rapporteur), summing up the discussion on his sixth report on the protection of persons in the event of disasters (A/CN.4/662), recalled that, based on proposals made in his second to fifth reports, the Commission had been able so far to adopt 16 draft articles, numbered 1 to 15 and 5 *ter*.<sup>101</sup> His conception of the topic, outlined in his preliminary report in 2008,<sup>102</sup> had been endorsed by the Commission, an endorsement repeatedly echoed in the Sixth Committee. In all of his reports, he had seen his task as to lay before the Commission all the elements of legal significance that he could identify, in order to facilitate an informed outcome. That was particularly important in the present case when the subject matter was truly novel, and work on it was handicapped by a paucity of legal precedent.

36. The sixth report highlighted the wide spectrum of legal elements that needed to be reviewed by the Commission in order to be incorporated in draft articles. Although the views expressed during the debate had ranged from one extreme of that spectrum to the other, all speakers had unanimously advocated referral of the new texts proposed in his sixth report, namely draft articles 16 and 5 *ter*, to the Drafting Committee. He therefore formally requested their referral for the Drafting Committee's consideration, based on the comments made in plenary.

<sup>100</sup> Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in the annual report of the Inter-American Commission on Human Rights (OEA/Ser.L/V/II.66 doc. 10, rev. 1), chap. V, and is also available from www.acnur.org/cartagena30/, "Documents".

<sup>101</sup> *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615 (second report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/629 (third report); *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643 (fourth report); and *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/652 (fifth report).

<sup>102</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

37. Several drafting suggestions had been made in respect of draft article 16, paragraph 1, including a change in its title. Regarding paragraph 2, the question of whether to add other examples of “measures” to the three already given had been raised. Most members had been in favour of his suggestion to incorporate draft article 5 *ter* in either draft article 5 or draft article 5 *bis*. He was receptive to many of the other drafting suggestions made.

38. In renaming the topic “Protection of persons” in 2008,<sup>103</sup> the Commission had clearly intended to give its treatment a markedly human rights perspective. However, as he had pointed out in his preliminary report, a protection regime often extended to the protection of property and the environment.<sup>104</sup> The Commission’s response to his request for guidance on the extent to which property and the environment ought to be covered was found in the definition of disaster in draft article 3: a disaster was an event that caused harm not only to individuals, but also to property and the environment. In adopting that definition, the Commission had been fully aware of the distinctions between natural and human-made disasters and sudden-onset and creeping disasters, for example. However, in its definition of disaster, no distinction was drawn between various kinds of disasters, or their diverse causes. In not proposing separate legal regimes for different types of disaster, therefore, he had strictly followed the path traced by the Commission.

39. International human rights law and international humanitarian law had from the outset been identified as sources of inspiration for the development of legal rules relating to the protection of persons in the event of disasters. In discussing human rights law in the context of protecting persons during the pre-disaster phase, he had done nothing more than maintain consistency. In draft article 16, the term “appropriate measures” reflected the principle of due diligence, drawn as much from human rights law as from international environmental law. The adoption of such measures by a State had been identified by the European Court of Human Rights, in the *Budayeva and Others v. Russia* judgment, as a means of complying with the duty to prevent and mitigate disasters. Paragraphs 128 and 129 of that judgment had been usefully cited during the Commission’s debate. The phrase “to ensure that responsibilities and accountability mechanisms be defined and institutional arrangements be established”, in draft article 16, paragraph 1, was intended to reflect a State’s primary duty, as outlined in *Budayeva and Others v. Russia*, to put in place a legislative and administrative framework to facilitate the taking of “appropriate measures”. The purpose of using the words “responsibilities” in the plural and “accountability” in the singular was to indicate that they referred to procedures and arrangements within the domestic jurisdiction of the State and were unrelated to the State’s responsibility under international law. He agreed, however, that such nuances would be better placed in the commentary and that the text would gain from the introduction in paragraph 1 of an express reference to “legislation and regulations”, in conformity with the *Budayeva and Others v. Russia* judgment.

<sup>103</sup> *Ibid.*, vol. II (Part Two), p. 129, para. 218.

<sup>104</sup> *Ibid.*, vol. II (Part One), document A/CN.4/598, p. 153, para. 53.

40. Citing paragraphs 133 and 135 of that judgment, he said they provided additional evidence of the relevance of principles derived from environmental law to the legal regulation of protection at the pre-disaster phase. Environmental principles were also relevant on account of the definition of “disaster” in draft article 3: since a disaster comprised the harmful effects that such an event could have on the environment, the legal regulation of protection in the pre-disaster phase could scarcely be predicated on any branch of international law other than international environmental law. International environmental law was a much wider concept than the prevention of transboundary harm, which was simply a concrete manifestation of the larger field of the law. It was situated, in fact, on the horizontal axis of the dual axis he had proposed in 2008, whose validity he now reaffirmed.

41. In his sixth report he had dealt with the precautionary “principle”, because authoritative individuals and institutions characterized it as such. The Commission, too, had done so: for example, in paragraph (14) of the commentary to draft article 3 on prevention of transboundary harm from hazardous activities,<sup>105</sup> and in paragraphs (5), (6) and (7) of the commentary to draft article 10 of the same text.<sup>106</sup> In paragraph (5) of the commentary to draft article 12 of the final text on the law of transboundary aquifers, however, the Commission had referred to a precautionary “approach”.<sup>107</sup> Hence, while the Commission had accepted the applicability of the precautionary principle in the context of transboundary harm, it had referred indiscriminately not only to a principle but also to an approach. In discussing the precautionary “principle”, his sixth report had merely reminded the Commission of one of its own precedents.

42. If there was one principle that unquestionably informed the Commission’s entire project, it was the principle of sovereignty. That principle needed no restating in each of the individual provisions that would ultimately constitute an integrated set of draft articles. It was explicitly enshrined in draft articles 9 and 11, which were of general applicability.

43. As previous reports had shown, cooperation was imperative for effective and timely disaster relief. When providing such assistance, the sovereignty of the affected State had to be respected and safeguarded. Draft articles 5 and 9, read together, made that clear. The purpose of draft article 5 *ter* was to extend the general duty to cooperate to the pre-disaster phase. The principles of sovereignty and cooperation were general principles of law, but the effect given to them in different branches of international law might vary according to specific circumstances. That was also true of the basic principles of international humanitarian law underpinning the current draft articles and of the general principle of prevention which, as the Commission had noted, did not pertain exclusively to the realm of transboundary harm. In its memorandum,<sup>108</sup> the Secretariat had placed the principle of protection at the same level as a number of other humanitarian principles. The

<sup>105</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 155.

<sup>106</sup> *Ibid.*, pp. 162–163.

<sup>107</sup> *Yearbook ... 2008*, vol. II (Part Two), p. 35.

<sup>108</sup> A/CN.4/590 and Add.1–3 (mimeographed; available from the Commission’s website, documents of the sixtieth session), para. 26.

Commission and the Secretariat had thus both recognized the existence of a legal principle of protection.

44. The terms “prevent”, “mitigate” and “prepare”, used in draft article 16, paragraph 1, had been drawn from the 2009 version of *Terminology on Disaster Risk Reduction* produced by UNISDR.<sup>109</sup> The terms were not mutually exclusive, and in some cases their meanings overlapped. The expression “appropriate measures”, in draft article 16, paragraph 2, referred to the innumerable practical measures that could be adopted, depending on the social, environmental, financial or cultural circumstances. They included, in addition to those mentioned in the sixth report, ecosystem management, drainage systems, contingency planning and the establishment of monitoring mechanisms. The three consecutive measures singled out in draft article 16, paragraph 2, were instrumental to the development and applicability of many, if not all, other measures. First, risk assessment concerned the generation of knowledge about hazards and vulnerability, without which no effective measures could be enacted. Next, the collection and dissemination of loss and risk information allowed all stakeholders to assume responsibility for their action and to determine priorities, while at the same time enhancing transparency and public security. Finally, early warning systems were vital in triggering the implementation of contingency plans and limiting exposure to hazards. The word “include” indicated that the list of possible measures could be widened. Examples of such measures would be provided in the commentary to draft article 16. The commentaries to all the texts adopted by the Drafting Committee would give a balanced account of the Commission’s reasoning in developing the draft articles.

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

[Agenda item 1]

45. Mr. TLADI (Chairperson of the Drafting Committee) announced the composition of the Drafting Committee on protection of persons in the event of disasters.

*The meeting rose at 1 p.m.*

### 3181st MEETING

*Wednesday, 17 July 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### Tribute to the memory of Sir Ian Sinclair, former member of the Commission (*concluded*)\*

1. The CHAIRPERSON said that Sir Ian Sinclair had been a prolific author, a great scholar and a true pillar of the Foreign and Commonwealth Office, where he had spent much of his career. His in-depth knowledge of the legal bodies of the United Nations and of the complex workings of international conferences had hugely enriched the work of the Commission, of which he had been a member from 1982 to 1986.

2. Sir Michael WOOD said that he had worked alongside Sir Ian for many of the years when he had been principal Legal Adviser to the Foreign and Commonwealth Office. He was perhaps best remembered today for his writings, notably his book on the Vienna Convention on the law of treaties,<sup>110</sup> which had become a classic, cited before international courts and tribunals. Sir Ian had been particularly interested in State immunity: he had been much involved in the development of the European Convention on State Immunity and had given a masterly series of lectures on the law of sovereign immunity at The Hague Academy of International Law. In his book on the International Law Commission,<sup>111</sup> he had been quite critical of the working methods in use in the mid-1980s, but what shone through in all his writings and his career was his attachment to the Commission. Although he had spent 34 years at the Foreign and Commonwealth Office, he had also had great knowledge of the United Nations, particularly its legal bodies, as well as the law of the European Economic Community, having been a member of the delegation that had negotiated the treaty of accession to the European Communities of the United Kingdom. He had also pleaded in a number of cases before the International Court of Justice and had been an active participant in the Institute of International Law. He himself had learned a great deal from working alongside Sir Ian, as, he was sure, was the case for all those who had known him.

3. Mr. KITTICHAISAREE, speaking on behalf of the members of the Commission from Asia, expressed condolences to the family and friends of Sir Ian Sinclair, who would be sorely missed. International lawyers in Asia, like their counterparts in other regions, had benefited from his seminal work on the 1969 Vienna Convention. Sir Ian’s field of interests had also included the law of sovereign immunity, human rights law, international legal cooperation, diplomatic relations law and maritime boundary law, a field in which he had served as agent and legal counsel for the United Kingdom in the *English Channel* case. The world of international law was indebted to distinguished British lawyers like Sir Ian Sinclair, whose illustrious predecessors had included Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock. He had discharged his responsibilities in the Commission with distinction, something emulated by his successors: Derek Bowett, Ian Brownlie and, of course, Sir Michael Wood.

\* Resumed from the 3179th meeting.

<sup>110</sup> *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, Manchester University Press, 1984).

<sup>111</sup> *The International Law Commission* (Cambridge, Grotius, 1987).

<sup>109</sup> Available from [www.unisdr.org/we/inform/terminology/](http://www.unisdr.org/we/inform/terminology/).

\* Resumed from the 3175th meeting.

4. Mr. VALENCIA-OSPINA, Mr. PETRIČ, Mr. ELMURTADI SULEIMAN GOUIDER and Mr. CANDIOTI likewise joined in paying a tribute to Sir Ian Sinclair and expressed their most sincere condolences to his family and loved ones as well as to the British authorities and people. As had been recalled by the members who had already spoken, Sir Ian had had a distinguished career and had touched the lives of all those who had had the honour of knowing him. His writings, particularly his book on the Vienna Convention on the law of treaties, and the significant role he had played in the drafting of that Convention, of the Vienna Convention on succession of States in respect of treaties and other texts such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>112</sup> were a testament to his outstanding legal skills. Ian Sinclair was just as capable of making penetrating criticism as of welcoming the advances in international law, all the while showing his trust in those around him.

**Formation and evidence of customary international law (A/CN.4/657,<sup>113</sup> sect. E, A/CN.4/659,<sup>114</sup> A/CN.4/663<sup>115</sup>)**

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

5. The CHAIRPERSON invited Sir Michael Wood, Special Rapporteur on the topic “Formation and evidence of customary international law”, to introduce his first report (A/CN.4/663).

6. Sir Michael WOOD (Special Rapporteur) thanked all those who had helped in the preparation of the first report on formation and evidence of customary international law, a topic that was already attracting a great deal of interest in the international legal community. He drew attention to the memorandum prepared by the Secretariat (A/CN.4/659) compiling elements of the Commission’s previous work that could be particularly relevant to the topic of formation and evidence of customary international law; the memorandum was of the highest quality and contained a wealth of information. He invited members to study in particular paragraph 14; the section entitled “State practice”; paragraph 23; observation 8 in the section on *opinio juris*; and observations 13 to 18 and 20, 22 and 23 in the subsequent sections and chapters. He suggested that when the Secretariat prepared such important documents, the authors themselves should come to a meeting of the Commission to introduce them and respond to any questions that members might have.

7. The Commission had held an initial debate on the topic in July 2012 on the basis of his own preliminary note,<sup>116</sup> and many of the points raised on that occasion

<sup>112</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>113</sup> Mimeographed; available from the Commission’s website.

<sup>114</sup> Reproduced in *Yearbook ... 2013*, vol. II (Part One).

<sup>115</sup> *Idem*.

<sup>116</sup> Reproduced in *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/653.

were referred to in the current report. Overall, the members who had spoken during the debate had welcomed the topic, as had those who had discussed it in the Sixth Committee. The importance of customary international law within the constitutional order and the domestic law of many States had been noted, as had the reaction of the international law community, which had already shown considerable interest in the topic.

8. The topic was undoubtedly a challenging one, and it would be necessary to approach it with caution. There was a view, in part based on the experience of the International Law Association’s committee that had dealt with the topic, that it was “impractical, if not impossible, to consider the whole of customary international law, even at a very abstract level”—which was not what the Commission was doing—and that the Commission was “doomed to fail, because it would end up by stating the obvious or being ambiguous”.<sup>117</sup> Even if the Commission ended up stating the obvious, however, would that necessarily be a bad thing? He had said in 2012 that a clear and straightforward set of conclusions relating to the topic might well be of practical use for the vast range of lawyers, many of them not experienced in international law, who found themselves confronted by issues of customary international law.<sup>118</sup> By bringing a little more clarity to the topic, the conclusions might also help dispel the scepticism that existed in some quarters about customary international law.

9. It was important to recall that the aim of the Commission’s project was to consider, not the substance of customary international law, but rather the general rules, known as “secondary rules”, related to the identification of customary international law.

10. In his first report, he had sought to set out in general terms the approach he proposed to take and to begin to gather the relevant materials. In the introductory part of the report, he had stressed that the outcome of the Commission’s work should be practical and not seek to resolve theoretical problems. In paragraphs 13 to 27 of the report, which dealt with the scope and outcome of the Commission’s work, he indicated that he would propose a set of conclusions with commentaries and addressed the question of whether *jus cogens* should be part of the topic.

11. Paragraphs 28 to 45 of the report dealt with terminological issues and an analysis of Article 38, paragraph 1, of the Statute of the International Court of Justice, which was widely viewed as an authoritative statement of the sources of international law. The issue of the relationship between customary international law and other sources of international law was of great practical importance for the topic. Section A of chapter II of the report ended with the central idea that the rules for identifying the sources of law could be found by examining in particular how States and courts set about the task of identifying the law (para. 38). The following chapter of the report, which dealt with the materials to be consulted, highlighted the constant presence of two elements of customary international law, namely State practice

<sup>117</sup> *Ibid.*, vol. I, 3148th meeting, paras. 18–19.

<sup>118</sup> *Ibid.*, 3152nd meeting, para. 2.

and *opinio juris*, which tended to support, subject to the necessary reservations and caution, an approach based on those two elements. That chapter of the report would have to be supplemented with information from States and an analysis of the work of other bodies, especially the International Law Association and the ICRC.

12. It would be premature in his view to refer the two draft conclusions in his report to the Drafting Committee. Instead, he suggested that the Commission's discussions should focus initially on the title of the topic and whether to deal with *jus cogens*. With respect to the title, he recalled that the English terms "formation" and "evidence" were simply intended to indicate that, in order to determine whether a rule of customary international law existed, the Commission would consider both the requirements for its formation and the evidence that established the fulfilment of those requirements (para. 15 of the report). However, since the translation of the word "evidence" appeared to be problematic, it might be preferable to replace it with the word "identification", which would be easier to translate and in itself would cover both aspects. The title in English could thus be "The identification of rules of customary international law". With regard to *jus cogens*, it would be preferable not to deal with it, so as not to complicate the Commission's task further, especially since a proposal had been made to include it as a separate topic in the long-term programme of work. In conclusion, he stressed the importance of gathering information on the practice of States and regional organizations.

13. Mr. MURASE said that the doubts he had expressed on the topic from the very beginning had only grown, now that he had read the Special Rapporteur's first report. He wished to focus on three points that were particularly problematic and were intrinsically linked, namely the scope of the topic, the methodological approach adopted and the choice of materials to be consulted.

14. With regard to the scope of the topic, the concepts of "formation" and "evidence" were so diametrically opposed that placing the two together merely invited methodological confusion. It would therefore be preferable to limit the scope to the evidence needed to show the existence of rules of customary international law. Simply deleting the word "formation" in the title of the topic would not suffice if the approach itself was not reconsidered. Furthermore, maintaining the two elements would require the Commission to conduct an analysis of the "material" and "formal" sources of international law, given that the analysis of the formation of a rule of customary law was based on "material" sources, while its identification was based on "formal" sources. The Special Rapporteur had not taken due account of that point, however. He had defined the concept of "formal sources" as "that which gives to the content of rules of international law their character as law" (para. 28 of the report). That definition was not in keeping with the widely accepted understanding of that expression but seemed to refer instead to the origin of the law and thus the philosophical sources of law. As for the "material" sources of international law, the Special Rapporteur had made only passing reference to them, in fact he had entered into substantive discussion of the highly academic and theoretical issue of the formation of customary international law. He himself therefore suggested deleting the

word "formation" in the title and in the draft conclusion in paragraph 23 of the report.

15. The problem he had just described was exacerbated by the unduly quick transition to a discussion of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice. Article 38 did not address the question of sources of international law in general—it merely listed the types of law which the Court could apply, a body of law that could be classified as "judicial sources", since each international court or tribunal had its own applicable law. However, those sources did not extend to the whole of international law: for example, they excluded the unilateral acts and decisions of States which were at the origin of many rules of international law. The International Court of Justice was by no means a central decision-making organ for matters of customary international law, and it would therefore not be appropriate to take the Statute of the International Court of Justice as a basis for preparing a general definition of customary international law for the entire international community. Furthermore, Article 38 did not give a clear definition of customary international law; the Commission should in no way appear to be writing a commentary to that provision. For all those reasons, he believed that the wording of draft conclusion 2 (a), in paragraph 45 of the report, was inappropriate.

16. Turning his attention to the methodology, he said that he would like to have clarification of the statement in paragraph 20 of the report that the approach should be the same regardless of the intended audience of the Commission's project, for he disputed the notion that a useful understanding, shared by all, could be achieved. Furthermore, the statement in paragraph 22 that defining the substance of *particular* rules of customary international law whose formation and evidence were under consideration did not come under the scope of the topic seemed unclear. It implied making a distinction (but based on what criteria?) between particular rules and general rules. If one accepted the Special Rapporteur's proposed analogy with the work on responsibility of States, involving an initial distinction between primary and secondary rules, there would have to be a constant dialogue between the two types of rules. The problems they raised could not be divorced from each other, especially given that the characteristics of customary international law varied in different branches of international law.

17. With regard to the materials to be consulted, the jurisprudence should be treated in a very circumspect manner. The role of judges was not to identify general rules but to hand down rulings, based on the arguments presented by the parties, in the specific and subjective cases brought before them. Thus, debates before the International Court of Justice over the existence of a particular rule of customary international law did not have the same basis or objectives as the Commission's project. The jurisprudence of other international courts and tribunals, meanwhile, should be considered as what Article 38 of the Statute of the International Court of Justice characterized as "subsidiary means for the determination of rules of law". The jurisprudence of domestic courts with regard to the identification of rules of customary international law and their incorporation into domestic law depended

on the status granted to those rules in the constitution of each country and on national judicial traditions. It was not appropriate for the Commission to seek to propose a set of guidelines to States on the matter. In conclusion, he recommended that the complexity of the issues being debated in the literature, and in particular the discussions about the two elements of customary international law, should not be underestimated.

18. Mr. FORTEAU said that he generally agreed with the Special Rapporteur's approach, which was based on a meticulous analysis of the case law and the memorandum by the Secretariat on the topic. However, contrary to what was stated in the memorandum, he believed that the Commission's task of making the evidence of customary international law more readily available was relevant: customary law must indeed be based on the practice of all States, something that was not yet the case given various inequalities and obstacles, including of a linguistic nature.

19. With regard to the methodology, the Special Rapporteur would have to explain more clearly how the Commission's work would differ from that of the International Law Association (para. 7 of the report). He would also have to guard against adopting an overly restrictive approach to the law and bear in mind that the "soft law" that existed at all the stages up until a law became binding was also part of the formation of customary international law. Contrary to what was stated in paragraph 38, it was important to examine the nature of the rules governing the formation of customary international law, given that those so-called secondary rules had a special status in international law. They were always applicable before international courts and tribunals, as the International Court of Justice had pointed out, with reference to treaty law, in the *Kasikili/Sedudu Island* judgment.

20. With regard to the project itself, there was no need to establish a standard terminology, as proposed in paragraphs 39 to 45 of the report. Even though it would be helpful to dispel confusion, various expressions (customary international law, rules of customary international law, international custom) seemed to coexist in contemporary practice without any adverse effects. However, it was necessary to clarify, or modify, the title and purpose of the topic. Unless it wished to engage in the progressive development of the rules applicable to the formation of customary international law, the Commission did not need to study the process in terms of the debates in the literature. Its work should focus on the identification of customary international law, and it should accordingly confine itself to defining the criteria and types of evidence to be used for that purpose, putting itself in the position of practitioners of the law who needed to know how to determine whether a rule was customary in nature. As to the scope of the project, *jus cogens* could be excluded; as had already been stated, while rules of *jus cogens* had to be rules of customary law, not all customary rules were *cogens*. They were in fact two completely separate things.

21. With regard to the identification of customary international law, the Special Rapporteur had identified two main approaches in the case law of the International Court of Justice: either the Court simply determined that a rule

of customary law existed, or it analysed in detail the two classical components of customary law, namely practice and *opinio juris*. Even when the Court did not elucidate the grounds for the existence of a rule, however, that did not mean that it had not applied the two components. A distinction therefore had to be made between approaches to the identification of a rule of customary law and methods of substantiating the Court's judgments. Furthermore, a detailed study of the Court's relevant case law would have to be made, as it sometimes seemed to consider other criteria such as the "evidence available" mentioned by the President of the Court in the statement cited in paragraph 65 of the report.<sup>119</sup> That element, as well as the agreement of the parties on the state of customary law, something to which national courts sometimes referred, could result in the identification of a varying number of rules of customary law. Those questions were therefore of significant practical interest.

22. Lastly, the Commission would have to maintain a balance with regard to the relationship between customary international law and the development of the law: it should neither encourage State institutions to engage in development nor dissuade them from doing so. The International Court of Justice had made it clear, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that this decision had been appropriate in the "current state" of customary international law. The Commission, too, must take care not to strip customary international law of its flexibility and its evolutive nature.

23. In conclusion, he said that he considered the proposed programme of work overly ambitious. A number of thorny issues had to be dealt with, such as the capacity of international organizations to contribute to the formation of customary international law, the applicability of the principle of specialization, the practice of NGOs and the current status of the system of persistent objection.

24. Mr. KITTICHAISAREE said that it was indeed crucial to preserve the flexibility of the customary process. In his view, that meant that the identification process should be practical and realistic and not "ultra-positivistic". The Special Rapporteur had rightly accorded great importance to the relevant work of the International Law Association (London statement of 2000<sup>120</sup>), which had shown how flexible the process should be. State practice, for example, need not necessarily be universal. Some did not think that customary law was evolutive, but the traditional approach to the identification of customary law was based on two elements: "general practice accepted as law", in the words of the Statute of the International Court of Justice, and *opinio juris*, which the Commission had called the "subjective element" of customary law. The second element was more difficult to define, particularly in view of the growing number of States. According to Anthony D'Amato, practice was action by States,

<sup>119</sup> P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 197–198.

<sup>120</sup> "London statement of principles applicable to the formation of general customary international law" (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39.

whereas *opinio juris* was the statement of their beliefs, as manifested in treaties and declarations. The President of the International Court of Justice had expressed a similar position at the conference on “The judge and international custom” in September 2012.<sup>121</sup> However, it would be too extreme to follow the views of Judge R. Abraham in his separate opinion in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. There, he had concluded that certain States might have acted on the basis of “a purely unilateral choice and sovereign decision” reached without any belief that the action was “required ... by some international obligation, whether conventional or customary—but solely in the belief that international law entitled them to do so. Here again, the ‘*opinio juris*’ is lacking” (para. 38). Unfortunately, it was unrealistic to try to find the ulterior motive behind a State’s action in order to prove the existence of *opinio juris*.

25. In fact, it was often impossible to disentangle *opinio juris* and practice. The International Law Association rightly differentiated among the various stages in the life of a customary rule and concluded that it was not always necessary to separately establish the existence of the subjective element of customary international law. On the other hand, the International Court of Justice had stated on a number of occasions that there must be a “settled practice” together with *opinio juris* in order to identify a rule of customary international law. However, both bodies considered that *opinio juris* that was well established in treaty law, for example, could compensate for practice that was less clear-cut. In that connection, the Special Rapporteur would have to deal with the relationship between treaty law and customary international law, with particular reference to the *North Sea Continental Shelf* cases.

26. It would also be useful to analyse the relationship between the approach of other intergovernmental actors and the formation of customary international law, as proposed in paragraph 53 of the report. The resolutions of international organizations were of special importance in that regard.

27. Lastly, the Special Rapporteur might consider the need to follow what the President of the International Court of Justice, in the conclusion of his speech at the September 2012 conference, had called the four particular methods that had played an important role in the Court’s assessment of evidence of customary international law, depending on the circumstances. The methods were (1) referring to multilateral treaties and their *travaux préparatoires*; (2) referring to United Nations resolutions and other non-binding documents which were drafted in normative language; (3) considering whether an established rule applied to the circumstances as a matter of deduction; and (4) resorting to an analogy.<sup>122</sup>

*The meeting rose at 1 p.m.*

## 3182nd MEETING

*Thursday, 18 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Cooperation with other bodies (*continued*)\*

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE  
INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Peter Tomka, President of the International Court of Justice, and invited him to address the Commission.

2. Mr. TOMKA (President of the International Court of Justice) said that, in fulfilment of its role as the principal judicial organ of the United Nations, the International Court of Justice had rendered two major decisions in the past year on the merits of cases concerning boundary disputes.

3. The decision in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* had settled a long-standing argument regarding maritime delimitation and sovereignty over certain maritime features in the western Caribbean. Although the case had been brought to the Court in 2001, the delivery of the final judgment had been delayed by the need to examine several objections to the Court’s jurisdiction and by the lodging, by Honduras and Costa Rica, of requests for intervention. In its judgment of 2007, on preliminary objections, the Court had concluded that it lacked jurisdiction over the claim by Nicaragua to three islands, since the matter had been resolved in favour of Colombia by the 1928 Treaty concerning Territorial Questions at issue between Colombia and Nicaragua.<sup>123</sup> Nevertheless, several maritime features had remained in dispute in the maritime area where delimitation by the Court was being sought by the parties.

4. The Court had first assessed whether the small maritime features could be subject to the exercise of sovereignty through appropriation. It had emphasized that, unlike low-tide elevations, islands, however small, were capable of appropriation. Upon review of the scientific evidence, the Court had concluded that the disputed features were above water at high tide and were therefore capable of appropriation.

<sup>121</sup> Tomka, “Custom and the International Court of Justice” (footnote 119 above).

<sup>122</sup> *Ibid.*, p. 215.

\* Resumed from the 3180th meeting.

<sup>123</sup> Signed at Managua on 24 March 1928, League of Nations, *Treaty Series*, vol. CV, No. 2426, p. 337.

5. Turning to the issue of sovereignty over the maritime features in dispute, the Court had first investigated the question of what constituted the San Andrés archipelago, which had been mentioned in the Treaty in lieu of any mention of specific maritime features. The historical records were silent on that point, and the Court had accordingly examined the arguments submitted by the parties. It had dismissed the arguments based on *uti possidetis juris*, but it had found that, through various administrative acts (*effectivités*), Colombia had consistently conducted itself *à titre de souverain* with regard to the disputed maritime features. That fact lent very strong support to its claim of sovereignty over them. The conduct of Nicaragua with respect to the islands, the practice of third States and the relevant maps were likewise supportive of the claims by Colombia.

6. In the context of maritime delimitation, the Court had had to address the admissibility of the submission by Nicaragua that the Court should define a continental shelf boundary by dividing the overlapping entitlements into equal parts. All the judges but one had concluded that the claim by Nicaragua to an extended continental shelf was admissible, but could not be upheld owing to a dearth of the information required by article 76 of the United Nations Convention on the Law of the Sea. In effecting a delimitation of the parties' overlapping entitlements in the maritime area in question, the Court had recalled the overarching objective, in maritime delimitation, of devising an equitable solution, as opposed to equal apportionment of maritime areas. It had also recalled the basic delimitation methodology described in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*.

7. The Court had then investigated whether there were any circumstances that might call for an adjustment of the provisional equidistance line in order to achieve an equitable result. In view of the substantial disparity between the respective lengths of the parties' coasts, the Court had found that a significant shift was justified. The delimitation it had ultimately effected took account both of the disparity in coastal lengths and of the need to avoid cutting off either State from the maritime space into which its coasts projected.

8. The judgment in the case had been adopted unanimously, save for one point related to the admissibility of claim by Nicaragua to an extended continental shelf.

9. In the second boundary delimitation case, *Frontier Dispute (Burkina Faso/Niger)*, the Court's work had lasted for three years, culminating in the judgment of 16 April 2013. It had analysed the historical records in resolving certain preliminary questions, including whether it should recognize a boundary recorded in surveys carried out in 2009. It had then turned its attention to the disputed section of the frontier and had opted, after a review of the scientific evidence, for a direct line to connect two points at which boundary markers were located. The judgment had been adopted unanimously. In early July 2013, the Court had performed its last act in connection with that case, by appointing three cartographers to assist the parties in implementing the judgment.

10. The Court had been involved in drafting and deliberations in a few other cases. In December 2012, it had held public hearings in the case concerning the *Maritime Dispute (Peru v. Chile)*. The deliberations had reached an advanced stage and it was to be hoped that the judgment would settle a long-standing dispute over the maritime frontier between those two States. In April 2013, the Court had held public hearings in the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* and would be handing down its judgment in late 2013. In July 2013, it had completed three weeks of public hearings in the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, and it was preparing to hold three weeks of public hearings in another case which was likely to have scientific and environmental implications, the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case.

11. The Court had been kept busy with the cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. In April 2013, the Court had decided to join those proceedings and to dismiss four counterclaims entered by Nicaragua in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*.

12. The Court's activities showed that States increasingly turned to the principal judicial organ of the United Nations as a propitious forum for the peaceful settlement of disputes, including those which had potential consequences for the conservation of the natural environment. The sharp increase over the previous 22 years in the number of judgments delivered could be ascribed to the fact that the Court strove to attain well-reasoned and just outcomes. Like the majority of international adjudicative bodies, the Court's jurisdiction over disputes between States was contingent upon parties agreeing to appear before it. States Members of the United Nations could accept the Court's compulsory jurisdiction by making an optional clause declaration under Article 36, paragraph 3, of the Statute of the International Court of Justice. The Secretary-General had launched a campaign in an attempt to boost the number of Member States which had done so from its current level of just over one third. Compared with the situation in 1948, when 59 per cent of Member States, including four of the five permanent members of the Security Council, had made Article 36 declarations, acceptance of the Court's jurisdiction had obviously declined in relative terms. It was encouraging, however, that in the past three years, three new Article 36 declarations had been made.

13. For the rule of law to be imbued with any meaningful force at the international level, it was vital to have independent and impartial courts where disputes could be adjudicated and rights asserted. It was therefore time to consider ways of enhancing the Court's role so as to bolster the rule of law and provide broader access to the peaceful settlement of international disputes. Ways of attaining the objectives and ideals enshrined in the Charter of the United Nations should be sought, with a view to strengthening both the role and the rule of international law. That, in turn, would facilitate the transition to more just and equitable societies.

14. Mr. FORTEAU said that there appeared to be some discrepancies between, on the one hand, the Court's 2007 judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* and its 2012 judgment in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* and, on the other hand, the 2012 judgment of the International Tribunal for the Law of the Sea in the Bangladesh/Myanmar case (*Delimitation of the maritime boundary in the Bay of Bengal*) with regard to the limits of the continental shelf beyond 200 nautical miles and the respective roles of the courts and tribunals under the United Nations Convention on the Law of the Sea and the Commission on the Limits of the Continental Shelf. He wondered whether the fact that the United Nations Convention on the Law of the Sea was intended to establish "a legal order for the seas and oceans" had an institutional impact on that relationship. Noting that it was stipulated in the Court's 2012 judgment that the parties to the dispute had agreed to consider article 121 of the Convention, on the legal regime of islands, as forming part of customary international law, he asked to what extent that agreement had been taken into account in the Court's ruling regarding the applicable customary international law.

15. Mr. KITTICHAISAREE asked whether the Court took into account the possibility that its decisions could lead to an escalation in tensions in the bilateral relations between parties. Referring to variations in the time taken to render judgments in different cases, he asked whether the delay was sometimes due to dissenting opinions among the judges. The Court should aim to ensure some consistency in the time it took to hand down judgments. Lastly, he noted that in the case concerning *Jurisdictional Immunities of the State*, the Court had only analysed the rulings of national courts in 11 European and 2 non-European States, but that was not a representative cross section of State practice.

16. Mr. VALENCIA-OSPINA, noting that Mr. Tomka had emphasized the need for the increased acceptance by States of the compulsory jurisdiction of the Court through optional clause declarations, enquired about the Court's views as to whether the Commission should consider including compromissory clauses concerning the jurisdiction of the Court in the final texts it adopted on its topics.

17. Mr. TOMKA (President of the International Court of Justice) said that he did not perceive any major discrepancy as far as the views of the Court and of the International Tribunal for the Law of the Sea were concerned: in its 2012 judgment, the Court had opined that even if a State was a party to the United Nations Convention on the Law of the Sea, it still had to go through the procedure for justifying its claim for an extended continental shelf. The fact that the other State was not a party to the Convention did not relieve the State party of that obligation. With regard to article 121 of the Convention, the Court had taken the view that that article reflected customary international law as far as the legal regime of islands was concerned. If the parties, too, accepted that a rule reflected customary law, then the issue was not open to challenge.

18. The Court adjudicated disputes in such a way as to effectively resolve them, but it was not appropriate for it

to speculate on what form bilateral relations might take following its decisions. Some judgments took longer to produce than did others, not because judges sometimes lodged dissenting opinions, but rather because the Court now took up several cases simultaneously, in an effort to progress on its caseload, and some cases were simply more complex or involved a greater volume of evidence than others.

19. Lacking the time or resources to carry out inductive studies on State practice in all cases, the Court welcomed the Commission's commentaries, which it found to be an extremely important resource when it was establishing the existence of customary international law.

20. He had highlighted the role of the optional clause because it would ensure broader recognition of the Court's jurisdiction. There were now some 300 multilateral conventions that contained compromissory clauses, and further efforts should be made to increase that number. In some cases, however, the jurisdiction of the Court could be established through unilateral declarations. By way of example, he cited the *Whaling in the Antarctic* case, in which article VIII of the International Convention for the Regulation of Whaling was disputed. As the Convention did not contain a compromissory clause, Australia had brought the case on the basis of declarations by it and by Japan recognizing the Court's jurisdiction as compulsory. Even if a State had not made a declaration recognizing the Court's jurisdiction, however, it could conclude a special agreement or, more exceptionally, become a respondent in order to establish *ad hoc* jurisdiction.

21. Mr. HMOUD asked whether the Court had the capacity to deal with the increase in its caseload. What type of assistance did it require from States and the General Assembly? Was it faced with any financial or technical difficulties?

22. Mr. MURPHY, referring to the maritime dispute between Nicaragua and Colombia, asked whether the Court's judgment might have been different if the applicant seeking delimitation of the continental shelf had been Colombia, which was not a party to the United Nations Convention on the Law of the Sea, instead of Nicaragua, which was a party thereto.

23. Mr. VÁZQUEZ-BERMÚDEZ said that the fact that in some cases the Court had simply declared that a rule reflected customary international law instead of conducting an inductive study did not mean that the rule did not meet the requirements of generalized practice and *opinio juris*. He would be interested to hear whether the Court considered some rules of international customary law to be self-evident and therefore not requiring a detailed analysis.

24. Mr. TOMKA (President of the International Court of Justice) said that under its new working methods, the Court now worked in parallel on two to three cases at a time. In the past there had sometimes been more than 20 cases on the Court's docket, but the backlog had now been reduced to only 10. That number was expected to go down to 5 by the following year, and any new cases brought before the Court could then be adjudicated

in an efficient manner once the written procedure had been completed. In some cases, the parties themselves requested additional time to prepare their arguments.

25. With regard to technical and financial assistance from countries, he noted that the Court had a very modest budget, US\$23.5 million, accounting for only 0.8 per cent of the regular budget of the United Nations. However, the Court's resolution of a dispute was very cost effective for the international community, since the alternative was the escalation of the dispute into action that, in addition to costing human lives, could cost a great deal of money, given the extended length of many peacekeeping missions.

26. When acceding to the United Nations Convention on the Law of the Sea, States could choose either the International Court of Justice or the International Tribunal for the Law of the Sea as their dispute settlement machinery by making a written declaration to that effect. Failing such a declaration by the parties to a dispute, proceedings would be instituted before an arbitral tribunal constituted in accordance with annex VII to the Convention or a special arbitral tribunal constituted in accordance with annex VIII. That was the explanation for the growing number of *ad hoc* maritime arbitrations in recent years.

27. Lastly, he said that once the Court had declared that a rule reflected customary international law, it could rely on that declaration in future without having to conduct additional studies of State practice.

#### **Formation and evidence of customary international law (continued) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)**

[Agenda item 8]

##### FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

28. Mr. TLADI, referring to the comment by some members of the Commission that the reference in the title of the topic to the "formation" of customary international law risked making it too broad, said he agreed with the Special Rapporteur's response, in paragraph 15 of his report (A/CN.4/663), that both the requirements for the formation of a rule of customary international law and the types of evidence that established the fulfilment of those requirements needed to be taken into account in order to determine whether a rule of customary international law existed. While he had no objection to replacing the word "formation" with "identification", it was not clear how customary international law could be "identified" without gaining at least a general conception of its formation. In any event, any change in the title of the topic should reflect what the Special Rapporteur had set as the main objective of the project, which was to shed light on the general processes of the formation and evidence of customary international law.

29. On the question of whether the scope of the topic should include *jus cogens*, he was of the view that *jus cogens* presented its own peculiarities and could not be dealt with adequately as part of the project. He also thought that the Commission should strive to achieve consistency in the wording used to refer to key concepts. For example,

the concept of generality of State practice had been expressed in a variety of ways, some of which had significantly divergent meanings. As to the use of terms, the Special Rapporteur should reformulate the definition of customary international law contained in paragraph 45 of the report. The mere reference to Article 38, paragraph 1 (b), of the Statute of the International Court of Justice was not particularly helpful, given that this provision, itself, required a definition. In view of the wealth of material available, a simpler and clearer definition ought to be possible.

30. In paragraph 19 of his report, the Special Rapporteur raised the question of whether different approaches to the formation and evidence of customary international law were used in different fields of international law. He himself cautioned against excluding *a priori* the possibility that such differences existed and advocated answering the question on the basis of a study of State practice. The fact that some international tribunals were less than rigorous in their search for and assessment of the constituent elements of customary international law might reflect differences, not in their approaches to finding evidence of customary international law, but simply in styles used to draft judgments. He hoped that the Special Rapporteur would explore that issue in subsequent reports.

31. Care must be taken not to overstate the role of State practice and *opinio juris* in advancing arguments about the existence of customary international law norms. Soft law, for example, also played an important role in the formation, and hence evidence, of customary norms in the field of environmental protection. As illustration, he cited the case of the International Tribunal for the Law of the Sea discussed in paragraph 67 of the report and the judgment of the International Court of Justice in the *Pulp Mills on the River Uruguay* case.

32. In paragraph 37 of his report, the Special Rapporteur drew attention to the distinction between customary international law and conduct by international actors that did not generate a legal right or obligation, the missing factor being *opinio juris*. When studying the relationship between State practice and *opinio juris*, the Special Rapporteur should consider the process according to which practice without legal significance evolved into practice that was accepted as law, a process that was central to the formation of customary international law.

33. He agreed with the Special Rapporteur's suggestion in paragraph 53 of his report that the approach of international actors, in particular the United Nations, might prove valuable when surveying practice. However, the two reports mentioned by the Special Rapporteur, while providing useful material on State practice, did not appear to be examples of the work of international organizations. It would be useful, when referring to the output of international organizations, to distinguish clearly between that of their secretariats and that of their intergovernmental organs in order to ensure that greater relative weight was given to the latter, whose authors were also the primary authors of State practice.

34. To his recollection, there had been general agreement during the sixty-fourth session that the Commission

should not be drawn into the academic debate on the various and sometimes conflicting theories to be applied to the formation and evidence of customary international law. To the extent, however, that the writings of experts helped to advance the Commission's work on the topic, then ample use should be made of them.

35. Mr. CAFLISCH said that it was important that the outcome of the Commission's work on the topic not be an abstract exposé, theoretically sound but devoid of any practical value. Given that States and certain writers held divergent views on the respective roles of *opinio juris* and general practice as components for identifying customary international law, the Special Rapporteur had wisely opted for a straightforward solution. He proposed to use a more elegantly drafted version of the definition of customary international law set out in Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, along with a reference to the two constitutive elements, practice and *opinio juris*. The additional element of *opinio juris sive necessitatis* could be included, in his own view, and paragraph 70 of the report would be relevant when defining that concept.

36. The Special Rapporteur appeared to be leaning towards excluding *jus cogens* from the scope of the topic, both for pragmatic reasons and because the Commission was contemplating a separate study of the subject. Nevertheless, the undeniable links between customary international law and *jus cogens* needed to be clarified. In his view, *jus cogens* was expressed in customary rules whose subjective elements included, in addition to *opinio juris*, a conviction that they were norms from which no derogation was permitted and which could be modified only by a subsequent norm of international law having the same character.

37. As to whether to include regional or subregional customary law in the scope of the topic, it seemed impossible not to do so. The only exception might be the controversial category of bilateral custom introduced by the International Court of Justice in the case concerning *Right of Passage over Indian Territory*. In his own view, such so-called "custom" related more to the law of treaties than to customary international law.

38. With regard to the relationship between customary international law and treaties, discussed in paragraph 34 of the report, it was true that "customary international law has an 'existence of its own', even where an identical rule is to be found in a treaty". That gave rise to the question of whether, and in what form, a customary rule would survive, if a conflict arose between it and a treaty provision, once the treaty provision had gained prominence and the customary rule was no longer supported by anything but reduced elements of practice and *opinio juris*.

39. With regard to the complex relationship between customary international law and general principles of law, he noted that, when general principles of law applicable under national law were transposed frequently enough into international law, they became customary rules of international law. The process by which that occurred was a mode of formation that the Commission could not afford to overlook.

40. A large portion of the report dealt with the process of formation of customary international law. Among the materials to be consulted to understand that process was the case law of the International Court of Justice and that of other courts and tribunals. While in principle there was no hierarchy among the various permanent or *ad hoc* courts and tribunals that engaged in the identification of customary international law, it was obvious that the judgments of the International Court of Justice enjoyed particular prestige as texts issued by the main judicial organ of the United Nations. The number of permanent courts that settled questions of international law had increased considerably, making it necessary to consider all the materials that they produced. However, all international tribunals did not always exercise care in examining whether a customary rule existed in a specific domain.

41. The "practice" referred to in Article 38, paragraph 1 (b), of the Statute of the International Court of Justice was another source to be consulted, although a certain degree of caution was to be advised. In order to identify it, the various collections of State practice compiled by certain countries would need to be consulted. In his view, such practice was every bit as important as that of the courts, and countries that had not begun collecting and publishing their practice should do so.

42. The two remaining types of materials were scholarly writings—he found the wording "the most highly qualified publicists of the various nations" in Article 38 of the Statute to be quite puzzling—and the decisions of domestic courts. Such decisions, at times, failed to reveal any specific trend; they were downgraded, by Article 38, to "subsidiary means for the determination of rules of law".

43. Clearly, the Commission's future work should be adapted to the contemporary environment of international relations and take into account new actors, such as international organizations and even NGOs. Lastly, he could accept the title of the topic but had a slight preference for replacing the term "*identification*" with that of "*détermination*" in the French text.

44. Mr. PETRIČ said that he had been sceptical from the very beginning about the inclusion in the scope of the topic of not only the evidence but also the "formation" of customary international law. By choosing that route, the Commission was sailing into the waters of the social sciences, including the sociology, theory and philosophy of law. It would need to look into what was shaping the will of States—the impact of ideology, political realities and social development, among other things. That was not its task, nor did he believe that the Commission could succeed at it. It should refrain from addressing the material sources of international law and should limit itself to the formal sources listed in Article 38 of the Statute of the International Court of Justice.

45. A decision to address *jus cogens* separately would facilitate the Commission's work, since it could then concentrate on whatever was necessary for the purposes of the current topic. *Jus cogens* was a kind of *corpus separatum* within customary international law that had a special quality and special effects.

46. He fully agreed with other speakers that the Commission's task was not to write a new commentary to Article 38 of the Statute of the International Court of Justice, since such commentaries had already been written and the Commission should not challenge them. Rather, it should devote its attention to the relationship between customary international law and treaties, and to that between customary international law and the general principles of law. The second relationship was perhaps the more complicated, thus warranting greater attention than the first.

47. While agreeing that the practice of States and other intergovernmental actors represented the crux of the topic, he thought that the Commission should also analyse soft law, such as statements by State representatives and confidential exchanges of views. In so doing, it should take into account the office held by the authors of such practice: he had in mind the members of the troika, whose statements were legally binding and carried more weight than those of other officials. The Commission should also consider the actual behaviour of States. Research should be devoted to the practice of constitutional courts, which issued important rulings, and to the provisions of States' constitutions, which stipulated the way in which international law would be applied.

48. It was important to bear in mind that, before the Second World War, international law had consisted primarily of customary international law. With the recent codification of the main areas of international law, customary international law had now become a somewhat subsidiary source. That change in its status over the past 60 years should be borne in mind when the Commission considered classical and modern scholarly writings and State practice.

49. Lastly, he thought it would be a reasonable ambition if the Commission restricted itself to the formulation of conclusions, not rules or criteria, for the formation of customary international law.

*The meeting rose at 1.05 p.m.*

### 3183rd MEETING

*Friday, 19 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Organization of the work of the session (*concluded*)\*

[Agenda item 1]

1. The CHAIRPERSON read aloud the proposed programme of work for the last three weeks of the session.

*The programme of work for the last three weeks of the session was adopted.*

### Formation and evidence of customary international law (*continued*) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPOREUR (*continued*)

2. Mr. MURPHY commended the Special Rapporteur for the wealth of information contained in his first report (A/CN.4/663) and noted that the memorandum by the Secretariat (A/CN.4/659) provided useful clarification of the Commission's previous work on the topic.

3. In the introduction of his report, the Special Rapporteur referred to the debates that had been held in the Sixth Committee in 2012; however, he failed to mention that some States had discussed the idea of identifying regional customary norms, which confirmed the wisdom of addressing such norms in his third report on the topic. The Special Rapporteur had suggested that the Commission should renew its request to States to provide information on their practice. As he himself was not very optimistic about the success of such an approach, he joined with the Special Rapporteur in encouraging Commission members to provide any relevant information that they might have available to them.

4. With regard to the part of the report on the scope and outcome, and in particular the title of the topic, he recalled that the term "evidence" was firmly embedded in the work on customary international law undertaken by the Commission in 1949<sup>124</sup> pursuant to article 24 of its statute, which itself contained that very term. That said, he had no objection to replacing the term "evidence" with "identification", as the two were treated as synonyms in the syllabus for the topic that had been prepared in 2011.<sup>125</sup> Nor did he have strong feelings about retaining the word "formation" in the title, even if the question of the formation of customary international law would no doubt resurface in one way or another at some point in the study. He proposed that consideration should be given to a title consisting of just three words, "customary international law", which clearly indicated that what was being dealt with was how the law was formed. As to the issue of *jus cogens*, in stating in its judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* that the prohibition of torture was part of customary

\* Resumed from the 3180th meeting.

<sup>124</sup> The Commission discussed the topic "Ways and means for making the evidence of customary international law more readily available" at its first and second sessions, held in 1949 and 1950 (see *Yearbook ... 1949*, pp. 283–284, paras. 35–37, and *Yearbook ... 1950*, vol. II, pp. 367–374, paras. 24–94).

<sup>125</sup> *Yearbook ... 2011*, vol. II (Part Two), annex I, paras. 6–10.

international law and had become a peremptory norm (*jus cogens*), the International Court of Justice seemed to be confirming the existence of a reinforced obligation, or a “super”, as opposed to “normal”, rule of customary international law. The Commission should perhaps help to clarify that distinction. Nonetheless, the peculiar nature of *jus cogens* norms, which apparently took precedence over certain “minor” treaties but not “major”, multilateral ones, in principle, justified the exclusion of *jus cogens* from the scope of the present topic. As to whether the rules governing the formation and evidence of customary international law differed depending on the branch of international law in question, he agreed with Mr. Tladi’s observation that it should not be assumed *a priori* that the rules of international law operated uniformly. On the other hand, he recalled that the Commission’s Study Group on fragmentation of international law had concluded that the very concept of the fragmentation of international law presumed the existence of a single international legal system.<sup>126</sup> In view of that position, he was in favour of giving precedence to the unity of the rules governing customary international law. Lastly, he supported the idea that the outcome of the Commission’s work should be a set of conclusions.

5. Regarding paragraphs 28 to 45 of the report, he agreed that the Commission should, at least briefly, examine the relationship between customary international law and the other sources of international law, especially since, as pointed out by the Special Rapporteur, the distinction between customary international law and the general principles of law was not always very clear in the case law or literature. The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* (1996) was a good illustration of that point, inasmuch as the Court had based its conclusions on an analysis of customary international law, international humanitarian law and general international law, without however clarifying the relationship between those different sources.

6. He preferred not to enter into a debate on paragraphs 46 to 101 of the report, which dealt with the issue of the traditional and modern approaches of customary international law. State practice and *opinio juris* had always constituted the two indispensable elements of customary international law and remained distinct from each other, despite the fact that, in some instances, it had become more difficult to infer the existence of *opinio juris* from State practice.

7. Lastly, in view of the difficulty of the topic, it was possible that the time required to complete the Commission’s work might exceed that provided for in the Special Rapporteur’s timetable. He considered it premature to refer the draft conclusions to the Drafting Committee.

8. Mr. PARK, noting that the Special Rapporteur’s first report and the memorandum by the Secretariat provided a

firm foundation for the Commission’s work on the topic, recalled that Hans Kelsen had considered the topic to be eminently complex, owing to the “unconscious” and “unintentional” elements that characterized customary international law.<sup>127</sup> The Special Rapporteur’s first report comprised two main components, the second of which presented an analysis of case law and doctrine, and revealed a current trend in customary international law.

9. With regard to the fragmentation of international law, he did not subscribe to the notion that the rules for the formation and evidence of customary international law differed depending on the branch of international law in question. Since that was a pivotal issue in terms of guiding the Commission’s work, it would be useful for the Special Rapporteur to clarify his position with regard to it. On the other hand, he agreed entirely with the Special Rapporteur’s recommendation to exclude *jus cogens* from the scope of the topic for the time being, even if, like the Special Rapporteur, he acknowledged the fact that customary international law and peremptory norms were closely related, as evidenced by paragraph 99 of the judgment handed down in the *Questions relating to the Obligation to Prosecute or Extradite* case cited previously.

10. As to the question of the effects of treaties on customary international law, particularly with respect to “widely accepted ‘codification’ conventions” (para. 35 of the report), it would be helpful if, when dealing with that issue in his next report, the Special Rapporteur addressed the following points in greater detail: the effects of multilateral treaties drafted by the Commission but which had not yet entered into force; the effects of multilateral treaties to which there were few States parties; and the value of those instruments as evidence of customary international law. Moreover, given the fine line that existed between customary international law and the general principles of law, it was important to include a definition of the latter in draft conclusion 2 (Use of terms). A further reason to do so was the practical objective established for the Commission’s work, which was to offer guidance to those called upon to apply rules of customary international law (especially national judges in monist systems).

11. Turning to the second component of the Special Rapporteur’s first report, and with regard to the approach taken by States and intergovernmental actors to the formation and evidence of customary international law, he emphasized that it would be useful to consider the work of United Nations special rapporteurs. He cited as an example the final report on systematic rape, sexual slavery and slavery-like practices during armed conflict presented in 1998 by the Special Rapporteur of the Commission on Human Rights,<sup>128</sup> in which the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict had demonstrated the customary nature of the prohibition against slavery. With regard to the case law of the International Court of Justice, in paragraph 64 of his report, the Special Rapporteur on the present topic had merely noted that, in the view of some

<sup>126</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, report of the Study Group finalized by Martti Koskeniemi (A/CN.4/L.682 and Corr.1 [and Add.1]), paras. 407 *et seq.*; available from the Commission’s website, documents of the fifty-eighth session (the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

<sup>127</sup> H. Kelsen, *Principles of International Law* (New York, Rinehart, 1952), p. 308.

<sup>128</sup> E/CN.4/Sub.2/1998/13.

authors, the Court, through its jurisprudence, had enhanced the role of customary international law, whereas according to others, it had not always demonstrated sufficient rigour in proving the existence of the customary rules it invoked. He would like to know the Special Rapporteur's opinion as to which of the two perceptions of the Court was the predominant one. The weight to be accorded to the individual and dissenting opinions of judges of the Court with regard to the constituent elements of customary international law should also be addressed in greater detail.

12. As to the draft conclusions formulated by the Special Rapporteur, he proposed that draft conclusion 1 (Scope) should mention the objective of the topic. In draft conclusion 2 (Use of terms), it would be preferable not to refer to Article 38 of the Statute of the International Court of Justice, given the lack of consensus regarding its relevance. It would, however, be useful for it to include a definition of the general principles of law. The title of the topic should reflect the objective of the study. An expression along the lines of "verification of the existence of customary international law" would resolve the problems posed by the use of the term "evidence".

13. Mr. NOLTE said that, while he acknowledged the arguments of Commission members who wished to restrict the scope of the topic to the evidence of customary international law, some attempt should be made to explain basic aspects of the process of formation. That was all the more true since the argument that there was a trend in a particular area of the law played an important role in court proceedings and in case law, as shown by another topic being dealt with by the Commission. Nevertheless, he could agree to the deletion of the term "formation" from the title. Greater attention must also be paid to the interaction between the rules and the principles of varying degrees of generality that constituted customary international law.

14. Another important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law, but given the need to consider the scope of the topic, a distinction had to be drawn between the two. The Commission must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources. In any event, it was important, as stated by the Special Rapporteur in paragraph 36 of his report, to at least identify those rules which, by their nature, needed to be grounded in the actual practice of States. But those rules could not be identified exclusively by way of "secondary" rules; they must also be identified on the basis of their substance.

15. To conclude, he welcomed the fact that the Special Rapporteur had not labelled the two main schools of thought as "positivist" and "critical". He also welcomed, in paragraph 65 of the report, the inclusion of a reference by the President of the International Court of

Justice to the criterion of the "evidence available".<sup>129</sup> That point deserved to be analysed further. The recognition of the relevance of availability in that context was not incompatible with the effort to make the identification of customary law more equal among States. Finally, one might wonder whether the comment in the last footnote to paragraph 84 of the report, which recalled that it was not for a national court to develop international law,<sup>130</sup> might not also apply to international courts, especially if one held to the notion that the accepted approach for identifying the law should be the same for all.

16. Mr. ŠTURMA said that the topic should cover both the formation and evidence of customary international law, even if the title mentioned only the second of those processes or was shortened to "customary international law". The Commission was concerned with the formal sources of international law, and it was not possible to consider the evidence of customary law without addressing its formation, especially in terms of determining whether the criteria of formation had been met. In order to settle the debate on secondary rules that appeared to divide the Commission, recourse might be had to the broader definition provided by H. Hart, who had described them as "rules about rules", which established the procedures through which primary rules could be introduced or modified.<sup>131</sup> In his own view, it was preferable not to deal with the issue of *jus cogens* as part of the topic; however, the relationship of *jus cogens* to customary international law should not be omitted entirely. Nor should the Commission adopt the somewhat outdated interpretation of *opinio juris* according to which the latter was regarded as an implicit form of consent. Mr. Tladi had suggested during the Commission's sixty-fourth session that both customary international law and treaty law were based on a theory of State consent, while *jus cogens* was based on something different. That was the interpretation of the old positivist school (the theory of the will), but nowadays customary international law differed from treaty law. It must be borne in mind that *opinio juris* was something other than the consent of all States and must be combined with practice in order to establish a peremptory norm.

17. The part of the report that dealt with the materials to be consulted made sense, but it should be recalled that not all States published a survey of State practice, and consideration should be given to the case law of other courts and tribunals besides the International Court of Justice, such as regional courts, international criminal tribunals, and the organs of the International Labour Organization, among others. The case law of national courts was also a valuable source of evidence, but was limited in terms of international law insofar as such courts primarily applied treaty law and did not always have competence to directly apply customary international law.

18. Mr. HMOUD said that the interaction between theory and practice was an inherent component of the

<sup>129</sup> P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 197–198.

<sup>130</sup> Lord Hoffmann, in his arguments before the Chamber of Lords in the *Jones and Mitchell* cases, para. 63.

<sup>131</sup> H. Hart, *The Concept of Law*, 2nd ed. (Oxford University Press, 1994), p. 94.

present topic, even if some saw that interaction as an expression of the flexibility of customary international law, while others saw it as a limitation. Developments in international relations had led to the emergence of various concepts whose legal value depended on whether they could be regarded as customary law. Disputes often arose when there was no clear or common understanding of what constituted customary international law or of the interaction between that law and other sources, such as treaties and general principles of law. The Commission should therefore clarify the process according to which customary international law was formed, its constituent elements and the kind of evidence required to establish its existence, all of which would serve to promote legal certainty.

19. The requirements for the formation of a customary rule and the means of establishing its existence were thus two separate but closely interrelated aspects of customary international law, and it would be futile to attempt to study one without the other. However, the Commission could, as had been noted previously, consider the term “identification” as adequate to cover both in the title. As to the scope of the topic, the question arose as to whether the approach to identification necessarily differed according to the branch of law concerned, in terms of both the constituent elements of the customary rule in question and the means that served to establish its existence. Further reflection was needed on that point. Along the same lines, it was necessary to study the potential role of customary regional law. He was of the view that *jus cogens* should be included in the scope of the topic. In its commentary to the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session, the Commission had recalled that peremptory norms of international law were, in almost all cases, customary in nature.<sup>132</sup> There was no convincing argument to suggest that such norms should be excluded from the topic, even if important questions still needed to be answered, such as those relating to their formation and their value, the extent of their acceptance and their relationship to multilateral treaty regimes. As to whether customary law should be considered a source of international law, it should be borne in mind that the notion of the binding nature of customary international law had long preceded the adoption of the Statute of the International Court of Justice, which merely reflected the state of the law. In his view, the definition contained in Article 38 of the Statute of the International Court of Justice was an appropriate reference, in addition to the fact that it was widely cited. However, rather than refer to the actual wording of the article, reference ought to be made to the binding nature of the customary international law that was implicit in it.

20. The definition of practice should specify that it should be general and consistent, while also clarifying precisely what was meant by those terms. A definition should also be given of the term *opinio juris sive necessitatis*, which should indicate whether there was a difference between the general recognition of the binding nature of a rule and its necessity. Another aspect that needed to be studied was whether *opinio juris* was

subsequent to practice or could precede it, given that some declarations and political acts appeared to be binding even prior to the existence of practice and could give rise to so-called “soft law”.

21. It was clear that there was a wide range of material that needed to be consulted in order to identify customary international law, although the relative weight of each element was dependent on its source and on the primary or secondary nature of that source. Thus a distinction had to be drawn between the different types of materials and their weight in the formation and/or proof of the existence of customary international law. In particular, clarification was needed of the circumstances in which an act or declaration by a State body or a decision by a national court reflected the practice of the State and those in which they reflected its interpretation of a particular rule of customary international law. The case law of the International Court of Justice could be considered the primary source of materials to be used for that purpose. The Court had, on several occasions, reiterated the elements required to establish the existence of a customary rule, specifying the need to take into account both the objective element of practice and the subjective element of *opinio juris*. Those statements served as guidance to the Commission on the approach to be followed, namely the traditional positivist approach, although the Commission should not exclude other approaches that were followed in situations in respect of which the Court had never ruled. That said, the Court had sometimes determined that a rule existed by virtue of the Court’s own pronouncement, which raised the question of whether such pronouncements were declaratory or determinative of the rule. Other international courts and tribunals followed the case law of the Court in order to identify the elements of a customary rule and its existence but sometimes failed to take into account one or the other of the two elements (practice and *opinio juris*) or both, thus departing to varying degrees from the conventional approach. That issue needed to be analysed in the light of the nature of both the law and the court concerned, and such analysis was important in determining the emergence of certain norms and the precise point in time at which emerging norms in a particular field achieved the status of customary international law. Material from international organizations also needed to be taken into account, while paying careful attention to the role of the bodies of various organizations, particularly the United Nations, in the formation of customary law. Among the questions to be answered were the following: At what point did a General Assembly resolution or Security Council decision become part of customary international law, or give rise to or reflect a rule of customary international law? Could customary international law be formed through the acts of an organization? The latter was a highly debatable question.

22. The Commission’s work on the topic could bridge the gap between the traditional and modern approaches, as well as foster greater understanding of the two elements of the law and the necessary emphasis to be placed on each depending on the situation, the time frame, the interests at stake and the area of law concerned. Finally, regarding so-called “emerging norms” and their link to customary international law, a study of the relationship

<sup>132</sup> *Yearbook ... 2011*, vol. II (Part Three), paragraph (14) of the commentary to guideline 3.1.5.3.

between the general principles of law and customary international law could assist in determining their legal value. In conclusion, he supported the programme of work proposed by the Special Rapporteur in his report.

23. Mr. HASSOUNA noted that the report raised many questions for which there were no clear answers, especially since even the basic terminology was unclear. The formation of customary international law was surrounded by ambiguity, largely created by States that wanted to have clear rules when they needed them, while the rest of the time they preferred the rules to be ill defined, unenforceable and “weak”. That duality created a certain fluidity of the law, making it difficult to define the rules that existed in that realm with clarity and certainty. Throughout his first report, the Special Rapporteur had combined direct and concise arguments with extensive references. In paragraphs 13 to 23 of his report, he had highlighted four main aspects relating to the scope of the topic and the form that the outcome would take, which were in line with the discussions held in the Commission in 2012.<sup>133</sup> The Special Rapporteur had considered it preferable not to deal with *jus cogens* as part of the present topic, which seemed well justified, even if it might sometimes be necessary to refer to some *jus cogens* rules in particular contexts. The Commission would nonetheless have to address the issue, which arose in the last two chapters of the report, of determining whether there were different approaches to the formation and evidence of customary norms in different fields of international law.

24. Regarding the title of the topic and its various language versions, perhaps the Commission could opt for “the identification of customary international law”, so long as both the formation and evidence of customary international law were duly addressed. As to paragraphs 28 to 45 of the report, the relationship between customary international law and the other sources listed under Article 38 of the Statute of the International Court of Justice should be considered at a later stage of the Commission’s work, since it was first necessary to have a clear understanding of the two elements of customary international law. With regard to the distinction between customary international law and general principles of law, it was important to differentiate general principles as a type of norm of a more general and fundamental nature from the source referred to in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

25. As noted by the Special Rapporteur in his report, the lack of response from States to the Commission’s request was certainly regrettable, and one might question whether it was a matter of mere negligence or a certain reluctance to engage in a complex and controversial topic. Not only was information on State practice required for the Commission’s process of codification but it was also of great value for the work of international courts and tribunals. The President of the International Court of Justice had recently highlighted the fact that the Commission’s work facilitated the Court’s task in identifying evidence of State practice and had further explained that the Court accepted the Commission’s codification work as

customary, with little or no further comment.<sup>134</sup> With regard to intergovernmental actors, the Commission should address the role of United Nations resolutions in the formation of customary international law, which the International Court of Justice had also addressed, namely in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and in its judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

26. Lastly, with regard to the future programme of work referred to in the last chapter of the report, which some had considered to be far too ambitious, it was his understanding that the Special Rapporteur intended to remain focused on the main issues of practical value to the current topic, and he was confident that the latter could successfully conclude the topic by the end of the current quinquennium.

27. Mr. WISNUMURTI said that the topic should cover both the formation of customary international law, which reflected a dynamic process, and its evidence, which had a static character. Some members had proposed to simplify the title so as to avoid translation problems by deleting the word “formation”, but he had reservations about that proposal given that he considered the two concepts to be equally important and closely interrelated. He had no problem with draft conclusion 1, provided that the set of conclusions covered the essence of both the formation and evidence of customary international law. He agreed that *jus cogens* should not be included as part of the present topic, even if the Commission might need to take into account rules of *jus cogens* at a later point in its work, and he agreed with the views expressed by the Special Rapporteur in paragraphs 34 to 37 of his report. He also agreed with the Special Rapporteur’s observations concerning the use of the terms “customary international law” and “rules of customary international law”. Draft conclusion 2 deserved the Commission’s attention.

28. With regard to the two conditions that had to be met for the formation and evidence of customary international law, namely practice that was extensive and virtually uniform, and a belief that such practice was rendered obligatory by the existence of a rule of law requiring it, as had been stated by the International Court of Justice in the *North Sea Continental Shelf* cases (paras. 74 and 77 of the judgment), it was worth noting that those two conditions had not been clearly explained or analysed. It was necessary to establish a common understanding as to what was meant by the phrases “settled practice” and “extensive and virtually uniform” practice by establishing criteria relevant to their meaning. The same applied to what was meant by the concepts “evidence of a belief that [a] practice [was] rendered obligatory by the existence of a rule of law requiring it” and “the subjective element ... in the very notion of *opinio juris sive necessitatis*”.

<sup>133</sup> See *Yearbook ... 2012*, vol. II (Part Two), paras. 169–191.

<sup>134</sup> Tomka, “Custom and the International Court of Justice” (footnote 129 above), pp. 202–203.

29. It was interesting to note, as indicated in paragraphs 94 to 101 of the report, that the traditional approach to the formation and evidence of customary international law had been criticized and that the proponents of a modern approach were in favour of reducing the role of *opinio juris*, or conversely, relaxing the practice requirement and focusing instead on *opinio juris*. He was of the view that the Commission should retain the two-element mode, it being understood that flexibility was needed to determine which of the two should take precedence. Finally, while it might be true that the Special Rapporteur's programme of work was too ambitious, the fact that he planned to prepare the final report on the topic in 2016 showed that he had set a target that he intended to achieve.

*The meeting rose at 12.45 p.m.*

### 3184th MEETING

*Tuesday, 23 July 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Formation and evidence of customary international law (continued) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)**

[Agenda item 8]

##### FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the first report of the Special Rapporteur on the topic of the formation and evidence of customary international law (A/CN.4/663).

2. Mr. GÓMEZ ROBLEDÓ said that the study of the topic should focus on the different lines of legal reasoning used to determine that a rule was part of customary international law. The context in which that finding was made—whether it was a court or a State that sought to establish the existence of the rule—should also be taken into account.

3. He considered the approach based on Article 38, paragraph 1 (b), of the Statute of the International Court of Justice to be appropriate, but as that provision was not exhaustive, account should also be taken of other sources of international law and the practice of the various actors that contributed to the formation of rules of customary international law. By way of example, he cited the 1969

judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, particularly the arguments contained in paragraph 73 thereof. It should be made clear to national courts that when there was an applicable rule of customary international law, they were obliged to apply it. It might also be worthwhile to include a brief introduction to the draft conclusions, explaining what was to be understood by “sources of international law”.

4. He commended the Special Rapporteur on his analysis of the two opposing theories, “traditional” and “modern”, about the formation of customary international law. He agreed that it made sense to work on the basis of the traditional, namely two-element, model of custom formation, but thought the Special Rapporteur could perhaps develop further the arguments for disregarding the modern theory. Given that the two-element model had been chosen, did that mean that in order for a rule of customary law to be identified both of the constitutive elements of custom formation, State practice and *opinio juris*, needed to be given equal weight?

5. With regard to the role of the International Court of Justice in the identification of rules of customary law, he said the Court did not have to prove the existence of the rules of customary law that it invoked: that was the responsibility of the States involved in the dispute. The Special Rapporteur should therefore review not only the Court's judgments but also the arguments presented by the parties in order to draw conclusions about how States identified and proved the existence of rules of customary international law.

6. He stressed the difficulty of finding evidence for elements of customary law in the rulings of national courts, particularly in countries with a neo-Roman legal system, because of their reluctance to base their decisions on customary law as opposed to written law. Nevertheless, the Mexican Supreme Court, for example, had developed innovative mechanisms to incorporate into the Mexican *corpus juris* the jurisprudence of the Inter-American Court of Human Rights, which occasionally confirmed the existence and validity of rules of customary law.

7. If the decisions of national courts on the existence of rules of customary law were to be taken into account as subsidiary means for the determination of rules of law, in accordance with Article 38 of the Statute of the International Court of Justice, then to what extent were such decisions binding on third parties, and to what restrictions were national courts subject when identifying such rules? Another question to consider was what happened if a decision of a national court diverged from what the State revealed through its conduct.

8. If the final conclusions to be presented by the Special Rapporteur were used by national courts, then the courts would be converted into another principal actor in the formation of such rules. National courts certainly contributed to the identification of rules, but it was more controversial to argue that they were actors in their formation. That subject could be given more thorough consideration in future reports.

9. The legal effects of the identification of customary international law by specialized institutions such as the

ICRC or the International Law Association could be studied in detail. The Special Rapporteur might include in his next report a section dealing with the work done by Jorge Castañeda on the legal effects of United Nations resolutions.<sup>135</sup> With regard to terminology, it might be more appropriate to refer to formation and identification rather than to formation and evidence of customary international law.

10. Referring to paragraphs 34 and 35 on the relationship between customary international law and treaties, he said that what happened when a treaty contradicted customary law and whether there was a hierarchy among those sources needed to be considered. He asked why paragraph 37 on acts of comity and courtesy had been included in the chapter on sources. In one case that he knew of, an act of comity had been invoked as the basis of an executive decision in the United States to comply with a judgment of the International Court of Justice.

11. Mr. CANDIOTI commended the Special Rapporteur on his pragmatic and descriptive rather than prescriptive approach. He would support a new request to States to provide documentation to facilitate an analysis of how customary international law was identified in State practice.

12. On terminology, he would favour using the phrase “customary international law”, as featured in the report, over “international custom”, as in Article 38 of the Statute of the International Court of Justice. He agreed with the Special Rapporteur that the most appropriate title for the topic was “identification”, not “formation”, of customary international law. Given the confusion surrounding the subject, it was of paramount importance that the Commission help to ensure greater terminological and conceptual clarity. He agreed that it was not advisable to address *jus cogens*.

13. As to the definition of customary international law, he stressed the importance of distinguishing it from other sources of international law. It was necessary to take into account not only the sources of law listed in Article 38 of the Statute of the International Court of Justice but also other new sources. He supported the programme of work proposed by the Special Rapporteur for the coming years.

14. Mr. GEVORGIAN said that, although the difficulty of assessing State practice often made it hard to identify rules of customary international law, those rules had to be predicated on a careful analysis of practice, rather than on abstract reasoning. In principle, he shared the basic premises underpinning the report. He agreed with the Special Rapporteur that the guidance to emerge from the Commission’s work should be of theoretical and practical use to specialists and non-specialists alike; its main value would lie in preventing the incorrect use of a rule of international customary law.

15. He could not agree with the idea of not using the word “formation” with reference to the topic. In order to establish the existence—or non-existence—of a rule of

customary international law, the whole process of its formation had to be analysed. He did agree with the Special Rapporteur and others, however, that the topic’s title must accurately convey, in all six languages, the intended scope. That meant, in his opinion, conveying the idea that in order to determine that a rule of customary international law existed, the whole course of events whereby the international community came to see a certain historical development as reflecting a customary rule had to be studied.

16. As the Special Rapporteur noted in paragraph 19 of the report, customary international law constituted a single, unified system of law and the process of its formation should not be addressed in a fragmented manner, from the standpoint of the various branches of the law. The first draft conclusion, contained in paragraph 23 of the report, was a good basis for future work. Rules of *jus cogens* should not be studied as part of the topic, since how they were formed remained a mystery, as Sir Ian Sinclair had rightly pointed out.<sup>136</sup> Still, they had not simply come down from the heavens, either: they had been produced by human activity, and they were mentioned in articles 53, 64 and 71 of the 1969 Vienna Convention. He agreed with other members of the Commission that they could be rooted both in custom and in treaties.

17. In paragraph 31 of the report, the Special Rapporteur referred to the sharp criticism to which the wording of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice had been subjected. Nevertheless, he himself agreed with other members that the Commission should not turn its work on the topic into yet another commentary to that provision, the significance of which was hard to overestimate, even though it contained a logical contradiction. It characterized international custom as evidence of general practice, when in fact the opposite was true: general practice was evidence of the existence of international custom. In that context, it would be more accurate to say that recognition, not of practice, but of the conduct constituting such practice, was what created a legal rule.

18. Another difficulty inherent in the wording of the Statute of the International Court of Justice was the use of the term “general practice”, which served as the basis for either denying that particular local rules might exist in international law, or confirming that the definition of international custom in Article 38 referred solely to universal or generally recognized customary rules. For that reason, he endorsed the statement in paragraph 33 of the report that it was necessary to consider the relationship between customary international law and the other sources of law listed in Article 38, paragraph 1.

19. He likewise endorsed the view expressed in paragraph 34 that the relationship between customary international law and treaties was an important aspect of the topic. That relationship was nothing if not complex, especially with the trend towards closer links between the two sources. Treaties could embody existing rules of customary international law, create new customary rules or serve as evidence, or lack thereof, of their existence.

<sup>135</sup> See J. Castañeda, *Legal Effects of United Nations Resolutions* (New York, Columbia University Press, 1969).

<sup>136</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester, Manchester University Press, 1984), p. 224.

Treaty-based rules could turn into rules of customary international law, and if that transition occurred, as article 38 of the 1969 Vienna Convention stipulated, then all States without exception could demand compliance with the treaty's provisions, regardless of whether they were parties thereto.

20. It was inaccurate, to say the least, to suggest that customary international law was less important than treaties as a source of international law. Rules of customary international law could fill lacunae in treaty law. The 1969 Vienna Convention even stipulated that the rules of customary international law would continue to govern questions that had not been regulated by the Convention.

21. He agreed with the Special Rapporteur that a distinction had to be drawn between customary international law and general principles of law, for which purpose a definition of the latter might need to be developed. Drawing a distinction was no easy matter: for example, was *pacta sunt servanda* a general principle, a rule of customary international law or a treaty rule? The criterion might be the presence or the absence of actual State practice. He also endorsed what was said in paragraph 38 of the report about looking at how States and courts went about identifying the sources of the law.

22. As terminology was extremely important, a list of terms and their definitions would be of great assistance, especially to practitioners who were not specialists in public international law. The proposed wording of draft conclusion 2 (a) was excellent, although it might be wise to think about subsuming the phrase “rules of customary international law” in the definition of “customary international law”. In paragraph 2 (b), it might be advisable to consider the relationship of national legislation and decisions of national courts to the formation of international custom. Extreme caution was required, however, when referring to the practice of national courts. Such practice could be used only as confirmation of the existence of rules of customary international law that were binding on a given State, not as pointing to the emergence of rules of customary international law. What constituted the State practice that created international custom must also be analysed. Did it include official statements at international conferences, or “passive” practice, such as refraining from expressing opposition to the acts of other States? When defining “State practice”, characteristics such as uniformity, generality and consistency, referred to in the memorandum by the Secretariat (A/CN.4/659), had to be borne in mind.

23. The attitude of States towards the decisions adopted by international organizations, for example General Assembly resolutions, might be used—with all due precaution—to identify *opinio juris*. States could recognize an emerging customary rule either expressly or tacitly, the advantage of the former being clarity about whether a State was bound by a given customary rule. In the absence of such express recognition, how could *opinio juris* be established? That was a question that merited careful study.

24. He endorsed the future programme of work set out in paragraph 102 of the report.

25. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur's first report accurately reflected the three main questions that arose in connection with customary international law: what elements defined the emergence of a rule of customary international law, and by what process was such a rule formed? How could the existence of those elements and the completion of the formation process be ascertained? What was the role of custom in contemporary international law? In addressing those questions, the Commission was revisiting a classic issue of international law that had already been abundantly addressed by scholars and research institutes, in particular the International Law Association. The challenge was to find a way to deal with the issue in such a way as to offer added value to what had already been achieved by others.

26. In introducing his first report, the Special Rapporteur had proposed an alternative title for the topic that offered a good starting point. The decision on the title was not just a matter of wording: it would define the scope of the Commission's work. The title should make explicit reference to the evidence, or determination, or identification, of customary international law. The use of the word “*documentación*” to mean “evidence” in the current Spanish version of the title was inappropriate. The word referred to the documentary substantiation of certain elements in order to prove or identify the existence of customary international law, and not to the act of proving or identifying. She did not see Mr. Murphy's proposal to change the title simply to “Customary international law” as the wisest option. Even though it had the advantage of being simple, it left the scope of the Commission's work too broad and ill defined.

27. As other speakers had noted, the formation and the evidence of customary international law were two distinct concepts; however, in addressing the task of identifying or proving whether the requirements for the emergence of a rule of customary international law had been met, the Commission would inevitably make pronouncements on the basic characteristics of those requirements and how they related to and interacted with each other. While she did not have any problem with taking on that task, she felt that it should be done with extreme caution, without entering into a purely theoretical debate. In that connection, she found some of the Special Rapporteur's doctrinal analyses in paragraphs 96 to 101 of the report to be somewhat worrying, as they seemed to enter into an ideological debate only marginally related to the system of sources of international law with which the topic should rightfully be concerned.

28. Divergent views had been expressed as to what was meant by finding evidence of or identifying a rule of customary international law, and what materials were to be used to substantiate such findings. In her own view, the general nature of customary international law implied that the range of materials to be used should be broad and sufficiently representative of the sources of information to be found worldwide. It should also be recalled that customary international law, as a formal source of international law, was characterized by its procedural flexibility, that being its main virtue and something to be preserved. Accordingly, the Commission should take care to ensure that its treatment of the topic did not lead to the formalization or straitjacketing of customary international law.

29. On the question of whether to include *jus cogens* in the Commission's work on the topic, she thought it should be excluded, not because it would complicate the Commission's work, but because it was a separate issue, although it did share some common ground with customary international law. The Commission would be doing a disservice to international law if it reduced *jus cogens*, which was an essential and autonomous component of the international legal system, to the identification of a customary rule. If the Special Rapporteur found it necessary to refer to *jus cogens*, he should do so briefly, and primarily to differentiate it from customary international law as a formal source of the law. Any other approach would be technically unsound. However, the Commission might wish to take up *jus cogens* independently, as had been proposed.

30. The use of the term "general international law" was not consistent with the aim of the current topic and was potentially misleading. The term was not synonymous with "customary international law". On the contrary, general international law encompassed customary international law, but also included other no less important categories, such as general principles of law. A reductionist approach to general international law would have serious and far-reaching consequences for the system of sources of contemporary international law and should be avoided.

31. In paragraphs 94 to 101 of his report, the Special Rapporteur referred to the fact that the various approaches used had sometimes been labelled as "traditional" and "modern". The use of those terms was inappropriate for two reasons: first, they were not sufficiently descriptive of the rationale behind certain approaches to customary international law; and second, they might bring in ideological aspects that it would be best to avoid. For example, the "traditional" approach was decried as having a "democratic deficit" and as being incompatible with basic human rights. Such arguments were difficult to sustain, especially if one looked closely at actual practice in contemporary international law. Nevertheless, the arguments were a good illustration of the problem facing the Commission, which was how to properly delimit the scope of the topic. If the topic included proving or identifying the existence of customary international law, then the arguments were irrelevant. If, on the other hand, it involved analysing the process and constitutive elements of the formation of customary international law, then the arguments took on greater relevance. However, she did not believe the Commission should take the second approach.

32. In paragraphs 86 to 93 of his report, which concerned the work of other bodies, the Special Rapporteur had included institutions and aspects of practice that, in her view, were not comparable. The ICRC did not have the same status as the Institute of International Law, and the International Law Association's work could not be compared to the ICRC project on customary international humanitarian law or to the American Law Institute's *Restatement of the Law Third*, of the foreign relations law of the United States.

33. Although the Special Rapporteur did not intend the draft conclusions to be sent to the Drafting Committee yet, the Commission should never lose sight of the aim of its work under the topic, which was to offer guidance

to those called upon to apply rules of customary international law on how to identify such rules. With that in mind, the Commission should formulate substantive conclusions, not generic ones. In view of the number and complexity of the subjects to be addressed, the proposed future programme of work appeared to be too ambitious for the Commission to complete in the next three years.

34. Mr. SABOIA said that the first report was precise and well substantiated. With regard to the title and the scope of the topic, while he understood the need to be consistent with the goal of establishing clear and pragmatic conclusions to provide guidance to practitioners, he agreed with others that leaving aside the aspect of formation would deprive the topic of an important element. He could accept the title "Identification of customary international law" on the understanding that formation would also be dealt with.

35. In order to remain relevant, customary international law should stay faithful to its two traditional pillars—State practice and *opinio juris*—but be flexible enough to incorporate aspects derived from the dynamics of international relations since 1945, and in particular in the past 20 years.

36. The relevance of the practice of the United Nations and its organs as well as international and regional organizations had become of paramount importance in shaping rules governing the behaviour of States and other actors worldwide. While resolutions and other decisions of international organizations were means of expressing the practice and *opinio juris* of States in a non-binding manner, in many cases non-universal bodies, in particular the United Nations Security Council, adopted decisions that were binding on all States, even those that had expressed their opposition to the decisions. The increased recourse by the Security Council to decisions under Chapter VII of the Charter of the United Nations could not be ignored, and the competence of the Security Council had been extended to fields previously reserved to negotiations among States.

37. Specialized organizations and their governing bodies took decisions that regulated the operations and practices of State organs in the technical, scientific and cultural fields. Although States had agreed to the conventions establishing the specialized agencies, the executive or governing bodies thereof, frequently limited in their composition, had undeniably acquired broader powers over time. Those developments had rightly been recognized in the report, in the proposed draft conclusion 2 (b) and in paragraphs 48 to 53, on the approach of States and other intergovernmental actors.

38. As to whether there were different approaches to the formation of customary international law and its evidence in different fields of law, it was likely that more weight was given in certain areas of law to the use of certain materials compared with other sources. That did not entail a risk of fragmentation of international law or a threat to its existence as a unified system, however; it merely corresponded to the need to adequately address the specific nature and requirements of particular branches of international law.

39. He joined the emerging consensus with respect to the Special Rapporteur's proposal that *jus cogens* should not specifically be addressed under the topic, but neither should it be ignored when a reference to it might be useful.

40. The case law of the International Court of Justice was undoubtedly of major importance, notwithstanding the limited guidance given by the Court itself on how a rule of customary international law was formed and was to be ascertained. Advisory opinions might also deserve special consideration as a source of *opinio juris*. In that regard, the Court's advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons*, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* could be relevant for the Commission's consideration of the topic.

41. Coming from Latin America, a region with a long history of work in international law, he could only support the proposal that the study of regional customary law be included in the topic. Attention could also be given to cases where practice had started as regional custom and had later acquired more universal recognition. The case law of the Inter-American Court of Human Rights had undoubtedly acquired very broad authority worldwide.

42. Mr. PETER said that as part of the work on the topic, the Special Rapporteur should set clear criteria to be used in identifying specific rules of customary international law and indicate what type of evidence was appropriate for that purpose. The criteria should be aimed at answering specific questions such as: How many States had to practise a particular rule, and for how long, before it was recognized as customary international law?

43. The Special Rapporteur should also indicate which rules of customary international law had become obsolete or lacked legitimacy. The question of what did or did not constitute customary international law was highly controversial. Some jurists, himself included, regarded the current body of customary international law as comprising rules developed by only a segment of society and imposed on the rest. They had been carved out at a time when a large portion of the world's population had no voice in establishing the laws that governed them. In 1945, when the United Nations was founded, only a very few of the current 54 member States of the African Union enjoyed the status of independent States. Nearly all the rest had been colonies in various guises, such as mandated territories, trust territories and protectorates. They were objects, not subjects, of international law, which was applied to them in the form dictated by their colonial masters. As a result, they had not participated in the creation of any type of international law, including customary international law.

44. The very language used in certain instruments from that period of history excluded African countries. The often-cited Article 38, paragraph 1 (c), of the Statute of the International Court of Justice referred to the general principles of law recognized by "civilized nations". At the time, colonies did not qualify as either civilized or

as nations. Customary international law had thus been created by a few States that had declared their customs to be international and universally applicable, with no regard for the opinion of all the other States.

45. The current topic presented an opportunity to correct that historical mistake. He urged the Special Rapporteur to challenge some of the so-called "established" rules of customary international law through the rigorous application of the identification criteria to which he had alluded previously. To embrace the current system and recommend only cosmetic changes would amount to a serious failure and be a disservice to the international community. What he was requesting fell within the mandate of the Special Rapporteur and required boldness and courage on his part.

46. As to the question of whether there were different approaches to the formation and evidence of customary international law, he disagreed with Judge Greenwood's declaration in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (compensation owed by the Democratic Republic of the Congo to the Republic of Guinea) that international law was a "single, unified system of law" (para. 8 of the declaration). In his own opinion, the approaches to the formation and evidence of customary international law would never be uniform: it was only the application of customary international law that could be uniform. The rules of customary international law pertaining to a particular branch of law tended to emerge, develop and consolidate according to a variety of factors, including the frequency of their use and application and the number of people or groups involved in that particular branch. He cited as an example the valuable contribution made by the ICRC to the development of international humanitarian law. In any area where there were dynamic interest groups, the law would be much more advanced than in others, and in different branches, the law would be found to have developed in very dissimilar ways. He knew that the Special Rapporteur was not in favour of breaking the law up into different specialist fields. However, he himself believed that the question of international law developing as one system of law did not even arise.

47. The Special Rapporteur, when hunting for possible sources of customary international law, should take into account the case law of subregional courts in Africa. In the section of his report on the contribution of domestic courts to the creation of customary international law, he had selected examples from a cross section of jurisdictions; however, the variety of those examples should be expanded even more in future reports.

48. In the section on scholarly writings, the Special Rapporteur seemed not to have ventured beyond the best-known literature and ideas. Asia and Latin America had doubtless produced their fair share of the world's finest legal minds, and there were legal luminaries from Africa who had made tremendous contributions to the development of international law. Few of them, however, had been referred to in paragraphs 94 to 101 of the report. In his next report, the Special Rapporteur should include a more balanced selection of the literature on customary international law from the developing countries.

49. The topic of customary international law had attracted much attention in legal circles and had elicited genuine interest in the international community. The quality of the Commission's reports and its debate on the topic, as well as the courage with which it handled its work, could help to sustain that excitement and ensure that it made a genuine difference in that important branch of international law.

50. Ms. JACOBSSON said she agreed with the definition of the scope of the topic proposed by the Special Rapporteur and with the wording of draft conclusion 1. She preferred the original title of the topic to the proposed alternative formulation. References in her statement to the "rules of customary international law" should be understood to include norms and principles as well.

51. Judges and adjudicators as well as government lawyers had to identify customary law and its genesis by investigating the formation of a rule and the evidence of its existence. That legal analysis had to address both process and content, although understanding the process by which States formed and identified customary international law was complicated by a lack of official documents and States' potential unwillingness to disclose how they went about the process. Unofficial State practice accordingly played an important role in the formation and evidence of customary international law and needed to be dealt with by the Commission.

52. For several years, the *Nordic Journal of International Law* had contained a section on Nordic State practice, but it was always difficult to elicit contributions from Nordic legal advisers. For that reason, it would probably prove hard to gather the relevant information. Governments and domestic courts did not necessarily take the same position on matters of international law, hence caution was needed in any attempt to use domestic court cases to elucidate the formation process of customary international law.

53. The expansion of the exclusive competence of the European Union had made it difficult to distinguish between an expression of a customary rule of the Union and a customary rule of the individual member States. While the organization might speak as a subject of international law and announce what it considered to be a rule of customary international law, the formation of that view was often preceded by lengthy discussions among member States which frequently advanced *opinio juris* arguments. As a result, the process leading up to the decision could be part of the formation of customary law and evidence of a rule thereof. Similarly, if an international court found that the European Union's interpretation of a rule of customary international law in an area where it had exclusive competence accurately reflected customary international law, it would be difficult to maintain that the practice did not amount to State practice.

54. General Assembly resolutions and the decisions of the Security Council had a role to play not only in the formation and evidence of customary international law but also as estoppel of its formation, as had been the case with Security Council resolution 1838 (2008) of 7 October 2008 on acts of piracy. Thus the practice of international organizations could not be disregarded.

55. A treaty could also signal intent to prevent the development of a rule of customary international law. While the provisions of such a treaty clearly applied to the parties thereto, would they apply in relations between a State which was a party and a State which was not? The formation of a rule in bilateral relations would necessarily be different than the formation of a rule of customary international law applicable to all States.

56. A distinction should also be drawn between evidence of the formation of geographically restricted regional State practice and of functional regional practice. While it was important to uphold a uniform system of international law, it was impossible to conclude that all customary law must have been developed, or must be developed, in an identical manner. Another question was whether the elements of the formation of a rule of customary international law should be given different weight in disparate situations.

57. The customary law process did not stop when a rule emerged, as Professor Mendelson of the International Law Association had pointed out.<sup>137</sup> The process evolved over time in a changing world. Some rules stood for decades, while others developed more quickly, and not all States could take an active part or play an equal role in their formation, hence the procedure for identifying the existence of those rules was different. It was likewise important to study the process of how a rule of customary international law might vanish.

58. The formation of a modified rule of customary international law might also be addressed. For example, freedom of the high seas was one of the classic principles of customary international law. The content of the principle had been modified through the centuries by both treaty provisions and State practice. The process by which the modified content was formed was probably not identical to the process used when the principle was first identified, however.

59. The increasingly frequent assertion by States that they were applying a rule of international law as a matter of policy rather than of law signalled a lack of *opinio juris sive necessitatis*, although it was clearly an example of State conduct. Did such an assertion by a State mean that it could prevent a rule from being recognized as a rule of customary international law?

60. While *jus cogens* could not be totally excluded from the consideration of the topic, it should not be studied in depth, since any discussion of the formation and evidence of *jus cogens* automatically entailed a risk of having to address the substance of the *jus cogens* rule itself. Moreover, *jus cogens* deserved separate study as a topic in its own right.

61. The Special Rapporteur had outlined the right course for consideration of the topic. However, undue emphasis should not be placed on court cases or the wording of Article 38 of the Statute of the International

<sup>137</sup> M. H. Mendelson, "The formation of customary international law", *Collected Courses of The Hague Academy of International Law*, 1998, vol. 272, pp. 155-410, at p. 188.

Court of Justice. Whether that article actually contained a complete list of sources of international law was a matter that needed to be discussed. Some attention should also be paid to the relationship between the formation of customary international law and general principles of law. In future work on the topic, it was vital to preserve the flexibility of the customary process.

62. Mr. EL-MURTADI SULEIMAN GOUIDER said that, in the light of the discussions both in the Commission and in the Sixth Committee, it was clear that the scope of the topic and its title in particular needed to be revisited. The report stated that the central issue was the “identification” of customary international law—in other words, the determination of whether a rule of customary international law existed. Accordingly, a title such as “The determination (ascertainment) of the existence of rules of customary international law” would be a better match for the scope of the topic, and would have the advantage of avoiding any mention of “formation” and “evidence”, thus circumventing all the reservations raised in that regard. There was no need to address the issue of peremptory norms (*jus cogens*), since the majority of members both of the Commission and of the Sixth Committee had agreed to exclude them, owing to the ambiguities and difficulties involved.

63. In addressing customary international law as a source of international law, the report mentioned, among other major sources, Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, with its reference to “international custom, as evidence of a general practice accepted as law”. That text, addressed to the International Court of Justice alone, had been, and still was, subject to much criticism. The phrase “evidence of a general practice accepted as law” had triggered questions about whether the subjective element was voluntary. Some argued that the paragraph would have been more precise if it had referred to “established custom consistent with a general practice accepted as law”, thereby making the relationship between the rule and its constitutive elements more logical.

64. Yet there was no choice but to deal with the article and with the dual requirements on which it had conditioned the formation of customary international law: practice and *opinio juris*. The mention in some treaties of international custom had no bearing on the evolution of customary rules from those two sources. It only pointed to the idea that the courts had to apply treaties, as special rules, before applying customary norms, as general rules.

65. Treaties, in particular treaties intended for the codification or progressive development of international law, were part of State practice relevant to the identification of rules of customary international law. In its judgments in *Military and Paramilitary Activities in and against Nicaragua* and the *North Sea Continental Shelf* cases, the International Court of Justice concluded that a rule set out in a particular treaty could become a new rule of customary international law. Customary law had lately been marked by a close relationship with written texts that was the starting point for the formation of customary rules, and in some instances the basis for the identification of certain rules.

66. He agreed with the Special Rapporteur’s proposals regarding terminology. It would unquestionably be useful to prepare a short lexicon of relevant terms in the six official languages of the United Nations. However, every language had its own spirit transcending the words, and in his experience, no sooner was a debate on terms closed than a new one started up.

67. Concerning the range of materials to be consulted, there was no doubt about the distinct status of the approaches or practice of States, described as “extensive and virtually uniform” by the International Court of Justice in the *North Sea Continental Shelf* cases (para. 74). Such practice was not limited to the unilateral behaviour of individual States. It went further, to the rich and important practice of groups of States: joint action, statements, declarations and the resolutions of United Nations organs and treaty bodies. The elements of customary international law were thus strongly tied to the will of States. The exercise of identifying those elements was largely about gathering facts that made it possible to determine the existence of a customary rule and the process leading thereto. It was no easy task, especially in view of the large number of States and international organizations holding diverse positions and coming from different backgrounds.

68. That might explain why only a limited number of States had so far responded to the Commission’s request for information on State practice. Apart from practice at the group level, there was some limited unilateral State practice on the part of the so-called “newly independent States” which had objected, soon after their creation, to a number of rules of customary international law, arguing that they had not participated in their formation.

69. The approach of international organizations and other intergovernmental actors could also prove valuable when surveying practice. For example, in its 1980 advisory opinion on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*,<sup>138</sup> the International Court of Justice appeared to have inferred from the agreements between States and international organizations some customary rules relating to the rights and obligations of the organizations and of host countries. The Court had relied on three resolutions passed by the General Assembly to conclude that the principle of permanent sovereignty over natural resources was one of the principles of customary international law, although it had found that the principle did not apply to the case under consideration. Some argued that the study of the practice of international organizations should take account of the limited spheres of competence of such organizations, while others tended to consider many aspects of practice such as that of the General Assembly to pertain more to State practice than to that of organizations.

70. Among the materials to be consulted, the report included the case law of the International Court of Justice, which was entrusted with the central task of verifying customary law, as well as interpreting treaties. The Court

<sup>138</sup> With regard to the text of the Agreement for the purposes of determining the privileges, immunities and facilities to be granted in Egypt by the Government to the Organization, signed at Cairo on 25 March 1951, see United Nations, *Treaty Series*, vol. 223, No. 3058, p. 87.

ascertained customary rules and their contents based on the important resource materials available to it and thanks to the high technical expertise of its judges. While the Court's rulings pertaining to the formation of customary rules were sometimes described—including in the dissenting opinions of its own judges—as vague, inconsistent and failing to analyse extensive and convincing practice, their important contribution to the elucidation of customary law was well recognized. In several cases, notably those involving maritime delimitation, the Court's role had extended beyond merely stating customary rules to inferring general principles from them.

71. He welcomed the fact that the activities of several international courts and tribunals were to be addressed in future reports, as was the work of other bodies. All of those activities dealt with, and had an impact on, customary international law. With regard to the future programme of work, he was confident in the Special Rapporteur's ability to overcome the "serious difficulties", as the International Law Association had put it, that were inherent in setting out the rules of customary international law.<sup>139</sup>

*The meeting rose at 1.10 p.m.*

### 3185th MEETING

*Wednesday, 24 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Formation and evidence of customary international law (*continued*) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)**

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the first report of the Special Rapporteur on formation and evidence of customary international law (A/CN.4/663).

2. Mr. HUANG congratulated the Special Rapporteur on the pragmatism of his first report and the clarity of

his approach. With regard to the title of the topic, in addition to the current title, the Special Rapporteur had proposed "Identification of customary international law" or "Determination of customary international law". The wording should be considered in the light of the purpose of the project. Seen from that angle, the current title and the first proposal, which were very similar, were both acceptable, although the latter had the advantage of being more concise. The third proposal, however, was not appropriate, as it might give the impression that the Commission was assuming the authority to determine what was customary international law. The outcome of the Commission's work should be a set of conclusions or guiding principles, as had been proposed by the Special Rapporteur. The guidelines should be both specific and flexible so as to maintain the discretionary power of judges who would have to apply them.

3. In taking into account possible differences in the criteria for formation and evidence of customary international law in the various branches of international law, a uniform approach should be adopted that highlighted criteria that were universally applicable to all fields of international law by all members of the intended audience, so as to avoid any further fragmentation of the law that would weaken customary international law.

4. He agreed with the opinion expressed by most members of the Commission that *jus cogens* should not be included in the scope of the topic. Indeed, as could be seen from article 53 of the 1969 Vienna Convention, *jus cogens* differed from customary international law in that it was of greater normative value and was not one of the formal sources of international law. With regard to the relationship between customary international law and other sources of international law, the role of treaties in the formation and evidence of customary international law should be considered. Could the existence of a universal rule of customary international law be inferred from a treaty, for example? That was what the Special Rapporteur seemed to imply when he suggested the need to collect cases in which a rule of customary international law had been identified without any reference to the criteria of practice and *opinio juris*.

5. Lastly, with regard to general principles of law, he noted that he, like other members, was uncomfortable with the differentiation from customary international law and that perhaps they might be considered customary rules.

6. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for the outstanding quality of his analysis and welcomed the very useful memorandum by the Secretariat (A/CN.4/659). He generally agreed with the approach to the topic adopted by the Special Rapporteur in his first report.

7. Bearing in mind the objective set for the Commission's work on the topic, it seemed appropriate not to separate the issues of identification and formation of rules of customary international law, as there were close links between identification and the method of formation. The title "Identification of customary international law" was acceptable, however. With regard to the outcome of the Commission's work, a set of conclusions with

<sup>139</sup> International Law Association, final report of the Committee on Formation of Customary (General) International Law, *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 713.

commentaries would certainly be appropriate, provided that they were not overly prescriptive.

8. With respect to the issue of *jus cogens*, it would admittedly be useful for the Commission to study those peremptory norms, which expressed essential values shared by the international community. As the Special Rapporteur stated in his report, however, it would be preferable not to do so as part of the current topic, although that did not mean that reference would not be made from time to time to rules of *jus cogens* in particular contexts.

9. Despite the proliferation of treaties and codification efforts undertaken in various areas of international law, customary law remained a key source of international law, especially as the original rule of customary law remained intact after codification and therefore, as stated by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, two rules with exactly the same content, one a customary rule and the other a treaty rule, could continue to exist separately (para. 178). Moreover, there was no reason why a rule of customary law could not continue to evolve. In general, the Special Rapporteur would at a later stage have to examine the interaction between customary law and treaties which, according to the International Court of Justice in the *North Sea Continental Shelf* cases, had a triple effect on customary law: declaratory, crystallizing and creating. It would be interesting to extend that analysis to a number of non-binding instruments such as certain General Assembly resolutions, as suggested by the Special Rapporteur.

10. Although it had come in for intense criticism, Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, which defined the two components of customary law, remained an authority. Most of the literature and the case law of the international courts and tribunals confirmed that those two elements must be present. The Special Rapporteur should take his analysis of the International Court of Justice's case law a bit further, but some important conclusions could already be drawn. With regard to the material element of customary law, it was clear that the passage of only a short period of time was not necessarily a bar to the formation of a rule of customary international law, provided that State practice during that period had been widespread (*North Sea Continental Shelf* cases). However, the Court did not refer, as had been suggested by certain legal writers, to instant custom, or to immemorial custom for that matter. In the same judgment, the Court specified that the practice must be "extensive and virtually uniform" (para. 74)—but not unanimous. The subjective element of customary law, meanwhile, appeared to be difficult to prove, particularly since, as recognized by the Court in its judgment in the case concerning *Right of Passage over Indian Territory*, it sometimes coincided with the material element. The Court sometimes referred to General Assembly resolutions to prove the existence of *opinio juris*, as in its advisory opinion on the *Western Sahara*, or relied on the response of States to a General Assembly resolution, as in the *Military and Paramilitary Activities in and against Nicaragua* case. Indeed, the Court had highlighted the normative value of those resolutions in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, noting

that the resolutions "provide evidence important for establishing the existence of ... *opinio juris*" (para. 70). It would be a good idea for the Commission to examine the relationship between customary law and the resolutions of international organizations.

11. In addition, it was important to make a distinction between customary international law and "the general principles of law recognized by civilized nations". As could be seen from the *travaux préparatoires* for the Statute of the International Court of Justice, those principles had been added to Article 38 to fill any gaps in the international legal order and avoid *non liquet*. Those principles of law, which were common to all national legal systems, differed from principles of international law. The International Court of Justice had made that point on several occasions, including in the *Ahmadou Sadio Diallo* case. When those general principles of law were repeatedly invoked at the international level, they became principles of customary international law. It was therefore vital to differentiate between general principles of international law derived from national systems, which were a formal source of international law, and principles of international law; in other words, between rules of customary international law and principles of international law. In that regard, it was interesting to note that article 21 of the Rome Statute of the International Criminal Court, on the law applicable by the Court, made a distinction between "principles and rules of international law", which hierarchically came before the "general principles of law derived by the Court from national laws of legal systems of the world".

12. In conclusion, he said that he supported the programme of work proposed by the Special Rapporteur, including the study of regional or local customary law that he intended to undertake.

13. Mr. SINGH congratulated the Special Rapporteur on the quality of his report and his realistic approach to the topic.

14. The topic covered both the formation and evidence of customary international law, as the two were closely related, and, regardless of the Commission's final decision on the title, the Special Rapporteur should continue using the approach outlined in paragraph 15 of his first report. He also supported the Special Rapporteur's proposal concerning the appropriate outcome for the Commission's work and agreed that *jus cogens* should not be included in the scope of the topic.

15. The relationship between customary international law and other sources of international law, including treaties, was an important aspect of the topic. The Special Rapporteur had rightly highlighted the fact that it was generally recognized that treaties could reflect existing or emerging rules of customary international law and serve as evidence of their existence. It was also true that rules of customary international law continued to govern questions not regulated by treaties as well as relations with and between non-parties. When he addressed the distinction between customary international law and general principles of law in his next report, the Special Rapporteur would have to exercise caution in order not to obscure the ultimate objective of the project.

16. The Special Rapporteur's extensive survey of the case law of the International Court of Justice and other international and national courts and tribunals indicated the consistent presence of the two elements of customary international law. However, given the criticism of the case law, the more detailed analysis proposed by the Special Rapporteur for his next report would be welcome. He agreed with the prudence advocated by the Special Rapporteur with regard to the role of domestic courts in the customary law process. With good reason, the Special Rapporteur had noted that, while the prominent role of customary international law had been widely recognized in the literature, scepticism in some quarters warranted a cautious approach.

17. In conclusion, he said that he considered the ambitious workplan set out by the Special Rapporteur to be entirely appropriate.

### Provisional application of treaties

(A/CN.4/657,<sup>140</sup> sect. D, A/CN.4/658,<sup>141</sup> A/CN.4/664<sup>142</sup>)

[Agenda item 7]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR

18. The CHAIRPERSON invited the Special Rapporteur, Mr. Gómez Robledo, to introduce his first report on the provisional application of treaties (A/CN.4/664).

19. Mr. GÓMEZ ROBLEDO (Special Rapporteur) thanked all those who had helped with the preparation of the first report on the provisional application of treaties and briefly reviewed the history of work on the topic. He recalled that, in 2011, Judge Gaja—a former member of the Commission—had presented a working paper on certain legal issues arising from the provisional application of treaties,<sup>143</sup> in which he had highlighted the remarkable variety of provisions on the subject, as well as the need to define the concept in order to determine its legal effects. In 2012, as soon as he had been appointed Special Rapporteur, he himself had conducted informal consultations with the members of the Commission on the issues they considered relevant to the topic. In general, the members had been of the view that the extent to which provisional application of treaties contributed to the process of identifying rules of customary international law should not be considered; that it would be premature to draw up a questionnaire for States; and that it was too soon to decide on the final form of the Commission's work. Continuing with the history of the topic, he drew the members' attention to the memorandum by the Secretariat on the provisional application of treaties (A/CN.4/658), from which a number of preliminary conclusions could be drawn. First, regardless of the modalities, the provisional application of a treaty gave rise to an obligation to implement the treaty or part thereof; second, the mechanism was quintessentially voluntary; and third, the obligation to provisionally apply the treaty came to an end when the treaty entered into force or if final entry into force was unreasonably delayed or clearly ceased to be probable.

<sup>140</sup> Mimeographed; available from the Commission's website.

<sup>141</sup> Reproduced in *Yearbook ... 2013*, vol. II (Part One).

<sup>142</sup> *Idem*.

<sup>143</sup> *Yearbook ... 2011*, vol. II (Part Two), annex III.

20. The main objective of the first report on the provisional application of treaties was to highlight the usefulness of the mechanism: only by so doing would the Commission be able to promote more frequent use of the mechanism by States. The report also dealt with important terminological issues, particularly the distinction between "provisional application" and "provisional entry into force", two expressions that should definitely not be confused, as they referred to two very different legal concepts. With regard to the scope of the topic, for the time being, he had deliberately chosen not to take account of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention)—even though it contained a provision on the provisional application of treaties—as, in his view, it would be preferable to concentrate at that stage of the project on State practice and the regime established under the 1969 Vienna Convention.

21. In paragraphs 25 to 35 of his report, the Special Rapporteur had sought to demonstrate that the purpose of provisional application was to give immediate effect to all or some of the substantive provisions of a treaty without waiting for the completion and effects of the formal requirements for entry into force contained therein. That part of the report contained a list of the primary factors that led States to resort to the provisional application of treaties, namely: urgency, flexibility, precaution and transition to imminent entry into force.

22. Future reports would have to look at whether, in some cases, the legal effects of provisional application of a substantive provision had more to do with the actual content of the provision than with the provisional application mechanism itself. Article 18 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction provided for the possibility of provisionally applying article 1 of the Convention, which stipulated that each State party undertook "never under any circumstances" to use anti-personnel mines. In other words, States that provisionally applied that article undertook to comply with a series of permanent prohibitions. Consequently, the question arose of whether once such an obligation had been undertaken, the application of the treaty was still provisional in nature, or whether there were two kinds of legal effects at work—in other words, whether it was the substantive rule that determined the applicable regime and legal effects of provisional application rather than the residual or auxiliary rule set out in article 25 of the 1969 Vienna Convention. The same question arose with regard to future human rights or international humanitarian law treaties which, by their nature, created individual rights that went beyond simple obligations between parties. Furthermore, given that provisional application arose from the context for the purpose of the interpretation of a treaty, in accordance with article 31, paragraph 2, of the 1969 Vienna Convention, it would be useful to hear the views on the matter of Mr. Nolte, Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties.

23. As pointed out in paragraphs 36 to 52 of the report, provisional application clearly had legal effects; however,

in view of the in-depth consideration it warranted, he proposed that the subject should be dealt with at a later stage. Nevertheless, the Commission could begin right away to study the legal consequences of the violation of obligations undertaken by virtue of provisional application and, if it deemed it relevant, it could also study the international responsibility of States. Should it decide to do so, it would have to give due regard to the views of two Special Rapporteurs on the law of treaties, Mr. Fitzmaurice and Mr. Waldock, who had considered that provisional entry into force had full legal effects. The Commission would have to recall that provisional application came under the scope of article 23 of its draft articles on the law of treaties, as adopted in 1966, which set out the principle of *pacta sunt servanda*.<sup>144</sup> The Commission must also emphasize that provisional application created obligations that went beyond the obligation not to defeat the object and purpose of a treaty prior to its entry into force, as laid out in article 18 of the 1969 Vienna Convention. Obligations arising from provisional application could continue even after the entry into force of a treaty whose ratification had been delayed if the State did not wish to invoke article 25, paragraph 2, of the 1969 Vienna Convention. There was no question about that, and it was particularly true when governments found it difficult to obtain ratification of a treaty by their legislative bodies. Certainly, those were problems of domestic law that, in principle, were of no concern to the Commission, unless its objective was to encourage the use of the provisional application mechanism among States. He would be interested to hear the views of Commission members on that point.

24. The last part of the report contained a list of the various issues that would be addressed in future reports. He had noted with interest the suggestions made by Commission members on the final outcome of the project. He himself still believed that a set of guidelines would better serve the needs of users—governments—than model clauses, which would not be able to give full account of the increasingly diverse range of situations in which States had recourse to the provisional application of treaties.

25. Mr. MURASE said that he was unclear about the purpose of the work on the provisional application of treaties. Was it to supplement the provisions of article 25 of the 1969 Vienna Convention, to elucidate its interpretation or, as seemed more likely, to clarify the potential usefulness of provisional application?

26. The need for provisional application of a treaty in certain circumstances was not disputed. Provisional application was often used to address urgent situations, to deal with legal gaps created by successive treaty regimes or to strengthen transparency and build trust among signatory States. States were therefore aware of the procedure and of its utility in certain exceptional cases. The question that arose was whether the Special Rapporteur intended to promote provisional application in *other* situations. Furthermore, irrespective of its utility, the reasonableness of the provisional application regime should be considered, bearing in mind the specific problems it might cause in relation to domestic law and parliamentary processes in certain countries.

27. The option of provisional application might actually discourage ratification of a given treaty, as had been the case with the Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part. Provisional application could give rise to disputes as to the binding nature of the obligations arising from the treaty, as had been observed in the *Yukos Universal Limited (Isle of Man) v. the Russian Federation* case under the Energy Charter Treaty. In any event, if provisional application did not create binding obligations, States would be able to enjoy the benefits of a treaty without incurring the obligations that would arise upon ratification. As the name indicated, provisional application must be an interim measure pending formal ratification of a treaty. It might therefore be more reasonable to encourage ratification of the treaty rather than allowing provisional application to persist. One solution might be to set a limited period for provisional application or to restrict it to certain exceptional situations.

28. While it might be necessary and reasonable to promote the provisional application of treaties, questions arose as to the Commission's role in that regard. Provisional application should be discussed during the actual treaty negotiation process. It was a highly political issue, as illustrated by the refusal of the Conference of the Parties to the United Nations Framework Convention on Climate Change to provisionally apply the revised Kyoto Protocol to the United Nations Framework Convention on Climate Change in order to fill the gap between two commitment periods. Accordingly, there seemed to be little that the Commission could do in that area, especially as article 25 of the 1969 Vienna Convention already provided sufficiently clear and flexible guidelines to States.

29. Turning to the conclusions enumerated in paragraph 53 of the report, he said that in his view, State practice did not suggest that States were unaware of the mechanism of provisional application, which was used extensively, nor did that practice demonstrate the usefulness of provisional application of treaties. The usefulness of the mechanism should be assessed according to the desired benefits in each case; for example, if the purpose was simply to delay ratification, that would amount to an abuse of the procedure. It might be worthwhile to differentiate between bilateral treaties of a contractual nature and multilateral treaties with law-making objectives. It would be difficult to identify the most common systems of domestic law in matters relating to provisional application, as proposed by the Special Rapporteur. The Commission could perhaps conduct a comparative study of domestic constitutional systems relating to provisional application. It would also be difficult to generalize about the procedural requirements for the provisional application of treaties, which depended on the specific nature of the agreement that incorporated provisional application and were therefore very diverse. The relationship between the regime established under article 25 of the 1969 Vienna Convention and other provisions of international law was not entirely clear. Article 18 of the Convention might be relevant if the Commission was to consider the legal effect of non-ratified treaties, but it did not seem a good idea to extend the scope of the topic to include that. The legal effects of the provisional application

<sup>144</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 210–211.

of treaties and, thus, the legal consequences of a violation of the obligations created by provisional application could only be determined on a case-by-case basis.

30. In conclusion, he stressed the need to encourage the ratification of treaties rather than their provisional application.

31. Mr. KITTICHAISAREE congratulated the Special Rapporteur on his first report and welcomed the memorandum by the Secretariat on the negotiating history of article 25 of the 1969 Vienna Convention.

32. The Special Rapporteur should have provided more detailed explanations on the potential conflict between international law and constitutional law in relation to provisional application of treaties (para. 35 of the report). The statement in paragraph 44 that “in principle, domestic law does not constitute a barrier to provisional application” was contradicted when one took the example of the Constitution of Thailand, which stipulated that a number of internal formalities had to be carried out prior to the conclusion of certain types of treaties, thus posing an obstacle to their provisional application. The concerns raised by some States at the United Nations Conference on the Law of Treaties with regard to respect for their domestic law were still valid today. The guidelines or model clauses that the Special Rapporteur would like the Commission to develop would not be used by States until that conflict was resolved. In that regard, it would be a good idea, as proposed in subparagraph 53 (c) of the report, to conduct an in-depth analysis of the relevant State practice and to suggest solutions to the conflict.

33. With respect to the legal effects of the provisional application of treaties, mentioned in subparagraph 53 (f) of the report, it would be appropriate to differentiate between the provisional entry into force of a treaty and its provisional application; to draw a distinction between provisional application of a treaty and provisional or interim agreements; to see whether the legal effects of the provisional application of treaties were based on the nature of the collateral agreement between the parties; and to explore the legal relationship between parties that had accepted the provisional application of a treaty or part thereof and third parties.

34. Mr. PETRIČ said that the new topic was both problematic and broad in scope. Provisional application of treaties in itself was a useful procedure when used as an exception. No rules could be derived from it, as that would be contrary to certain fundamental values of the contemporary democratic world. The Commission’s objective should therefore be to gain a better understanding of the procedure and to elucidate it, possibly in the form of conclusions with commentaries, but certainly not to promote the practice.

35. There were two important elements at the centre of the topic: the impact of the provisional application of treaties on legal certainty and the relationship of provisional application with domestic constitutional systems. Provisional application of treaties was often used as a means of avoiding war, as had been the case

with the Trieste conflict, provisionally regulated in 1954 by a Memorandum of Understanding that had been applied until the Treaty of Osimo was adopted in 1975.<sup>145</sup> However, it was conceivable that, without that treaty, the provisional arrangement, which dealt only with boundary issues and not with sovereignty, could have continued to be applied until 1991, at which point Italy, in the face of the breakup of Yugoslavia, could have imposed its unilateral vision of sovereignty over Zone B of the territory. The provisional application of treaties was thus closely linked to legal certainty. It also overlapped with constitutional law, as had already been mentioned by other members. The case of Thailand had been cited, but in Slovenia, too, provisional application of a treaty raised issues of constitutional compliance.

36. Turning his attention to the content of the Special Rapporteur’s first report, he said that while the analysis of practice could certainly be brief initially, in its later work, the Commission would have to rely much more on practice than on the literature. In particular, it would have to address the practice of the European Union, given the complexity of applying treaties in 28 States, and look at the work of the Council of Europe. Although the distinction between “provisional application” and “provisional entry into force” was important, it was particularly important not to deal with provisional application that was not provided for in the treaty itself or in a subsequent agreement, and to always bear in mind, as stated by the Special Rapporteur, that it was a “transitory mechanism”. The purposes of provisional application of treaties listed in paragraphs 25 to 35 of the report were appropriate, with the possible exception of giving greater flexibility to the treaty regime (paras. 28–30). The question arose whether it was right that the provisional application of a treaty enabled constitutional rules to be sidestepped or the treaty to be modified without following the necessary procedure. Caution would need to be exercised on that point. Paragraphs 36 to 52, on the legal regime of provisional application, were also apposite, if only because, contrary to what was stated by the Special Rapporteur in paragraph 44, the issue of domestic law would have to be taken into consideration.

*The meeting rose at 1 p.m.*

### 3186th MEETING

*Thursday, 25 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia,

<sup>145</sup> Treaty between Italy and Yugoslavia on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947, signed at Osimo, Ancona, on 10 November 1975 (United Nations, *Treaty Series*, vol. 1466, No. 24848, p. 25).

Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

**Formation and evidence of customary international law (concluded) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)**

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his first report on formation and evidence of customary international law (A/CN.4/663).

2. Sir Michael WOOD (Special Rapporteur) said that he was grateful to the many colleagues who had taken part in the debate, which had been rich and of very high quality. The debate had been further enriched by coinciding with the Gilberto Amado Memorial Lecture, delivered by Professor Paulo Borba Casella on the subject of *opinio juris*, and by the helpful memorandum by the Secretariat (A/CN.4/659).

3. There seemed to be support among Commission members for the basic approach suggested in his report. While some agreed with his proposed timetable, others doubted the feasibility of concluding work on the topic by 2016. It was not his intention to rush ahead with undue speed: 2016 should be seen as a target, not an absolute deadline.

4. Mr. Murase had again argued that the approach to the identification of customary international law depended on the intended audience. That implied, however, that different persons, addressing different audiences, could with equal validity come to different views. Mr. Murase had also said that each State had its own judicial tradition in identifying customary international law. That, too, seemed to be a denial of the existence of any system of international law. Yet one theme in the report that virtually all speakers had supported was the unity of international law. Mr. Murphy, for example, had drawn attention to the statement in paragraph 1 of the conclusions reached by the Study Group on fragmentation of international law<sup>146</sup> that international law was a system, not a random collection of norms.

5. Mr. Forteau had advocated addressing the nature of the rules governing the identification of rules of customary international law, which were sometimes called “rules of recognition” or “rules about rules”. Mr. Murase had been right to question the use of the term “secondary rules” and the reference, in the first footnote to paragraph 22 of the report, to the articles on responsibility of States for internationally wrongful acts.<sup>147</sup> The

Commission was not concerned with secondary rules, in the sense that the rules on State responsibility or on the law of treaties were secondary.

6. Turning to the relationship of the Commission’s work to that of the International Law Association, which had adopted the London statement of 2000,<sup>148</sup> he said he hoped that the Commission’s product would attract more attention. The fact that the Commission worked in close contact with States and that its product was submitted to the General Assembly gave it a particular quality and standing. There was also now much more material for the Commission to examine, as well as lessons to be drawn from the way the London statement itself had been received.

7. In writing future reports, he would bear in mind the point made by Mr. Gómez Robledo concerning the hierarchical relationship between customary international law and an inconsistent treaty, which was a complex matter. He had taken due note of Mr. Gómez Robledo’s question about the reference to acts of courtesy and comity in paragraph 37 of the report. With regard to Mr. Peter’s comments on the lack of references to writers and cases from Africa, he recalled that the collection of materials on the topic was a collective responsibility, and not one to be assumed solely by the Special Rapporteur.

8. As requested by Mr. Park, he wished to clarify his position on whether there were different approaches to the formation and evidence of customary international law in different fields of international law. He would do so subject to two caveats, however: first, that a more definitive answer would be given following further research; and second, that what mattered was not his own position but that of the Commission. His feeling coincided with that of Mr. Tladi: that the notion of a single approach, while correct, ought not to be assumed. He agreed with Mr. Huang that the criteria on the formation and evidence of customary international law should be unified, and should not differ depending on different branches of international law or intended audiences. He shared Mr. Park’s view that it would not be appropriate for the Commission to admit, or accept favourably, fragmentation in the formation of customary international law. He also agreed with him and other speakers that the Commission should not distinguish between fields of law as such, which were not in any case objectively separable from one another. At the same time, the nature of the available and relevant evidence for identifying a rule of customary international law might vary, depending on the rule or asserted rule under inquiry.

9. It had not been his intention to place undue emphasis on Article 38, paragraph 1 (b), of the Statute of the International Court of Justice; however, it was the most widely accepted treaty provision on the matter, and one that was binding on 193 States. He was grateful to Mr. Hmoud for recalling that the binding nature of customary international law had preceded the adoption of the Statute of the Permanent Court of International Justice, and to Mr. Gómez Robledo for drawing attention to certain

<sup>146</sup> *Yearbook ... 2006*, vol. II (Part Two), pp. 177 *et seq.*, para. 251.

<sup>147</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40, art. 4, para. (1). The articles on responsibility of States for internationally wrongful acts adopted by the Commission are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

<sup>148</sup> “London statement of principles applicable to the formation of general customary international law” (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39.

limitations in Article 38: it was not an exhaustive list of sources and had been drafted at a time when States were seen as the only actors in international law.

10. In paragraph 64 of the report, his intention had been to note what certain commentators had said about the practice of the International Court of Justice, not to suggest that the Court had used two distinct approaches in its reasoning. Similarly, in paragraph 62, he had meant to refer to two different ways of drafting parts of a judgment, not to two different methods for determining whether a rule of customary international law existed. Judge Tomka had made that very point.

11. With regard to terminology, he noted that one obstacle to predictability and good reason in relation to customary international law was precisely the obscurity of some of the arguments advanced. Although, in keeping with Mr. Forteau's warning, he did not intend to seek to impose a unique and exclusive terminology, he concurred with Mr. Candioti and Mr. El-Murtadi Suleiman Gouider that one of the merits of the Commission's work in many fields had been to introduce a degree of terminological uniformity, and to do so in the six official languages of the United Nations. That represented a valuable contribution to the establishment of the common language between States that international law aspired to be.

12. Clearly, as Mr. Huang had pointed out, the Commission needed to strike a balance between certainty and flexibility. Mr. Hmoud had put it very well: even if the Commission merely described the current state of the law through its adoption of a set of conclusions, those conclusions would definitely advance the rule of law, contribute to a clearer understanding of what constituted customary international law and what did not, and assist in avoiding disputes and in reaching a degree of legal certainty that might otherwise be attained only through judicial pronouncements.

13. Useful suggestions had been made for the two draft conclusions contained in the first report, which he would take into account when revising them. He would have to review draft conclusion 2, subparagraph (a), as the Commission proceeded with the topic, and he would consider the suggestions made on the addition of terms such as "general principles of law".

14. He would incorporate a large number of the specific points made by members in his subsequent reports. Speakers had pointed to the need to examine the following subjects: the officials whose words and conduct should count as State practice; the arguments used by States in cases before the International Court of Justice; the role of international organizations in relation to State practice and *opinio juris*; the role of United Nations resolutions; the practice of the Security Council; the practice of regional organizations; the work of constitutional courts; and the potential role *de lege ferenda* of soft law.

15. Speakers had noted the absence of digests of the practice of many States. As a first step it might be helpful to draw up a comprehensive list of existing digests and publications in the field, and he would welcome assistance in that regard.

16. He had drawn some useful conclusions from the debate that he would take into account in subsequent reports. They included the fact that there was general support for the "two elements" approach, which required an assessment of both State practice and *opinio juris*. At the same time, it had been recognized that the two elements might sometimes be closely "entangled", and that the relative weight to be given to each might vary.

17. There had been general agreement that the primary materials for seeking guidance on the topic were likely to be the approach of States and other international actors and the approach of international courts and tribunals, first among them the International Court of Justice, including, as Mr. Saboia had recalled, its advisory opinions. There had also been general agreement that the outcome of the work should be of an essentially practical nature, aimed in particular at those who were not necessarily specialists in international law, and that it should be a set of conclusions, with commentaries, that were not overly prescriptive. Commission members had further agreed on the need to deal with the relationship between customary international law and other sources of international law, in particular treaties and general principles of law. Particular interest had been expressed in the relationship between customary international law and general principles of law, perhaps as distinct from general principles of international law. There also appeared to be a widespread interest in looking into regional customary international law, and he would give thought to Mr. Cafilisch's strictures about so-called "bilateral custom".

18. The great majority of speakers considered that the Commission should not deal in detail with *jus cogens* as part of the present topic. A number of speakers considered that it should be the subject of a separate topic, noting that a proposal to that effect was, in fact, currently under consideration within the Working Group on the long-term programme of work.

19. It had been agreed to renew the call to States to provide information on their approach to the identification of customary international law. A deadline of 31 January 2014 should be set, on the understanding that the information needed to be received in good time if it was to be of any use. Although comprehensive information would be ideal, the provision by States of even one or two good examples of their approach would be appreciated.

20. With regard to the title of the topic, there had been general agreement that the Commission should consider only the formal, not material, sources of international law. The discussion had turned on two points of terminology: the term "evidence" had been seen as somewhat ambiguous, and there had been a debate about whether the topic should include the word "formation". His view was that both issues would resolve themselves as the work proceeded. In any event, there had been general agreement that the aim of the topic was to offer guidance to those called upon to apply rules of customary international law and that, in order to determine whether such rules existed, it was necessary to consider both the requirements for their formation and the types of evidence or proof that established the fulfilment of those requirements.

21. Although quite a number of members supported the current title, it had been agreed to recommend that it should be changed to “Identification of customary international law”, “*La détermination du droit international coutumier*” and “*La identificación del derecho internacional consuetudinario*” in English, French and Spanish, respectively; Commission members had provided the corresponding translations in Arabic, Chinese and Russian. The recommendation to amend the title was on the understanding that matters relating to the formative elements and evidence or proof of customary international law remained within the scope of the topic.

22. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to change the title of the present topic to the formulations proposed by the Special Rapporteur in English, French and Spanish, respectively, with the corresponding amendments to be made in Arabic, Chinese and Russian, and to approve the other conclusions and recommendations contained in the first report.

*It was so decided.*

**Provisional application of treaties (continued)**  
(A/CN.4/657, sect. D, A/CN.4/658, A/CN.4/664)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

23. The CHAIRPERSON invited the Commission to continue its consideration of the first report of the Special Rapporteur on the provisional application of treaties (A/CN.4/664).

24. Mr. FORTEAU said that, while the memorandum by the Secretariat on the topic (A/CN.4/658) had helped to clarify the difference between the provisional application and the provisional entry into force of treaties, many other difficulties still remained.

25. To begin with, the Special Rapporteur could have included in his report information on the existing case law on the subject. Doing so would have given members an initial impression of how plentiful or consistent it was and whether it could be used as a basis from which to draw useful conclusions.

26. Certain passages of the report, for example, paragraph 22 on treaty practice, were not adequately supported by concrete examples, which made it difficult to understand the scope or value of the information they contained. He trusted, however, that in future reports, the Special Rapporteur would document his arguments in greater detail. He would also be grateful if the Special Rapporteur could provide clarification on the six issues summarized in paragraph 53 of his report.

27. He disagreed with the goal described in paragraph 54 as being to create incentives for greater use of the mechanism of the provisional application of treaties. The Commission’s task was not to create incentives, or to remove incentives, for that matter, but rather to identify the rules governing the provisional application of treaties

with a view to ensuring greater legal certainty when resorting to that mechanism.

28. For the same reason, he disagreed with Mr. Murase’s view that the Commission should encourage the ratification of treaties rather than their provisional application. The decision to ratify a treaty or not was a matter to be left to the discretion of each State. States were free to prefer provisional application over ratification, and the Commission had no business interfering in that political decision.

29. Nor did he share the views of Mr. Petrič, who maintained that the provisional application of treaties must be regarded as an exception that was at variance with fundamental values. In his own view, the situation was much simpler: the provisional application of treaties was a practice governed by international law, and the Commission should study it without either imposing value judgments or questioning its legitimacy.

30. The Special Rapporteur seemed to have doubts about whether the purpose of the topic was solely to take stock of the existing treaty practice of States, or to identify the rules of customary international law that existed with regard to the provisional application of treaties. He seemed to doubt the very existence of a set of such rules when he noted, in paragraph 17 of his report, that article 25 of the 1969 Vienna Convention sets “the minimum standard on the matter” and, in paragraph 21, that there was a “lack of uniform regulations on the matter”. In his own view, the very existence of article 25 was sufficient to establish the fact that general rules on the provisional application of treaties existed. Thus, one of the Commission’s priority tasks was to survey the practice concerning the application of article 25, with the aim of identifying which general rules on the subject had gained acceptance. In attending to that task, the Commission should isolate the subsidiary rules and correlate the rest with the regime set up in each treaty for recourse to provisional application. *Lex specialis* would no doubt be ubiquitous, but that did not preclude the identification of applicable general rules, however few they might be.

31. The Special Rapporteur appeared to be prejudging responses to certain fundamental issues. For example, he stated in paragraph 23, subparagraph (a), of his report that the intention to provisionally apply a treaty must be expressed unequivocally. Such a criterion had to be substantiated and then debated by the Commission; it could not be regarded as established at so early a stage in the work.

32. The Special Rapporteur seemed to consider that the acceptance of the provisional application of a treaty by a State necessarily led to the treaty being binding on that State. He himself supported that conclusion, which appeared to follow clearly from the *travaux préparatoires* of the 1969 Vienna Convention reviewed in paragraphs 74 to 79 of the memorandum by the Secretariat. Once again, however, the Commission should avoid conveying the impression that it operated merely on the basis of assumptions. The 2011 syllabus<sup>149</sup> indicated that there were four differing viewpoints on the legal effects

<sup>149</sup> *Yearbook ... 2011*, vol. II (Part Two), annex III, para. 4.

of provisional application, each of which should be compared with practice and case law before reaching a final conclusion. Account also had to be taken of the fact that the legal effects of provisional application could be established independently in each treaty.

33. The relationship between internal and international law in the provisional application of treaties was one of the fundamental issues, and the Special Rapporteur should explain how he intended to deal with it. Article 46 of the 1969 Vienna Convention covered the “defective ratification” of the entry into force, not the provisional application, of a treaty. The task before the Commission was to determine the extent to which the rules laid down in article 46 should be extended, *mutatis mutandis*, to the provisional application of treaties.

34. There were two possible approaches to that task. The first, a restrictive approach, was to consider that a State that had undertaken an international commitment to provisionally apply a treaty was ultimately not bound by that commitment when it emerged that its internal law prohibited it from agreeing to provisional application. The second approach, more liberal, was to consider that the State was not bound by that commitment only in the extreme case when its consent had been expressed in manifest violation of a rule of its internal law of fundamental importance. The question of the legal effect of internal law on an international commitment to provisionally apply a treaty merited in-depth consideration. It had been extensively debated in the cases involving the Russian Federation that had been settled by the Permanent Court of Arbitration in 2009.<sup>150</sup>

35. For the Commission’s purposes, study of the matter must be set in the correct legal framework, namely the perspective of international law. The Commission should seek only to determine the extent to which international law transformed respect for internal law into a restriction on the provisional application of a treaty. International law did not prohibit a State from entering into an international commitment in violation of a provision of its internal law. The flexibility of international law in that respect was reflected in article 25, paragraph 1 (b), of the 1969 Vienna Convention. Accordingly, resort to the provisional application of treaties was prohibited only if it entailed serious breaches of national law. It was unfortunate that certain discrepancies between domestic and international law were permitted under that system, but it was up to States to ensure consistency between the two, or to stipulate in their treaties that provisional application was possible solely in conformity with domestic law.

36. Other subjects not mentioned by the Special Rapporteur but which should be considered were the rules on reservations in the event of the provisional application of a treaty; the rules applying to substantive and final clauses; the exact scope of article 24, paragraph 4, compared with article 25, of the 1969 Vienna Convention; and interpretative difficulties due to provisional application.

37. It would be premature to express an opinion on the final form to be taken by the Commission’s work on the topic.

38. Mr. CAFLISCH drew a distinction between the coming into force of a treaty, governed in principle by article 24 of the 1969 Vienna Convention, and its provisional application, covered by article 25 of that Convention. The Commission’s mandate was limited to the latter.

39. Once all the provisions of a treaty had become applicable, it would bind all States which had given their consent to be bound by it. That did not necessarily mean that a party would become responsible for failure to observe the terms of the treaty, for those terms, although they had entered into force, might not be applicable. Thus, the 1949 Geneva Conventions for the protection of war victims and the appended Protocols might be in force for many States, yet they would become applicable only in the event of a *casus belli*. In addition, under article 24, paragraph 4, of the 1969 Vienna Convention, some of the treaty’s provisions would have become applicable even prior to its entry into force; and the same could be true for other provisions and even all of them if the treaty so provided or if the negotiating States had so agreed by other means.

40. The subject was primarily one of international law but involved constitutional aspects. Provisional application was a device to overcome the slowness of parliamentary processes. It thus could collide with domestic provisions on treaty-making. That raised the question of whether article 46 relating to the domestic law governing the conclusion of treaties also applied, *mutatis mutandis*, to provisional application. It would be useful, therefore, to look at some domestic treaty-making rules, even though a complete examination appeared impossible.

41. Regarding the legal regime of provisional application, he said that in paragraphs 36 to 40 of his report, the Special Rapporteur wondered about the effects of such application on the issue of State responsibility. He agreed with the Special Rapporteur’s tentative conclusion (para. 37) that, as in the case of any other agreement between States, an agreement on provisional application would be effective on the international level. Provisional application ended, he himself thought, (a) with the coming into force of the treaty (article 25, paragraph 1, of the 1969 Vienna Convention) or (b) for a State having so notified the other States provisionally applying it, by declaring that it did not intend to become a party to the treaty (article 25, paragraph 2). The question then arising was whether a State having made such a notification in order to shed its provisional treaty obligation could subsequently change its stance by informing the other States that it had changed its view and now wished to become a party to the treaty after all.

42. He disagreed with the suggestion that the Commission should drop the topic in order to incite States to use normal treaty-making procedures. The Commission was not an institution for “moralizing” international law. Moreover, provisional application was a device expressly sanctioned by article 25 of the 1969 Vienna Convention. It was perfectly natural for the Commission to give guidance

<sup>150</sup> *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*; *Yukos Universal Limited (Isle of Man) v. the Russian Federation*; and *Veteran Petroleum Limited v. the Russian Federation*.

to States on how to use the tool of provisional application and to advise them as to its legal consequences.

43. Mr. ŠTURMA said that the provisional application of a treaty could have positive or negative effects and had substantial constitutional implications. Interestingly enough, no definition of provisional application had been included in the 1969 Vienna Convention, and article 25 appeared to have been incorporated rather hastily, and in order to take account of existing State practice without establishing a precise legal regime. Nevertheless, provisional application was provisional solely from the temporal point of view: it created definite obligations. Even after the termination of provisional application, the effects of the rules applied provisionally were the same as those derived from the application of a treaty that was in force.

44. Domestic law, in particular constitutional law, could considerably limit the ability of governments to accept provisional application. The situation in various States varied, however. States could be divided into three groups, based on studies done by the Council of Europe among its members and observer States.

45. In the first and largest group, the organ with competence to conclude the treaty decided on its provisional application. The treaties involved were mainly those concluded and implemented by the executive branch without the participation of parliament. Countries that fell into the first group included Austria, Belgium, Finland, France, Italy, Poland, Slovenia and the United Kingdom.

46. The second group comprised States that allocated agreement to provisional application to the executive, even where the conclusion of a treaty required the consent of parliament. Provisional application was excluded only with respect to international treaties whose provisions would conflict with constitutional rules. Countries in that group included Croatia, the Czech Republic, Germany, Greece, Kazakhstan, the Russian Federation, Spain and Switzerland.

47. The third group included States that did not permit provisional application at all. Such was the case with certain Latin American countries, Cyprus and Portugal.

48. While that short survey did not claim to be exhaustive, it showed that provisional application of treaties, while being the exception in treaty practice, was nevertheless a relatively frequent one. He did not think that States should be encouraged to use the mechanism more often: they already did so on many occasions. As the report showed, its use was not limited to trade or other economic treaties but extended to instruments on a range of issues, including politically sensitive ones.

49. What the report lacked was a more detailed work-plan, describing a process that should lead to the adoption of guidelines or conclusions. While it was important not to overregulate the institution of provisional application of treaties and to keep the flexibility of article 25 of the 1969 Vienna Convention, it was appropriate for the Commission to shed more light on the institution.

50. The most complicated problems arose when the obligation to provisionally apply a treaty was subject

to consistency with internal laws. Accordingly, States should declare whether and to what extent they were not able to engage in provisional application of treaties. The precise formulation of such declarations might avoid serious problems, including responsibility for breach of treaty obligations.

51. Mr. HUANG said that, although the provisional application of treaties was a long-standing practice which had been generally accepted by the international community, the rules governing that practice were in need of clarification. The Commission could provide valuable guidance to States by simply shedding light on the conditions, effects and termination of provisional application.

52. As far as the methodology was concerned, the Commission's study of the topic should rest on an in-depth analysis of the wealth of international and domestic practice and decisions, including the findings in cases submitted to international arbitration. Article 25 of the 1969 Vienna Convention stipulated that a treaty could be applied provisionally pending its entry into force, but in practice, the time at which that application began varied widely. States' domestic practice regarding provisional application was also highly disparate. The Special Rapporteur's next report should therefore contain a thorough review of national and international practice.

53. The Commission should also investigate the legal effects of the provisional application of treaties, especially the rights and obligations deriving from such application, since article 25 of the 1969 Vienna Convention did not specify those effects and there was much uncertainty in that respect. Did a signatory State have rights and obligations derived from provisional application? Should those rights and obligations end immediately when a State unilaterally terminated provisional application? After the entry into force of a treaty, what residual rights and obligations still lay with States that had provisionally applied the treaty? Those issues warranted careful study.

54. Another aspect deserving consideration was the relationship between the provisional application of treaties and other rules established in the 1969 Vienna Convention. It was clear from the Convention that provisional application was a special treaty rule and differed from the general provisions in other articles. The regulation and clarification of the regime of provisional application would inevitably touch upon its relationship with articles 18, 26, 27 and 46 of the Convention. Since the latter had been one of the Commission's most important achievements, it fell to the Commission to provide an authoritative interpretation on those issues.

55. While article 25 of the 1969 Vienna Convention did not refer specifically to the relationship between provisional application and internal law, most treaties that allowed for provisional application made it conditional on compliance with internal law. During the negotiation of the Convention, some States had pointed out that since provisional application could be decided by the executive branch at the time of signature of the treaty, it might enable the executive to bypass the treaty approval authority of the legislative branch.

In practice, some treaties already made useful attempts to address such issues, for example by requiring that provisional application be approved by parliament or providing that it was only possible when a country had completed the ratification procedure yet the treaty itself had not entered into force. Relevant examples included the General Agreement on Tariffs and Trade and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which clearly stipulated that a State could declare that it would provisionally apply a treaty when it had completed the internal ratification process but the treaty had not yet entered into force. The key was to strike an appropriate balance between provisional application and internal law, ensuring the effects of provisional application as a rule of international law while leaving adequate space for States to choose to use provisional application in the light of their internal law.

56. Mr. HASSOUNA said that, although the report highlighted the need to distinguish between the terms “provisional application” and “provisional entry into force”, the issue appeared to go beyond terminology, as their very meaning appeared disputed. Most strikingly, the 1969 Vienna Convention itself did not mention the “provisional entry into force” of treaties. The Commission could therefore make an important contribution by clarifying the legal implications of the two concepts.

57. It was generally assumed, as noted in paragraph 39 of the report, that the regime set out in article 25 of the 1969 Vienna Convention was based on the scenario of provisional application while the treaty was not yet in force. However, in the case of a multilateral treaty ratified by some States but not by others, the treaty was deemed to be in force, but only for the ratifying parties. There was obviously a need to clarify the perspective from which the status of a treaty was assessed. The Commission’s analysis of State practice should therefore distinguish between the various types of treaties in order to provide a clearer picture of the possible scenarios involving provisional application.

58. He agreed that the provisional application of treaties could serve a useful purpose in specific instances of urgency or legal or political necessity. A further elaboration of the idea that some instances of provisional application were non-controversial could therefore be undertaken. Consideration of State practice, with particular reference to the domestic constitutional requirements of States, was also needed.

59. An analysis of the relationship between article 25 and article 24 would appear to be necessary for a comprehensive understanding of the topic. The international responsibility of States and the implications arising from article 25 of the 1986 Vienna Convention should also be addressed.

60. Given that many States had expressed concern that the provisional application of treaties could be used to avoid compliance with domestic requirements on treaty ratification, the possible effect of provisional application on the stability and security of treaty relations should be assessed.

61. The Special Rapporteur should provide a specific time frame for the consideration of the topic, but a decision on whether to adopt guidelines, model clauses or conclusions should be left to a later stage. The final purpose of the work should be to provide more clarity, uniformity and consistency, leaving it to States to resort to the practice of provisional application whenever a legitimate need to do so arose.

62. Sir Michael WOOD said that he did not share the view that provisional application was in some way exceptional or necessarily undemocratic, or that the Commission needed to consider constitutional or other internal laws in detail. He agreed that it was not for the Commission to actively encourage or discourage provisional application, but he hoped that the outcome of its work would make it clearer to States how to proceed where necessary. The Commission’s main task would be to distil the learning and produce a practical guide to assist States and others in negotiating new clauses and in interpreting and applying existing ones. While the focus would be on article 25 of the 1969 Vienna Convention, the Commission should not ignore the 1986 Vienna Convention.

63. He did not entirely agree with the conclusions of Anneliese Quast Mertsch, one of whose works was cited in the last footnote to paragraph 18 of the report, that the legal effect of provisional application was contested in practice and that theoretical treatment had been scant.<sup>151</sup> The fact that she had made those assessments after a very thorough study, however, pointed to the utility of the Commission taking up the topic. There was no shortage of relevant practice, recent and important case law and writing on the topic.

64. The statement in paragraph 7 of the report that the terms “provisional entry into force” and “provisional application” referred to different legal concepts might be somewhat misleading. That certainly did not appear to have been the widespread view when the wording of article 25 had been changed from the former to the latter at the United Nations Conference on the Law of Treaties.<sup>152</sup> It seemed to have simply been a matter of choosing the most appropriate terminology, with the concept covered by the two terms being essentially the same, nor was there a clear distinction between the two in State practice or in writings on the subject.

65. He did not understand what was meant by the statement in paragraph 17 that article 25 “sets the minimum standard on the matter”. In subsequent paragraphs, the Special Rapporteur seemed to imply that article 25 left certain central questions unanswered, including the legal effects of provisional application. However, it could be deduced from article 25, read in the light of its *travaux préparatoires*, that unless otherwise agreed by the parties, agreement to provisional application implied that the parties concerned were bound by the rights and

<sup>151</sup> A. Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012), p. 22.

<sup>152</sup> *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.39/14, pp. 143–145, paras. 224 (ii) (b), 227 (b) and 230.*

obligations under the treaty in the same way as if it were in force.

66. He agreed with the Special Rapporteur that the content and scope of the provisional application of a treaty depended largely on the terms in which such application was envisioned. He did not see why it was necessary to enter into particular questions of State responsibility. If the provisional application of a treaty imported legal rights and obligations as between the States provisionally applying it, then the secondary rules of State responsibility should apply in the usual way if there was a breach.

67. He was not convinced that it was necessary to address the issues listed in paragraph 53, subparagraphs (a), (b), (c) and (f). The most important issue would be the legal effect of provisional application, a matter governed by the terms of the agreement to provisionally apply the treaty. The near consensus of opinion, in State practice, the case law and writings, seemed to be that the rights and obligations of a State that had agreed to provisionally apply a treaty were the same as if the treaty was in force.

68. Mr. MURPHY said that the fact that 24 States had spoken on the topic in the Sixth Committee demonstrated the level of interest in the provisional application of treaties. While the report covered many interesting points, it was difficult to identify the exact issues the Special Rapporteur intended to address, and the list in paragraph 53 did not provide a rigorous framework for the Commission's future work. In his view, the purpose of the project was essentially to provide greater clarity to the meaning of article 25 of the 1969 Vienna Convention through a careful analysis of its language and of State practice.

69. If the Special Rapporteur was to develop guidelines on the topic, an idea which he supported, a number of areas should be addressed, some of which were touched on in the report. The Commission should clarify terminology by defining what was meant in article 25 by "provisional application of treaties". While he tended to agree with the Special Rapporteur that "provisional application" and "provisional entry into force" were not synonymous, the Commission should be cautious about viewing them as wholly distinct legal concepts, given that they mostly aimed at the same legal outcome. In its work on the law of treaties in the 1960s, the Commission did not appear to have taken a conscious decision to exclude the practice of "provisional application" when referring to "provisional entry into force". Nor did the *travaux préparatoires* for the United Nations Conference on the Law of Treaties indicate that the replacement of the words "enter into force provisionally" with "provisional application" reflected a decision to only address one form of practice and not another. Both terms were used to capture the same practice whereby States decided in some situations to give legal effect to a treaty prior to ratification, while allowing themselves the option of not proceeding with ratification.

70. He agreed with the Special Rapporteur that, although the *Treaty Handbook*<sup>153</sup> referred to "provisional entry into

force" and not to "provisional application", it appeared to view those two legal concepts as being essentially the same.

71. The Commission should indicate the ways in which a State might express consent to the provisional application of a treaty based on existing State practice, bearing in mind that it was the underlying treaty that established the specific rules. In doing so, the Commission would be neither encouraging nor discouraging States to engage in provisional application, any more than its work on the topic of reservations to treaties had encouraged or discouraged them to file reservations. A related issue was the question of whether, if a multilateral treaty negotiated by States was to be provisionally applied, the provisional application extended only to States that signed the treaty, to States that consented to the adoption of the treaty, or to all States that had negotiated the treaty. It was not clear what the Special Rapporteur meant by saying in paragraph 35 that the provisional application of the Maritime Boundary Agreement between the United States of America and Cuba<sup>154</sup> was a relevant example of "subterfuge aimed at evading ... domestic legal requirements".

72. The Commission should acknowledge the legal consequences of agreeing to the provisional application of a treaty, including the fact that it was a legally binding obligation whose violation would trigger consequences under the law of State responsibility. The Commission should also indicate how such legal consequences differed from those arising under article 18 of the 1969 Vienna Convention.

73. It should clarify the manner in which provisional application of a treaty could be terminated. Lastly, it should address the question of whether the rules set forth in article 25 reflected customary international law that was binding even with respect to treaties not governed by the 1969 Vienna Convention.

*The meeting rose at 1 p.m.*

### 3187th MEETING

*Friday, 26 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

<sup>153</sup> United Nations publication, Sales No. E.12.V.1 (available from <https://treaties.un.org>, "Resources").

<sup>154</sup> Signed at Washington, D.C., on 16 December 1977, ILM, vol. 17 (1978), p. 110.

**Protection of persons in the event of disasters (concluded)\* (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)**

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (concluded)\*\*

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the Drafting Committee's report concerning the topic "Protection of persons in the event of disasters" contained in document A/CN.4/L.815.

2. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted two meetings to the consideration of draft articles 5 *ter* and 16, which it had provisionally adopted.

*Draft article 5 ter. Cooperation for disaster risk reduction*

Cooperation shall extend to the taking of measures intended to reduce the risk of disasters.

*Draft article 16. Duty to reduce the risk of disasters*

1. Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate and prepare for disasters.

2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.

3. Draft article 5 *ter* on cooperation for disaster risk reduction sought to extend the scope *ratione temporis* of draft article 5 (Duty to cooperate) to pre-disaster cooperation.

4. Draft article 16, which set forth the duty to reduce the risks of disasters, comprised two paragraphs: the first dealt with the fundamental duty of reducing disaster risks by taking certain measures; the second listed the measures.

5. The Drafting Committee had chosen the formulation "each State" rather than "States" in the first paragraph to show that, whereas in the draft articles relating to disaster response a distinction was drawn between the affected State, or States, and other States, the obligation to cooperate in the pre-disaster phase applied to all States without exception. The verb "shall" signified the existence of a legal obligation not only of conduct but also of result. The Drafting Committee had decided to focus on reducing the risk of harm caused by a disaster rather than on preventing disasters themselves, which was more in line with the international community's current views, as evidenced in several major pronouncements such as the Hyogo Declaration 2005.<sup>155</sup> The Committee had also opted for the term "necessary and appropriate measures", which encompassed all the views expressed by members and reflected the notion of due diligence. The word "including" had been added in order to indicate that, although preference should be given

\* Resumed from the 3180th meeting.

\*\* Resumed from the 3162nd meeting.

<sup>155</sup> 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. I, resolution 1.

to legislation and regulations, other measures, including those of an administrative nature, could be taken. The definite article before "necessary" showed that the draft article referred to not just any general measures but to specific and concrete measures.

6. In the second paragraph, the Drafting Committee had added the word "include" in order to indicate that the three preventive measures mentioned did not rule out other forms of action to reduce the risk of disasters.

7. The CHAIRPERSON invited the Commission members to adopt the Drafting Committee's report contained in document A/CN.4/L.815.

*Draft article 5 ter (Cooperation for disaster risk reduction)*

8. Mr. KITTICHAISAREE asked if the expression "*de nature à*" in the French version conveyed the meaning of "intended to".

9. Mr. CAFLISCH proposed that "*de nature à*" should be replaced with "*destinées à*".

*The proposal was adopted.*

*Draft article 5 ter, as amended in the French version, was adopted.*

*Draft article 16 (Duty to reduce the risk of disasters)*

*Draft article 16 was adopted.*

*Document A/CN.4/L.815, as a whole, was adopted.*

**Provisional application of treaties (continued) (A/CN.4/657, sect. D, A/CN.4/658, A/CN.4/664)**

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPporteur (continued)

10. The CHAIRPERSON invited the Commission members to pursue their consideration of the Special Rapporteur's first report on the provisional application of treaties (A/CN.4/664).

11. Mr. MURPHY said that, in its guidelines, the Commission could confirm the legally binding nature of a State's agreement provisionally to apply a treaty in whole or in part.

12. He and many other members had expressed that view during the informal consultations held the previous year and that had also been the position adopted by the Commission in its 1966 draft articles on the law of treaties.<sup>156</sup> As the Special Rapporteur had stated in paragraph 43 of his report, a State's expression of its intention was the source of the resulting inter-State obligation. It went without saying that, once an intention had been expressed, the source of the obligation became an international agreement on the provisional application of the treaty and the rule of *pacta sunt servanda*.

<sup>156</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

13. The report did not answer the question of whether some parts of a treaty were excluded from the scope of the obligation flowing from provisional application because, in order to be effective, they presupposed the treaty's entry into force, or of whether it was necessary implicitly to recognize that those parts were also covered by the obligation in question.

14. In its guidelines, the Commission could also deal with the issue of the impact on State responsibility of a violation of an obligation stemming from provisional application, even if that rarely arose in practice. It could further examine the question of the termination of provisional application and, in order to supplement the provisions of article 25, paragraph 2, of the 1969 Vienna Convention, it could make it clear that provisional application also ended when the State became a party to the treaty.

15. The Special Rapporteur had suggested that a State might remain bound by an obligation flowing from the actual contents of a treaty provision, even when provisional application had ceased. He personally considered that this could not be the case when the rule laid down in that provision had passed into customary international law.

16. The Commission could also draw up guidelines on the issue of whether the rules set forth in article 25 of the 1969 Vienna Convention had come to reflect customary international law. He would tend to reply in the affirmative. It would be interesting to obtain States' views on that matter by sending them a questionnaire which should focus more generally on State practice and how States interpreted it.

17. As for the relevance of national law to the consideration of the topic, although several members had been concerned about the Special Rapporteur's wish to "encourage" States to use the provisional application of treaties, since in their view doing so might bypass national parliaments, that concern, albeit understandable, was undue. It was not up to the Commission to encourage States to do anything at all, but to strive to identify their practice and to formulate the rules governing it. When States undertook to apply a treaty provisionally, their decision was carefully considered and, generally taken in consultation with the parliamentary authorities. When studying the international legal effects of provisional application, the Commission therefore had no reason to attach too much importance to internal law. The only question worth addressing in that context was the situation where a treaty clause providing for provisional application referred to internal law, such as article 45, paragraph (1), of the Energy Charter Treaty.

18. Mr. CANDIOTI agreed with Mr. Murphy that the Commission must endeavour primarily to study the regime established by article 25 of the 1969 Vienna Convention and any gaps in it, and to answer the questions it raised. The relationship between national and international law should not, however, be completely ignored. At some point, the Commission would have to investigate the relationship between the provisional application of treaties and constitutional procedures for their ratification.

19. Ms. ESCOBAR HERNÁNDEZ said that the provisional application of treaties clearly deserved to be studied, mainly because States had frequent recourse to it and because it posed not inconsiderable practical problems owing to the general nature of article 25 of the 1969 Vienna Convention. As for the legal nature of the provisional application of treaties, some members had been of the opinion that it constituted an exception to the general rules of the law of treaties. She, on the contrary, believed that provisional application, far from being a substitute for ratification, was in reality part of the general law of treaties and reflected well-established, but widely diverging, international practice. Provisional application was one of the tools which States had fashioned in order to fulfil their treaty obligations and, in that respect, it was an additional means of exercising their decision-making authority. For that reason, it was neither an exception nor a systemic anomaly that should be discarded.

20. The Commission should neither encourage the use of provisional application nor give it a greater role to play, for such action only lay within the sovereign power of States. The Commission's simple, but no less important task was to clarify the notion of provisional application, identify its main aspects and scope and determine what repercussions it might have on the international responsibility of a State.

21. Provisional application was an institution of international law which the Commission ought to analyse, but when doing so it had to be cautious about how much importance to attach to internal law. Provisional application was to some extent related to internal rules, especially those governing the distribution of authority between branches of government and, in some cases, it could result in parliament not being able to express an opinion on the obligations stemming from some international treaties, even if the constitution allowed it to take the final decision on whether to accede to a treaty. Since such matters were inherent to relations between a State's institutions, it was not incumbent upon the Commission to express an opinion on a real-life situation which could take many different forms. That did not mean that internal law could be ignored, or that the Commission should encourage States to adopt conduct that did not comply with the law. On the contrary, it must take account of the fact that the provisional application of treaties was authorized by international law and that it was frequently governed both by the latter and by national legal rules. If a conflict arose between national and international legal rules, it had to be resolved in accordance with the criteria laid down in the 1969 Vienna Convention. It was not therefore up to the Commission to say which would be the most or least appropriate way of ensuring that a State's expression of its wish to be bound by a treaty through the provisional application thereof was tailored to that State's own system of distributing powers. The statement that provisional application was more or less democratic would prompt an ideological debate that was better to avoid as far as possible.

22. Duly defining the scope of the topic under consideration was of paramount importance. First, provisional application had to be clearly delimited and differentiated from other, very similar practices, such as provisional

entry into force, or from other categories of temporary agreements such as those which defined transitional arrangements applying at specific times or to specified sectors. Mr. Petrič had referred to the Permanent Statute of the Free Territory of Trieste,<sup>157</sup> and Mr. Murphy had mentioned the Maritime Boundary Agreement between the United States of America and Cuba.<sup>158</sup> Attention should also be drawn to the “provisional arrangements” for which the United Nations Convention on the Law of the Sea made provision. It might be wise for the Special Rapporteur to draw a distinction between such provisional agreements and the provisional application of a treaty *stricto sensu*. Second, it would be interesting to examine to what extent provisional application might have different effects on the parties to a treaty depending on whether it was a bilateral or a multilateral treaty, whether provisional applications could produce particular effects only between certain parties to a treaty, or whether provisional application could be used unilaterally by one State. Third, the Commission should also investigate the effects of the unilateral termination of provisional application, especially when provisional application had produced objective effects which were likely to last after that termination, or when the treaty concerned had created rights or the expectation of rights on the part of individuals. Lastly, it would be useful to deal with provisional application in the practice of international organizations. In conclusion, the topic under consideration was of immense importance in international legal practice and gave rise to a number of questions which the Commission could help to answer.

23. Mr. HMOUD said that the provisional application regime had been implemented inconsistently, in part because article 25 of the 1969 Vienna Convention was rather ambiguous and some areas, which its wording had left open, were not clearly understood. While the Commission could explain current practice, provide guidance regarding ambiguous areas and, if necessary, suggest rules to supplement the existing regime, it should neither encourage nor discourage that practice. The history and brevity of article 25 of the Convention showed that its authors intended the regime to have limited scope and consequences. A parallel regime outside the scope of parties’ relations should not therefore be created, but neither should a common practice be restricted.

24. It was clear from the history of article 25 that, from the outset, there had been some confusion about the distinction between a treaty’s provisional application and its provisional entry into force. It would therefore be useful to explain the relationship between those terms and any doctrinal differences. Practice prior to the 1969 Vienna Convention might shed light on areas of the provisional application regime still in need of clarification. It would also be necessary to examine the content of provisional application, especially when a treaty did not indicate whether a State could choose to apply its provisions in whole or in part, or did not specify the relationship between the various provisions relating to provisional application, the rules on interpretation laid down in the 1969 Vienna Convention and the means of interpreting the articles on provisional application in the Vienna regime.

<sup>157</sup> See the 3185th meeting above, para. 35.

<sup>158</sup> See the 3186th meeting above, para. 71.

25. The Commission should also clarify the temporal scope of provisional application, namely when it started and ceased to take effect *vis-à-vis* the States concerned. Practice had shown that, when treaties did not provide otherwise, provisional application could continue indefinitely, which raised the issue of the various legal effects of the parallel application of treaties once they had entered into force. The Commission should also clarify the meaning of the term “pending its entry into force” and the prospect of indefinite provisional application, including in cases where a State had no intention of becoming a party to a treaty. It should likewise deal with the question of the legal consequences of provisional application and its termination by identifying the scope of legal obligations and indicating whether they were identical for the State party and the State which was applying the treaty provisionally. It should also investigate the question of retroactivity and the change in status of those obligations when the State which was provisionally applying a treaty became a party to it.

26. Unlike some other members, he considered that it would be unwise to dwell on the question of the legal consequences of breaches under the provisional application regime, because the key issue was to ascertain whether provisional application created legal obligations and, if necessary, to identify the scope of those obligations. As far as the principle of *pacta sunt servanda* was concerned, it would still be necessary to determine whether there was any rule of customary law allowing a State to invoke its internal law as justification for the non-performance of obligations stemming from the provisional application of a treaty, and whether the principles of general international law permitted exceptions to that rule. As for the expression of intention to apply a treaty provisionally, it would be necessary to ascertain whether article 46 encompassed the provisional application regime, even if a State had not yet become a party to the treaty and, if that was not the case, what other rule of general international law might apply to that situation. It would be inadvisable to deal with article 18 of the 1969 Vienna Convention within the scope of the topic under consideration and it would be preferable to defer until a later stage any decision on the form to be given to the outcome of the Commission’s work.

27. Mr. GEVORGIAN said that, on the whole, he endorsed the main ideas expressed by the Special Rapporteur in his report. As stated in paragraph 1 thereof, any study of the provisional application of treaties had to begin with article 25 of the 1969 Vienna Convention which, contrary to the opinion of the legal writers referred to in paragraph 18, was drafted concisely and precisely. The term “provisional entry into force” meant nothing other than the parties’ intention to apply the substantive provisions of a treaty as soon as possible without waiting for the completion of domestic procedures—in other words to apply the treaty provisionally in accordance with article 25 of the 1969 Vienna Convention. However, those notions should plainly not be used interchangeably, because the term “provisional entry into force” had been virtually rejected by the authors of the Convention who had opted for the expression “provisional application”, which reflected the aforementioned intention of States, without either mixing up the various rules on the operation of a treaty, or treating those on its entry into force separately. Any further discussion of that matter was therefore pointless.

28. In paragraphs 25 to 35 of his report, the Special Rapporteur explained why provisional application was necessary. He personally agreed with the views expressed in paragraph 25. Since it was generally impossible to know the reasons why the parties had decided to apply a treaty provisionally, because negotiations were held *in camera*, the list of factors in those paragraphs was valuable. Generally speaking, however, flexibility was not a reason for, but a characteristic of provisional application and of the law of treaties in general. He concurred with other members that it would be unwise to engage in detailed theoretical studies of the conformity of the provisional application of international treaties with the provisions of a State's constitution or other national laws. As Mr. Šturma had shown, States' national laws dealt with the provisional application of treaties in a great variety of ways.

29. On the whole, he agreed with the Special Rapporteur's conclusions in paragraph 53 of the report. With regard to subparagraph (a), he considered that various formulas used by States indicated not that they were unfamiliar with the possibilities offered by that mechanism, but rather that they solved specific questions pragmatically. On the other hand, he fully endorsed subparagraphs (e) and (f). Mr. Murphy's proposal on that matter was interesting.

30. The provisional application of treaties was a fact of international life, which was, perhaps, not quite "proper" from a legal point of view, but which the Commission must not under any circumstances view as being good or bad. While the regime was generally deemed to be an exceptional or a transitory measure, which could not and must not replace the entry into force of a treaty, States would undoubtedly continue to have recourse to it. In any event, provisional application in good faith was better over the years than no treaty at all. He therefore completely concurred with Mr. Hmoud when he said that that institution should be neither encouraged nor discouraged and with the Special Rapporteur's view in paragraph 54 that it should not be overregulated.

31. Mr. CANDIOTI, referring to a comment made by Ms. Escobar Hernández with regard to a unilateral decision of a contracting party, pointed out that, in the context of article 25 of the 1969 Vienna Convention, at least two negotiating States had to agree to provisional application.

32. Ms. ESCOBAR HERNÁNDEZ said that she would tend to agree, but that some recent bilateral and multilateral treaties had provided that each State could indicate whether it was prepared to apply the treaty provisionally. That highly ambiguous formula left everything wide open, because it did not make it clear whether a unilateral declaration would produce its effects immediately, or whether it was necessary to wait for at least one other State to accept provisional application as well. It would therefore be advisable for the Special Rapporteur to investigate that question.

33. Mr. PETRIČ said that if one thing was clear with regard to article 25 of the Vienna Convention it was that it was ambiguous, precisely because a certain amount of "constructive" ambiguity was always useful. For years, States had used the provisional application of treaties and

the institution seemed to be working well. As Mr. Hmoud had suggested, the Commission must therefore carefully study it before deciding what form should be taken by the outcome of its deliberations.

34. Ms. ESCOBAR HERNÁNDEZ said that article 25 of the Vienna Convention made it clear that consensus, in the shape of a specific clause or an additional agreement, was necessary when deciding whether a treaty could be applied provisionally. However that article was silent as to the actual effects that provisional application could produce, in particular whether they pertained exclusively to one State, or whether they must necessarily apply in relations between different States. For example, she did not believe that article 25 prohibited a State from unilaterally applying a treaty recognizing individual rights, but it was necessary to determine the scope of such a possibility.

35. Ms. JACOBSSON noted that some members had reproached the Special Rapporteur with wishing to encourage the provisional application of treaties, which would indeed be worrying. It was, however, difficult to detect such an intention in the first report. In his working paper in 2011, Mr. Gaja had concluded that it was first necessary to define what was meant by the provisional application of treaties.<sup>159</sup> The Special Rapporteur had merely widened the debate in order to determine the parameters for usefulness of the concept. In addition, at the previous session, he had already emphasized that States resorted to the provisional application of a treaty as a matter of exception, mainly for reasons of peace and security, or the stabilization of relations between States. From that it could be concluded that his chief aim was to study the legal aspects of the notion, albeit in the light of the practice and needs of States, which was entirely consistent with the Commission's mandate. Care would simply have to be taken to preserve the flexibility offered by article 25 of the 1969 Vienna Convention and not to attempt to overregulate the provisional application of treaties. As for the use of the latter to circumvent domestic, democratic procedures, it had to be assumed that the laws and constitutions of States provided for proper governance, including in cases where provisional application was resorted to. The Special Rapporteur should nevertheless examine what procedural requirements would mitigate the risk of failure to act in accordance with the constitution.

36. The Special Rapporteur should also clarify the difference between constitutional provisions authorizing the provisional application of treaties and those authorizing a State to become a party to agreements which were not treaties in the technical sense of the term, and he should explain at what point provisional application might become a custom. It would also be interesting to examine the borderline, from the point of view of legally binding effects, between the provisional application of treaties and other political commitments of States, such as memorandums of understanding, for that distinction was the very essence of the topic. Even if the Special Rapporteur had no wish to dwell on the practice of international organizations, it would be worth studying that of the European Union, especially as almost all of its 28 member States had a constitutional procedure in place that preceded the

<sup>159</sup> *Yearbook ... 2011*, vol. II (Part Two), annex III, para. 2.

provisional application of a treaty and many European treaties contained provisions governing that mechanism.

37. Mr. WISNUMURTI said that the topic under consideration was important because its study would enable the Commission to clarify the legal consequences of the provisional application of treaties, in the absence of uniform regulations in that area, without losing sight of the fact that, as the Special Rapporteur had stated, in paragraph 21 of his report, “the content and scope of the provisional application of a treaty will depend largely on the terms in which such application is envisioned in the treaty” concerned.

38. The question of legal effects was of fundamental importance and required further elaboration in subsequent reports. The Special Rapporteur’s references to them in various places in the report (paras. 23, 25 and 36–52) did little to shed light on the matter. He rightly noted that the provisional application of treaties had “consequences that arise both within the State and at the international level” (para. 37). The Commission would have to pay particular attention to the relationship between that mechanism and constitutional law requirements for the entry into force of a treaty. As stated in paragraph 35, a conflict could arise between international law and the constitutional law of the parties to a treaty. Of course, it was presumed that steps would be taken to avert that risk before agreement was reached on provisional application but, for the sake of legal certainty, any guidelines for States would have to include an indication of how to avoid that difficult situation. Due attention should therefore be paid to internal law without embarking on a comparative study of constitutional law and the provisional application of treaties.

39. The Commission might be able to draw on article 25 of the Vienna Convention when drafting guidelines on the provisional application of treaties for States. Since the terminology of that article should therefore be followed, it would be unwise to speak of “provisional entry into force”. In order to decide on the content of those practical guidelines, it would be necessary to identify and take into consideration certain relevant factors, such as the terms on which provisional application had been agreed, arrangements for its termination (by a unilateral or multilateral act or through the entry into force of the treaty), the relationship between provisional application in international law and constitutional requirements in internal law and the principles contained in provisions other than article 25, especially those mentioned in articles 26 and 27, as well as the principle of consent to be bound by a treaty.

40. The conclusions set out in paragraph 53 of the report, which had prompted a number of comments from members, were more akin to reference points for further work and were all relevant, save (a) and (f). It was premature to decide what form should be taken by the work, but it had to be made clear right from the very start that the purpose was not to encourage the use of provisional application, as the Special Rapporteur seemed to suggest in paragraph 54. That procedure had to remain an interim solution pending the entry into force of the treaty, and the Commission must simply help States to make use of it without interfering with their sovereign right to decide what was best for them.

41. Mr. SABOIA wished to emphasize the influence of constitutional law and national political systems on the topic under consideration. The Commission’s statute required it to take account of various legal systems throughout the world and the opportunity for doing so had certainly arrived. The example of Brazil was interesting in that respect: it had been able to ratify the 1969 Vienna Convention only with a reservation to article 25, *inter alia*, because a number of members of Congress had taken the view that that article encroached on their constitutional role, even though it created no obligation to accept provisional application. The General Agreement on Tariffs and Trade, which Congress had authorized the Executive to apply provisionally back in 1948, was virtually the only example. Depending on the political system, parliamentary approval could be more or less easy to obtain. Moreover, even if provisional application might be a legitimate tool for expediting the achievement of the goals of an international instrument, it must not deprive the representatives of the people and civil society of holding an appropriate debate on the implications of the treaty concerned. Ratification remained necessary, even if the procedure ought to be speeded up, and it could be secured if there was political will and pressure from civil society, as had been the case of the Rome Statute of the International Criminal Court, which had been ratified by Brazil two years after its adoption.

42. The Commission could therefore usefully clarify certain issues connected with the regime of the provisional application of treaties, in particular that of how that application became effective between the parties, what its legal effects were and its relationship with the provisions of the Vienna Convention and the rules on State responsibility. It would also be necessary to study the thornier issues of the termination of provisional application, and the retention of provisional application by a State after the entry into force of the treaty. As for the outcome of the work, as other members had said, it must be explanatory and practical, but neutral; it should neither encourage nor discourage the provisional application of treaties, and it should also avoid making future practice in that area a source of an obligatory acceptance of clauses related to that procedure.

*After the statements made by Mr. Schmidt, the Director of the International Law Seminar, and Ms. López-Ruiz Montes, the representative of the participants in the Seminar, the Chairperson congratulated the participants and declared the Seminar closed.*

*The meeting rose at 1 p.m.*

## 3188th MEETING

*Tuesday, 30 July 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree,

Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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**Provisional application of treaties (concluded)**  
(A/CN.4/657, sect. D, A/CN.4/658, A/CN.4/664)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. NOLTE said that the Commission was faced with a division of opinions over a key issue. While some members held that the provisional application of treaties should not be encouraged, because it entailed the risk that domestic constitutional procedures might be circumvented, others maintained that States were under no obligation to accept the provisional application of treaties and were free to make sure that their constitutional procedures were respected. In his view, both positions expressed important points, and they were not mutually incompatible.

2. The second position presupposed that it was clear to all what was meant by “provisional application”. The first position reflected doubts as to whether such clarity existed. He himself shared those doubts: to those who were not international legal experts, the term was ambiguous enough to be regarded as not implying a legally binding effect. He also had the impression that the provisional application of treaties might offer governments a means of suggesting to their parliaments that there was some third category of agreement, somewhere between a binding treaty and a less formal undertaking, which did not require treatment according to normal constitutional standards.

3. If the Commission were to conclude that provisional application always entailed a legally binding treaty obligation, that would mean that most States which required parliamentary approval in order to undertake such an obligation would have to follow normal constitutional procedures in order to obtain approval. In that case, it was unclear what advantage was offered by provisional application. If, on the other hand, the Commission concluded that provisional application did not produce a legally binding commitment, then the goal of bringing the treaty into operation speedily might be achieved, but at the expense of the protection offered to the parties by the binding character of treaties. By spelling out the meaning and legal effects of provisional application, the Commission could help to ensure that States did not accept what they thought was something less than a binding treaty, only to discover, belatedly, that they were bound by a real treaty.

4. Such clarification might come with a price, however. Fewer States might be prepared to have recourse to provisional application if it denoted a binding treaty obligation. In that case, it would no longer fulfil its primary function of enabling States parties to embark upon cooperation under a treaty even before its entry into force made it fully binding. That function would have to

be fulfilled by means of treaty clauses in which the parties undertook to do their best to apply the treaty within the constraints imposed by their constitutions or domestic legislation.

5. Mr. PARK said that in order to determine the general direction of the Commission’s work on the topic, it was necessary to study the background to the formulation of article 25 of the 1969 Vienna Convention and to analyse current State practice in the provisional application of treaties. The purpose of work on the topic should be the drafting of guidelines in order to ensure that the provisional application of treaties served to promote legal certainty in international relations.

6. The fact that the terms “provisional application” and “provisional entry into force” were often used interchangeably in legal writings and State practice could introduce ambiguity into treaty regimes. The Commission should therefore issue a guideline advising States to use one of those terms in preference to the other. It should not encourage States to have more frequent recourse to provisional application, however, because it was a legal mechanism that was not yet fully formed and its legal effects were not always clear.

7. A number of questions raised by article 25 needed to be considered: for example, the question of when provisional application began and ended. Since article 25, paragraph 2, enabled a State to terminate the provisional application of a treaty whenever it wished, by unilateral notification, other States were vulnerable to arbitrary abuse by that State of the provisional application regime. As for the legal effect of provisional application, he subscribed to the view that during such application, a State was legally bound, under the principle of *pacta sunt servanda*, and that failure by a State to abide by a provisionally applied treaty entailed its responsibility for an internationally wrongful act. Bilateral and multilateral treaties should be dealt with separately, since that distinction might affect assessments of whether all the parties had consented to the provisional application of a treaty or to the termination of provisional application.

8. A potential conflict between domestic legislation and the provisional application of a treaty could sometimes be resolved, or avoided, at the national or international level. In the absence of a constitutional provision concerning provisional application, a government could seek parliamentary approval of such application. Alternatively, an international treaty could incorporate a special clause requiring States to apply the treaty provisionally in accordance with their national or internal laws. Problems arose, however, when there was neither a national procedure nor a treaty clause permitting provisional application. That was why the Commission should draw up guidelines that would obviate any conflict in those circumstances.

9. Mr. VÁZQUEZ-BERMÚDEZ said that even though some Latin American States had entered reservations to article 25 of the Vienna Convention, article 330 of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, permitted its provisional application subject to compliance with the requisite domestic procedures

in each country. In Peru and the member States of the European Union, the agreement had been provisionally applied since 1 March 2013, pending the completion of ratification procedures by all the States, whereas in Colombia, parliamentary approval was necessary for its provisional application. There was, however, no difference between the legal effects of the provisional application of the agreement and the legal effects of its final entry into force.

10. Mr. GÓMEZ ROBLEDÓ (Special Rapporteur) said that, before summing up the debate, he wished to explain that the last sentence of paragraph 35 of his report (A/CN.4/664) was not intended to describe a case where, as the penultimate sentence indicated, provisional application might be a subterfuge for evading the domestic legal requirements for the approval of a treaty. The case cited was one example among many where provisional application served to speed up the implementation of a treaty.

11. With regard to sources, he had taken note of the recommendation that he should look into State practice during the negotiation, implementation, interpretation and termination of a treaty that was subject to provisional application. He would also take due account of the case law and the opinions that would be expressed by States in the Sixth Committee at the upcoming session of the General Assembly. States might be requested to provide information on their practice, particularly with respect to bilateral treaties, and to explain how and when they used provisional application, when they deemed such application to be terminated and what they viewed as its legal effects. An indicative list of State practice could then be drawn up on the basis of that information.

12. It was true that it was not the Commission's task to encourage or discourage provisional application of treaties by States. His use of the word "incentives" in paragraph 54 of the report had apparently given the impression that he wanted the Commission to actively promote the practice. However, the objective was simply to clarify the relevant legal regime by studying State practice and case law, as was the Commission's standard practice. His working hypothesis was that provisional application was a transitional regime that could, but did not always, lead to the entry into force of a treaty.

13. The Commission's discussion of terminology had led to an exploration of the distinction between provisional application and entry into force. The term used in article 25 of the 1969 Vienna Convention was "provisional application", however, and it was on that term and its meaning that the Commission's work must focus.

14. A number of members had raised the issue of whether provisional application constituted a rule of customary international law. Irrespective of whether it did, provisional application was a reality in inter-State relations. Determining that it was, or was not, a customary rule could be useful in situations involving two or more States that were not parties to the Vienna Convention and where no treaty provision was applicable.

15. Several members had mentioned the relationship between provisional application and the internal law and, in particular, the constitutional law of States, which was

undoubtedly a complex issue. He fully shared the view that it was not necessary to conduct an exhaustive study of internal or constitutional law in each State as part of the current project. Some internal legislation could nevertheless be taken into account to shed light on the position taken by States and to ensure that they were aware of the implications that recourse to provisional application could have for their internal law. He agreed with those who had recalled that article 27 of the Vienna Convention should guide the Commission's work in that area. Of course, it would also be necessary to take account of the situation that could arise from the scenario referred to in article 46 of that Convention, as pointed out by one speaker. By alleviating the uncertainty surrounding provisional application of treaties, the Commission's work might even embolden States to address provisional application in their internal law.

16. With regard to the analysis of the legal effects of provisional application, he agreed with several speakers that the Commission should find out how the rules on provisional application related to other rules in the Vienna Convention and whether a *lex specialis* regime or the general regime of the Convention regulated provisional application. In future reports, he would examine the effect of the Vienna Convention on provisional application in areas such as the expression of consent, reservations, relations with third States, interpretation, amendment, termination and invalidation. The temporal aspect of provisional application would also need to be studied. Normally, provisional application ended with the entry into force of a treaty, although in some cases it could continue indefinitely, as was the case with the Arms Trade Treaty. Consideration would also be given to the scenario mentioned by two speakers in which provisional application generated rights for individuals. He agreed that a distinction should be made between bilateral and multilateral treaties.

17. It was true that there was no need to analyse the relationship of provisional application to the regime of State responsibility. Provisional application was unquestionably governed by the principle of *pacta sunt servanda* and clearly any breach of an obligation arising from the provisional application of a treaty would bring into play the rules on responsibility of States for internationally wrongful acts.

18. He had taken note of the interest expressed by a number of speakers in addressing the treatment of provisional application in treaties concluded between States and international organizations or between international organizations.

19. While various members had suggested that it was too early to define what form the outcome of the Commission's work should take, in his view, the most logical approach would be to draft a series of guidelines, including commentaries, to assist States when negotiating, implementing, interpreting and terminating the provisional application of a treaty. The purpose would be to provide tools to facilitate recourse to provisional application by the executive and possibly other branches of government. He would endeavour to include some guidelines and commentaries in his next report.

20. As one speaker had pointed out, the Commission should take into account the possible cost of eliminating the ambiguities surrounding provisional application. He agreed that there was a risk of affecting the flexibility of provisional application, and it would therefore be necessary to avoid being too prescriptive.

21. The future programme of work could focus on the following issues: a brief review of State practice; the relationship between the rules on provisional application and other rules in the 1969 Vienna Convention; the legal regime under article 25 of the Convention; the legal effects of provisional application; and the regime of provisional application in the light of the 1986 Vienna Convention.

**Programme, procedures and working methods of the Commission and its documentation (A/CN.4/657,<sup>160</sup> sect. I, A/CN.4/L.830<sup>161</sup>)**

[Agenda item 11]

REPORT OF THE PLANNING GROUP

22. Mr. ŠTURMA (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.830), said that the Group had held three meetings to consider section I (Other decisions and conclusions of the Commission) of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-seventh session (A/CN.4/657); General Assembly resolution 67/92 of 14 December 2012, on the report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions,<sup>162</sup> in particular paragraphs 23 to 28; General Assembly resolution 67/1 of 24 September 2012 containing the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels; and General Assembly resolution 67/97 of 14 December 2012 on the rule of law at the national and international levels.

23. At the Commission's current session, the Working Group on the long-term programme of work had been reconstituted. Based on a proposal by Mr. Murphy, the Working Group had recommended, and the Planning Group had endorsed, the inclusion of the topic "Crimes against humanity" in the Commission's long-term programme of work. The syllabus of the topic would be annexed to the Commission's report to the General Assembly.

24. As in the past, the Planning Group had prepared a section on the rule of law at the national and international levels in response to the request of the General Assembly in resolution 67/97. For the first time, specific language had been added to the section on documentation and publications to highlight the importance attached to the continued issuance of the Commission's publications and to recommend that the General Assembly take the necessary action.

25. The Planning Group also recommended that the sixty-sixth session of the Commission should be held in

Geneva from 5 May to 6 June and from 7 July to 8 August 2014. The recommendations of the Planning Group would be incorporated, with the necessary adjustments, in the final chapter of the Commission's report on the work of its sixty-fifth session.

26. Mr. PETRIČ said that, although the topic of protection of the atmosphere had been discussed a number of times, to date those discussions had not been mentioned in the Commission's reports or summary records. He wished to know whether they would be covered in the report on the current session.

27. Mr. CANDIOTI, endorsing those remarks, pointed out that many States in the Sixth Committee had shown interest in the topic of protection of the atmosphere. He wished to make a formal proposal for the inclusion of the topic in the Commission's agenda for its sixty-sixth session. In addition, he proposed that chapter II of the Commission's annual report, which contained a summary of the work of the Commission at its sixty-fifth session, contain a paragraph to indicate that informal consultations had been held on the topic and to describe the results of those consultations.

28. The CHAIRPERSON said that the Commission was to hold informal consultations the following day precisely in order to discuss the protection of the atmosphere, a topic that had been pending for some time. He would announce the results of those consultations at the plenary meeting immediately following them.

29. Mr. CANDIOTI, supported by Mr. PETRIČ, emphasized the importance of maintaining transparency in the Commission's work and, in particular, of keeping the Sixth Committee and the General Assembly fully informed of its activities, including all the topics it discussed.

30. Following editorial proposals and drafting suggestions by Mr. FORTEAU, Ms. ESCOBAR HERNÁNDEZ, Mr. EL-MURTADI SULEIMAN GOUIDER, Sir Michael WOOD, Mr. HMOUD and Ms. JACOBSSON, the CHAIRPERSON said he took it that the Commission wished to adopt the recommendations of the Planning Group contained in document A/CN.4/L.830.

*It was so decided.*

31. The CHAIRPERSON said he took it that the Commission wished to incorporate the topic "Crimes against humanity" in its long-term programme of work and to annex the syllabus of the new topic to its report on the work of its sixty-fifth session.

*It was so decided.*

**Protection of the environment in relation to armed conflicts**

[Agenda item 9]

ORAL REPORT OF THE SPECIAL RAPPOREUR

32. Ms. JACOBSSON (Special Rapporteur) said that consultations had been held on 6 June and 9 July 2013 on the basis of two informal papers she had circulated.

<sup>160</sup> Mimeographed; available from the Commission's website.

<sup>161</sup> *Idem.*

<sup>162</sup> *Yearbook ... 2011*, vol. II (Part Two), and *Yearbook ... 2012*, vol. II (Part Two).

The purpose had been to initiate an informal dialogue on a number of issues that could be of relevance to the consideration of the topic during the present quinquennium. The two informal papers were to be read together with the syllabus containing the initial proposal for the topic, as reproduced in the report of the Commission to the General Assembly on the work of its sixty-third session.<sup>163</sup> The issues discussed during the consultations included the scope, general direction of work and timetable. On the basis of the consultations, she had circulated an outline for future work on the topic, including the proposed focus of her first report.

33. She had proposed that the topic should be addressed from a temporal perspective, rather than from the perspective of various areas of international law. The temporal phases related to legal measures taken to protect the environment before, during and after an armed conflict (phases I, II and III). Such an approach would allow the Commission to identify concrete legal issues that arose in the different phases and would facilitate the development of concrete conclusions or guidelines.

34. She had further proposed that the focus of the topic be on phase I, obligations of relevance to a potential armed conflict, and phase III, post-conflict measures. Phase II, the phase during which the law of war applied, would be given less emphasis, as it should not be the Commission's task to modify the existing legal regimes. The work on phase II should also focus on non-international armed conflicts.

35. The original time frame envisaged in the syllabus had been five years, based on an approach to the topic that was different from the one she had just described. With respect to the final outcome, her preliminary view was that the topic was much better suited to the development of non-binding draft guidelines than to a draft convention.

36. During the informal consultations, the approach of addressing the topic in temporal phases had generally been welcomed. Several members of the Commission had emphasized that phase II, rules applicable during an armed conflict, was the most important, although others considered that either phase I or phase III, or both, were paramount. Her view was that although the work was divided into temporal phases, there could not be a strict dividing line between them, since that would be artificial, and it would not correspond to the way in which the legal rules relevant for the topic operated.

37. Several members had cautioned against taking up the question of weapons, whereas a few members thought that it should be addressed. In her opinion, it should not be the focus of the topic.

38. Some members considered it premature to decide on the final form of the work or to ask Member States to report on their practice. Consultations with other United Nations organs or international organizations involved in the protection of the environment were encouraged. She had also been encouraged to consult regional bodies, such as the African Union, the European Union, the League of Arab States and the Organization of American States.

39. She intended to present her first report to the Commission at its sixty-sixth session. She envisaged a three-year timetable for the Commission's work on the topic, with one report each year. The focus of the first report would be on phase I, obligations of relevance to a potential armed conflict. It would not address post-conflict measures *per se*, even if preparation for post-conflict measures might need to be implemented before an armed conflict had broken out. She also planned to identify the issues previously considered by the Commission that might be of relevance to the present topic. It would be valuable if the Commission could ask States to provide examples of instances in which international environmental law, including regional and bilateral treaties, had continued to apply in times of international or non-international armed conflict.

40. The second report would be on the law of armed conflict, including non-international armed conflict, and would contain an analysis of existing rules. The third report would focus on post-conflict measures, including reparation of damage, reconstruction, liability and compensation. Particular attention would be given to case law. All three reports would contain conclusions or draft guidelines for discussion by the Commission, and possible referral to the Drafting Committee. At the current stage, it was hard to predict whether it would be possible to conclude the topic within the current quinquennium.

41. She wished to draw attention to a discrepancy in the translation of the title of the topic into certain official languages. The title was "Protection of the environment in relation to armed conflicts", with the phrase "in relation to" reflecting the fact that the subject was not limited to the armed conflict phase and included two other temporal phases.

42. The CHAIRPERSON said he took it that the Commission wished to take note of the report presented orally by the Special Rapporteur on the topic of protection of the environment in relation to armed conflicts.

*It was so decided.*

*The meeting rose at 12.30 p.m.*

### 3189th MEETING

*Wednesday, 31 July 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

<sup>163</sup> *Yearbook ... 2011*, vol. II (Part Two), annex V.

**Cooperation with other bodies (concluded)\***

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE AFRICAN  
UNION COMMISSION ON INTERNATIONAL LAW

1. The CHAIRPERSON welcomed Mr. Kilangi, President of the African Union Commission on International Law (AUCIL), and invited him to present the institution's work in areas where its interests coincided with those of the Commission.

2. Mr. KILANGI (African Union Commission on International Law) said that AUCIL had decided to call on the Commission every year in order to exchange views and assess the progress made by the two institutions, which performed similar work, albeit in different settings. AUCIL, which had the same arrangement with the IAJC, hoped that representatives of the Commission would visit it in Addis Ababa during one of its sessions. Such meetings were considered very important for three main reasons. First, there had been concerns, when AUCIL was established, that its work would aggravate the fragmentation of international law and lead to competition with the Commission. Exchanging views seemed, therefore, to be the best way forward, not only in dispelling those concerns, but also in achieving economies of scale and better results. Second, AUCIL, which had only begun its work in 2010, was still defining its methodology and approach, and wished to draw inspiration from the Commission's extensive experience. Lastly, in Africa, like in other parts of the world, politics sometimes intervened in many areas, including legal matters. The best way for AUCIL to remain professional and independent would be to hold discussions with other legal experts working on similar issues. Without wishing to narrow the discussion, he therefore requested members of the Commission to share their thoughts on how the two institutions could work together, enrich each other, benefit from each other's work, inform and consult each other, without compromising their respective mandates and functions. AUCIL had prepared a draft memorandum of understanding, which it would present to members of the Commission with a view to deepening cooperation between the two institutions.

3. AUCIL had been established to serve as the chief advisory body of the African Union on matters of international law. It worked to codify and develop international law in Africa, carry out studies on legal matters of interest to the African Union and its member States and promote the teaching, study, publication and dissemination of literature on international law in Africa. It conducted research and studies; produced reports; prepared draft framework agreements, instruments, model laws and regulations; organized seminars, conferences and forums; prepared legal advisory opinions; issued publications; and collaborated with various institutions, including universities. More specifically, a dozen studies were being conducted on topics such as the harmonization of procedures for ratification of treaties in the African continent, the immunity of State officials under the Rome

Statute of the International Criminal Court, the principle of universal jurisdiction and the ways of promoting the teaching, study and dissemination of international law and African Union law on the African continent. Since 2012, AUCIL organized an annual forum of experts in international law, most of whom were African. It was currently preparing a legal advisory opinion on the establishment of an international constitutional court as proposed by Tunisia. It published a *Journal of International Law* and a *Yearbook*. It planned to cooperate with the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, and it contributed to the website of the United Nations Audiovisual Library of International Law. Lastly, it cooperated with the Commission and the IAJC, and would launch its programme of cooperation with universities in 2014. Nevertheless, its work was hindered by a lack of human, financial and material resources.

4. The CHAIRPERSON thanked Mr. Kilangi for his presentation and invited members to comment or ask questions.

5. Mr. TLADI wished to know the extent to which the opinions of African Union member States were solicited and taken into consideration in studies such as the ones on the harmonization of procedures for ratification of treaties on the African continent and the immunity of State officials under the Rome Statute of the International Criminal Court, and what procedure was followed in that regard.

6. Mr. NOLTE asked whether Mr. Kilangi saw a distinction between international law and African Union law and, if so, what that might be. He also wished to know whether recent events in Egypt had influenced the discussions that the African Union was holding on unconstitutional changes of government.

7. Mr. PETRIČ asked whether AUCIL intended to deal with constitutional law.

8. Mr. KILANGI (African Union Commission on International Law) said that when AUCIL incorporated a topic in its programme of work, it appointed a special rapporteur to conduct a study, present it at the plenary meeting, seek the views of other members and, if necessary, consult international law experts and institutions from the African continent and other regions of the world. AUCIL was then obliged to consult all African Union member States, which informed it of their views. The procedure could prove problematic, because the views of member States sometimes ran counter to the principles of international law, which AUCIL had a duty to respect. The issue of the distinction between international law and African Union law was part of ongoing debates within the African Union, which also had yet to decide how best to deal with "popular uprisings", since the term did not have a clear and indisputable definition. In Egypt, a military coup had been staged with the support of some sectors of the population, but other sectors had subsequently rallied behind the former President. It was a complex situation, and member States had not yet reached consensus on it. Lastly, a system that might be characterized as international constitutional law had never yet been developed, but there was a perceived trend towards the

\* Resumed from the 3182nd meeting.

internationalization of constitutional law, and that might result in arrangements for elections and governance.

9. Mr. HASSOUNA asked whether AUCIL kept abreast of, and discussed, the Commission's work, and whether it consulted other organizations, in particular AALCO, of which several African Union member States were also members. It would be very useful to explore the possibilities for cooperation between the Commission and AUCIL and the practical arrangements for such cooperation, for example through a website, since many of the issues studied by AUCIL were also of interest to the Commission. In Egypt, there had not been a typical military coup, but rather a popular uprising that had been backed by the army. An African Union delegation had recently travelled to Cairo to examine the new Government's road map. He hoped that Egypt, which was a founding member of the African Union, would go back to being a full member very soon.

10. Mr. PETER, underlining the importance of Mr. Kilangi's visit, said that, contrary to some common preconceptions, Africa had made a significant contribution to the development of international law. He congratulated AUCIL on the work that it had undertaken since its establishment, particularly the publication of its *Yearbook* and *Journal of International Law*: in such publications, it could pay tribute to great African jurists. AUCIL would gain greater visibility by having its own website, as information on it was somewhat lost in all the other information on the African Union site. Lastly, he congratulated AUCIL for adopting a scientific approach to its work and developing a strategic plan for 2011–2013,<sup>164</sup> which would perhaps benefit from being extended to five years, but which could, above all, serve as an excellent basis for collaboration with institutions such as the Commission, with which it shared numerous topics of study.

11. Mr. KILANGI (African Union Commission on International Law) said that, in 2014, AUCIL would have a consolidated budget that should enable it to keep abreast of the Commission's work. With regard to interregional cooperation, AUCIL had links to AALCO through Ghana and the United Republic of Tanzania, but it planned to apply for observer status in 2014. Once its work had been completed, AUCIL published and uploaded it to the African Union website, but a summary could also be found in the *Yearbook*. Africa's contribution to the development of international law should be more clearly recognized, as it remained unsung in spite of its great importance, particularly in respect of refugees and displaced persons, the concept of peoples as groups and the idea of an exclusive economic zone.

12. The AUCIL strategic plan did indeed include several topics of interest to the Commission and would serve as an excellent basis for collaboration and exchange. Objective 4 of the plan, which was to promote international law in Africa,<sup>165</sup> was particularly important because that was one of the founding principles of AUCIL, which had a key role to play in that regard.

13. Ms. ESCOBAR HERNÁNDEZ, welcoming the fact that AUCIL was devoting a study to the immunity of State officials, with particular reference to the Rome Statute of the International Criminal Court, asked whether it would be possible to obtain further information on the progress and content of work on that topic. The Commission had itself been dealing with a related topic since 2007—the immunity of State officials from foreign criminal jurisdiction—to which the United Nations General Assembly attached particular importance. It would be very helpful if AUCIL could inform African Union member States of the Commission's needs in that area and encourage them to provide comments and information on their practice. Lastly, she hoped that genuine mechanisms for cooperation between the two Commissions would be established, so that dialogue could be pursued over and above the annual visit.

14. Mr. CAFLISCH said that many jurists were interested in African international law, but that information was very hard to come by. He asked whether AUCIL was in favour of broadening the jurisdiction of the African Court of Justice and Human Rights, and why the process was so problematic.

15. Mr. KITTICHAISAREE enquired about the slightly illogical reasoning behind the African Union's resolutions and declarations regarding cooperation with the International Criminal Court. The main reason given to justify the refusal of African countries to cooperate was the need to maintain national and regional stability, with the presence of Heads of State deemed essential to national peace processes. Yet when those leaders were no longer in power, the atrocities committed under their regimes could be viewed as acts of the State that threatened to undermine national stability and reconciliation. He also wished to know why African States had not adopted the recommendations of the African Union–European Union Technical Ad hoc Expert Group to examine the issue of the improper invocation of the principle of universal jurisdiction.

16. Mr. GÓMEZ ROBLEDÓ said that, in the context of discussions on unconstitutional changes of government, it would be useful for Mr. Kilangi and members of the IAJC to exchange views on the impact of the Inter-American Democratic Charter in Latin America. That instrument, which provided for a series of measures culminating in the suspension of member States that had breached constitutional order, was no longer always sufficient to respond to the numerous threats to democracy. In the recent case involving Honduras, the mechanism had led too readily to a decision to suspend the member State and had left no room for dialogue. Conversely, the decision not to suspend Paraguay appeared to have allowed the country to move towards a return to democracy in the space of six months. To conclude, he underlined the invaluable contribution of African countries to international law, in particular their fundamental support for the adoption of the Rome Statute of the International Criminal Court, irrespective of the problems that might currently arise from that instrument's implementation.

17. Mr. TLADI pointed out that the African Union's resolutions against cooperation with the International

<sup>164</sup> See *AUCIL Yearbook 2013*, pp. 87 *et seq.*

<sup>165</sup> *Ibid.*, p. 100.

Criminal Court were based not only on concerns over peace and stability, but also on legal arguments, particularly in relation to article 98 of the Rome Statute of the International Criminal Court.

18. Mr. KILANGI (African Union Commission on International Law) said that AUCIL contributed to broadening the jurisdiction of the African Court of Justice and Human Rights, but only in a consultative capacity on certain technical aspects, with no political considerations. It was, of course, working on a definition of the crime of “unconstitutional change of government”, but also of piracy and illegal exploitation of natural resources, over which the Court would also have jurisdiction. Moreover, AUCIL was endeavouring to disseminate information on the evolution of the law in Africa, although this duty could only be fulfilled within available means.

19. With regard to failure to cooperate with the International Criminal Court, it was important to recall that, although AUCIL worked independently, it nevertheless had to take into account the opinions of African countries. The issue was linked to that of the immunities of Heads of State, and African jurists, in their interpretation of the Rome Statute of the International Criminal Court, believed that article 27 recognized those immunities. Another issue was related to the interpretation of the principle of complementarity, and in particular the limits placed on its implementation. Lastly, European countries often overlooked an element that was important in the African context, namely the need to make justice compatible with peace and reconciliation. In the light of situations such as the ones experienced in South Africa and Rwanda, one might question the effect of retributive justice on society. As for the work on universal jurisdiction, it related not so much to the improper invocation of the principle as to how its scope should be interpreted, given that it derived from custom. The Inter-American Democratic Charter was similar to the African Charter on Democracy, Elections and Governance, and it would indeed be useful to share opinions and experiences with the aim of reviewing the two instruments, neither of which appeared to have had the desired effect, which was why there had been a proposal for the establishment of an international constitutional court.

20. Mr. HMOUD supported the questions that had been asked previously. He also asked which were the areas in which AUCIL intended to collaborate with the Commission, and which were the legal matters specific to Africa in which it felt it could make a contribution. He also wished to know how AUCIL perceived the balance between respect for sovereignty and protection of human rights.

21. Ms. JACOBSSON said that an additional aspect of the huge contribution that African countries had made, and continued to make, to international law, was that many of them referred cases to the International Court of Justice. She joined other members in expressing regret at how difficult it was to obtain information on the legal work undertaken in African countries, and noted in particular that the African Union website was not very user-friendly.

22. Sir Michael WOOD supported the comments made by Ms. Jacobsson. He also agreed with Mr. Tladi on the subject of cooperation with the International Criminal Court. The African Union’s opinion that customary international law could take precedence over the Rome Statute of the International Criminal Court in matters pertaining to immunities of Heads of State was interesting and well argued. He asked whether AUCIL planned to cooperate with CAHDI. As other members had pointed out, African Union member States should be encouraged to contribute to the Commission’s work by providing information, particularly in relation to the formation and evidence of customary international law, especially as the AUCIL statute appeared to attach great importance to treaty law.

23. Mr. SABOIA thanked Mr. Kilangi for his very informative presentation and paid tribute to the significant work undertaken by AUCIL since its establishment in 2009 and, more generally, the contribution of African jurists to international law. Sharing the concerns expressed by Sir Michael with regard to cooperation between the African Union and the International Criminal Court, he said that it would be a shame if African countries—which had, after all, actively participated in the *travaux préparatoires* of the Rome Statute of the International Criminal Court—should come to harbour negative feelings about the Court.

24. In respect of refugees and displaced persons, an issue that was of direct relevance to the Commission’s work on the expulsion of aliens, he welcomed the enhanced protection afforded to refugees by the Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa, as well as the adoption of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). He had learned with great interest that AUCIL representatives were to participate in the eighty-third regular session of the IAJC with the particular aim of examining the issue of unconstitutional changes of government.

25. Mr. KILANGI (African Union Commission on International Law) said that there was no reason to worry about procedural problems linked to the deepening of cooperation between AUCIL and the Commission, as they would gradually be resolved. With regard to sovereignty and human rights, a highly theoretical issue about which a great deal could be said, he proposed, given the late hour, to go back to it in an informal setting.

26. It was true that few documents were uploaded to the AUCIL website, mainly for budgetary reasons, but due regard would be paid to the question of how to improve the document dissemination system during the development of the next strategic five-year plan.

27. He acknowledged that it would be useful to initiate cooperation with CAHDI, and said that the matter would be carefully considered. Through its work, AUCIL would undoubtedly contribute to improvements in the reporting of information on the practice of African States. Moreover, it would give due consideration to customary law, given that, under its mandate, it was responsible for codifying the law.

**The most-favoured-nation clause**  
(A/CN.4/657,<sup>166</sup> sect. H, A/CN.4/L.828<sup>167</sup>)

[Agenda item 10]

REPORT OF THE STUDY GROUP

28. Mr. FORTEAU (Acting Chairperson of the Study Group on the most-favoured-nation clause) said that, in the absence of Mr. McRae, he had served as Chairperson of the Study Group, which had been reconstituted at the current session. The Study Group had held four meetings, on 23 May and on 10, 15 and 30 July 2013.

29. He wished to begin by reading out amendments to the report of the Study Group (A/CN.4/L.828) which, in its current version, did not reflect the discussion held on 30 July 2013 on the working paper entitled “Survey of [most-favoured-nation] language and *Maffezini*-related jurisprudence”.

30. The first sentence of paragraph 8 would read as follows: “The Study Group had before it a working paper entitled ‘A [bilateral investment treaty] on mixed tribunals: legal character of investment dispute settlements’, drafted by Mr. Murase, and a working paper entitled ‘Survey of [most-favoured-nation] language and *Maffezini*-related jurisprudence’, drafted by Mr. Hmoud.”

31. A paragraph 9 *bis* would be added, to read: “The working paper by Mr. Hmoud provided a compilation of treaty provisions which were the subject of examination in awards, and which addressed the *Maffezini*-related issue of whether a most-favoured-nation clause extended to dispute settlement clauses, together with the relevant excerpts of the awards.”

32. Lastly, the following sentence would be inserted between the second and third sentences of paragraph 12: “It was considered that the study commenced by Mr. Hmoud would be helpful when the Study Group eventually addressed the question of guidelines and model clauses in relation to issues raised in the *Maffezini* award.”

33. The first part of the report essentially recalled the overall objective of the Study Group, the work that it had undertaken since its establishment in 2009<sup>168</sup> and the elements likely to guide its future work. The end goal of the Study Group was to put together an overall report that would systematically analyse the various issues identified as relevant. The report would provide a general background to the work within the broader framework of general international law, in the light of subsequent developments, including the 1978 draft articles.<sup>169</sup> Accordingly, the Study Group would also seek to address contemporary issues concerning most-favoured-nation clauses in its report. It might address broadly the question of the interpretation of most-favoured-nation provisions in investment agreements.

<sup>166</sup> Mimeographed; available from the Commission’s website.

<sup>167</sup> *Idem*.

<sup>168</sup> *Yearbook ... 2009*, vol. II (Part Two), p. 146, para. 209.

<sup>169</sup> *Yearbook ... 1978*, vol. II (Part Two), para. 74.

34. The second part of the report contained an overview of the discussions held by the Study Group during the current session. The Group had focused its attention on the analysis of two awards, *Daimler Financial Services AG v. Argentine Republic* and *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, which shed further light on the various factors taken into account by tribunals in interpreting most-favoured-nation clauses.

35. The Study Group had also held an exchange of views on the outline of its future report. In that connection, it had noted that, while the focus of its work was in the area of investment, the issues under discussion should be located within a broader framework, that of general international law and the Commission’s prior work. The possibility of developing guidelines and model clauses remained an objective, on the understanding that an overly prescriptive outcome was to be avoided.

36. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Study Group on the most-favoured-nation clause.

*It was so decided.*

**The obligation to extradite or prosecute (*aut dedere aut judicare*)** (A/CN.4/657,<sup>170</sup> sect. F, A/CN.4/L.829<sup>171</sup>)

[Agenda item 3]

REPORT OF THE WORKING GROUP

37. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that the Working Group had held seven meetings, on 8, 14, 16 and 28 May, 5 June and 18 and 24 July 2013, and that it had had before it four working papers prepared by the Chairperson.

38. The introduction of the Working Group’s report (A/CN.4/L.829), provided background on the topic and highlighted its importance in the Commission’s work. Numerous conventions gave effect to the obligation to cooperate in the fight against impunity, which included the obligation to extradite or prosecute, and the crucial role played by that obligation was widely recognized by States. The topic, which could be viewed as having been encompassed in the Commission’s work since 1949,<sup>172</sup> had become particularly important because of the need for an effective system of criminalization and prosecution of the most serious crimes.

39. Paragraphs 6 to 10 of the report provided an overview of the Commission’s work on the topic up to its sixty-third session. It recalled, *inter alia*, that from its fifty-eighth to its sixty-third sessions (2006–2011), the Commission had considered four reports and four draft

<sup>170</sup> Mimeographed; available from the Commission’s website.

<sup>171</sup> Reproduced in *Yearbook ... 2013*, vol. II (Part Two), annex I.

<sup>172</sup> The topic “Jurisdiction with regard to crimes committed outside national territory” was part of a provisional list of 14 topics selected by the Commission at its first session in 1949 (*Yearbook ... 1949*, p. 281, paras. 16–17); see also *The Work of the International Law Commission*, 7th ed., vol. I (United Nations publication, Sales No. E.07.V.9), pp. 44–45.

articles,<sup>173</sup> and that a Working Group established in 2009 under the chairpersonship of Mr. Alain Pellet had been responsible for drawing up a general framework for consideration of the topic.<sup>174</sup>

40. Paragraphs 11 to 20 of the report, which dealt with the work undertaken in 2012 and 2013, underlined that it would be futile to seek to harmonize the various treaty clauses on the obligation to extradite or prosecute. There were significant gaps in the present conventional regime that might need to be closed, and there were no international conventions with that obligation in relation to most crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflict. With respect to genocide, the international cooperation regime could be strengthened beyond the rudimentary regime under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

41. Paragraphs 21 to 36 of the report concerned the implementation of the obligation to extradite or prosecute. It contained, *inter alia*, an analysis of the judgment by the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite*. It also addressed the temporal scope of the obligation to extradite or prosecute and certain consequences of non-compliance, as well as the relationship between that obligation and the “third alternative”: with the establishment of the International Criminal Court and various *ad hoc* international criminal tribunals, there was now the possibility that a State faced with an obligation to extradite or prosecute an accused person might have recourse to a third alternative, that of surrendering the suspect to a competent international criminal tribunal.

42. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 3190th MEETING

*Friday, 2 August 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau,

<sup>173</sup> The Special Rapporteur, Mr. Zdzislaw Galicki, presented his preliminary report (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571) in 2006; his second report (*Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585) in 2007; his third report (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603) in 2008; and his fourth report (*Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648) in 2011. The Special Rapporteur proposed the draft articles in his second (A/CN.4/585, para. 76) and third reports (A/CN.4/603, paras. 110–129) and, three years later, in his fourth report (A/CN.4/648, paras. 40, 70–71 and 95).

<sup>174</sup> *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

## Draft report of the International Law Commission on the work of its sixty-fifth session

### CHAPTER I. *Organization of the session* (A/CN.4/L.816)

1. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of chapter I of the draft report as contained in document A/CN.4/L.816.

#### Introduction

Paragraph 1

*Paragraph 1 was adopted.*

#### A. Membership

Paragraph 2

*Paragraph 2 was adopted.*

#### B. Casual vacancy

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

Paragraphs 7 and 8

*Paragraphs 7 and 8 were adopted.*

#### 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

2. Ms. JACOBSSON, referring to agenda item 9, stressed that all language versions should refer to protection of the environment “in relation to armed conflicts” and not “during armed conflicts”.

3. Mr. FORTEAU and Ms. ESCOBAR HERNÁNDEZ proposed editorial corrections to the French and Spanish versions, respectively, of agenda item 8, and a numerical correction to footnote 5.

*Paragraph 12, as amended, was adopted.*

*Chapter I of the report of the Commission, as a whole, as amended, was adopted.*

**CHAPTER VI. Protection of persons in the event of disasters (A/CN.4/L.821 and Add.1–2)**

4. The CHAIRPERSON invited the Commission to consider the section of chapter VI of the draft report contained in document A/CN.4/L.821.

5. Mr. VALENCIA-OSPINA (Special Rapporteur) pointed out that, in Spanish, the title of the topic should read “*Protección de las personas en casos de desastre*” throughout the text of chapter VI.

6. The CHAIRPERSON said that the Spanish version of the text would be corrected where necessary.

**A. Introduction**

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

**B. Consideration of the topic at the present session**

Paragraph 7

7. Mr. PARK pointed out that there was a discrepancy between the English and French versions of the first sentence. The English referred to “aspects of prevention ... including disaster risk reduction”, while the French read “*aspects de la prévention ... dont l’évolution du concept de prévention des risques de catastrophe*”.

8. Mr. FORTEAU proposed that the words “*l’évolution du concept de*” should be deleted.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

Paragraph 11

*Paragraph 11 was adopted, subject to the insertion of dates by the Secretariat.*

9. The CHAIRPERSON invited the Commission to take up the section of chapter VI contained in document A/CN.4/L.821/Add.1.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) recalled that the five draft articles that appeared in document A/CN.4/L.821/Add.1 had been prepared by the Drafting Committee in 2012<sup>175</sup> but had not been adopted by the Commission until the first part of the current session.

<sup>175</sup> A/CN.4/L.812 (mimeographed; available from the Commission’s website, documents of the sixty-fourth session).

**C. Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission**

**1. TEXT OF THE DRAFT ARTICLES**

*The text of the draft articles contained in section C.1 was adopted.*

**2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION**

*Commentary to draft article 5 bis (Forms of cooperation)*

Paragraph (1)

11. Mr. VALENCIA-OSPINA (Special Rapporteur) suggested deleting the word “latter” in the third sentence of the English version.

*Paragraph (1) was adopted with that amendment to the English text.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

12. Mr. FORTEAU, noting that draft article 5 bis consisted of only one sentence, proposed that the French version of the first sentence in paragraph (3) should be rephrased to read “*Le début du projet d’article*” rather than “*La première phrase du projet d’article*”.

13. Mr. VALENCIA-OSPINA (Special Rapporteur) endorsed that proposal and said that other language versions might need to be amended as well.

14. Sir Michael WOOD suggested that, in the second sentence, the words “to be read in accordance with” should be replaced with “to be read in the light of”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

15. Sir Michael WOOD suggested that in the first sentence, the phrase “modalities of cooperation” should be replaced with “forms of cooperation”, which were the words used throughout the rest of the commentary to draft article 5 bis. He pointed out that in the third sentence, the phrase “draft article 5 bis is meant to be reciprocal in nature” was imprecise and suggested that it should be replaced by “the forms of cooperation in draft article 5 bis are meant to be reciprocal in nature”.

16. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed that the reformulation suggested by Sir Michael would be clearer.

17. Mr. FORTEAU suggested that in the final sentence, the word “rather” (“*plutôt*”) should be deleted.

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

Paragraph (6)

18. Sir Michael WOOD suggested that the first sentence should be amended to indicate that cooperation must be in conformity with “the other draft articles” rather than “all other draft articles”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

19. Mr. CANDIOTI said that, in order to ensure consistency, the word “modalities” should be replaced with “forms” in the first sentence.

*Paragraph (8), as amended, was adopted.*

*The commentary to draft article 5 bis as a whole, as amended, was adopted.*

*Commentary to draft article 12 (Offers of assistance)*

Paragraph (1)

20. Sir Michael WOOD noted that, according to the first sentence of paragraph (1), draft article 12 was to be viewed as complementary to the “primary role” of the affected State enshrined in draft article 9. However, the words “primary role” were used only in draft article 9, paragraph 2, and not in paragraph 1. It therefore would be more accurate to refer to the “role” of the affected State, as in the title of draft article 9, or to add a reference to the “duty” of the affected State, as in paragraph 1 of the draft article, in order to capture the full contents of draft article 9.

21. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the idea of the primary role of the affected State was extremely important to the text and he would rather maintain the word “primary”. He was not in favour of including a reference to duty.

22. Mr. MURPHY said that he supported the Special Rapporteur. The second paragraph of draft article 9 was closely related to the first and simply clarified that it was the affected State that had the primary role in organizing disaster relief. The commentary referred to draft article 9 as a whole and he would favour leaving it as currently drafted.

23. Mr. PETRIČ said that draft article 9 was one of the most crucial of those discussed by the Commission and expressed the balance developed throughout the whole project: the affected State had the primary role, but at the same time a primary duty. The situation might be clearer if the suggestion made by Sir Michael were accepted.

24. Mr. TLADI said that he shared the views expressed by Mr. Murphy and the Special Rapporteur. In paragraph (1) of the commentary, the Commission was referring to the role of the international community as contrasted with the role of the affected State. In that context, it made sense to refer to the contents of draft article 9, paragraph 2.

25. Ms. ESCOBAR HERNÁNDEZ said that a reference to draft article 9, paragraph 2, as suggested by Sir Michael, would improve the text. In the Spanish version of the commentary, the words “*función primordial*” should be replaced with “*función principal*” to reflect the wording of the draft article itself.

26. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he did not see the need to specify in which of the two paragraphs of draft article 9 the primary role of the affected State was enshrined and favoured maintaining the original wording.

*Paragraph (1) was adopted with the amendment to the Spanish text.*

Paragraph (2)

27. Mr. FORTEAU drew attention to the following words in the fourth sentence: “an affected State remains free to accept ... or not to accept, offers of assistance”. Those words were followed by a reference to article 11, paragraph 3. However, the freedom to accept or not to accept offers of assistance was qualified, in draft article 11, paragraph 2, by the words “Consent to external assistance shall not be withheld arbitrarily”. That established an important limitation on the right of a State to refuse offers of assistance. Accordingly, he proposed that in the fourth sentence, after the words “an affected State remains free”, the words “subject to article 11, paragraph 2,” [“*sous réserve de l’article 11, paragraphe 2,*”] should be inserted.

28. Mr. VALENCIA-OSPINA (Special Rapporteur) said he had detected a tendency in the Commission to want to repeat in every draft article references to principles clearly laid down in other articles. That was why he had stressed that all the articles were interrelated and had to be taken together, as an integral whole. If necessary, a final clause to that effect could be added. Reference had been made to paragraph 3 of draft article 11 because it dealt with making an offer of assistance known, not with the entirely different matter of limitations on the consent of the affected State.

29. Mr. NOLTE said that he understood the Special Rapporteur’s reluctance to include references to additional draft articles, but as currently drafted, the commentary might give the impression that there were no limitations on the freedom of States with regard to offers of assistance. The fifth sentence, which began with the words “At most”, strongly reinforced that impression. He therefore proposed that the words “At most” should be replaced with the following words, “This is without prejudice to the duty of an affected State, according to article 10 of the present draft articles, to seek assistance to the extent that a disaster exceeds its national resource capacity. In addition, ...”.

30. Ms. JACOBSSON said that, while she shared the Special Rapporteur’s concern about not referring back to all of the draft articles on every occasion, she supported the views expressed by Mr. Forteau and Mr. Nolte. She would also be in favour of a general clause as suggested by the Special Rapporteur.

31. Mr. TLADI said that paragraph (2) should incorporate something that was, admittedly, a minority viewpoint: that in order to achieve an equilibrium between the rights and duties of States in disaster situations, draft article 12 had to reflect the duty of third States not to arbitrarily refuse requests for assistance. He therefore proposed that at the end of paragraph (2) of the commentary, a sentence should be added, to read: “The view was expressed that in order to ensure congruence between draft article 12 and draft article 11, paragraph 2, States have a duty not to arbitrarily refuse to assist affected States.”

32. Mr. WISNUMURTI said that any attempt to use the commentary to shift the balance struck in the draft articles should be avoided. For that reason, he had a problem with the proposals just made. The wording of paragraph (2) should be left intact: he fully supported the arguments of the Special Rapporteur in that regard. It was important to provide the context in which the fourth sentence of paragraph (2) was to be read, which included draft article 11, paragraph 3, as reproduced in the fifth sentence of paragraph (2).

33. Mr. HMOUD said he held the same views as Mr. Forteau, but the Special Rapporteur had a valid point: discussion on draft article 11 could not be reopened. It was the word “free” in paragraph (2) of the commentary to draft article 12 that appeared to be problematic, since it suggested that the State had unlimited freedom to accept or refuse assistance in the event of disasters, which had the effect of tilting the balance.

34. Sir Michael WOOD proposed that, in the fourth sentence, the words “remains free to” should be replaced with “may”; at the end of the sentence, the phrase “in accordance with article 11” should be inserted; and the fifth sentence should be deleted.

35. Mr. CANDIOTI said that the Commission must preserve the balance that had been achieved with such difficulty in article 11. The fourth sentence of paragraph (2) should refer to article 11 in its entirety, not only to paragraph 3 of that article. Sir Michael’s proposal solved the problem very well.

36. Mr. MURPHY said that he endorsed Sir Michael’s proposed amendment, which was preferable to the amendment proposed by Mr. Nolte. It was better to refer only to article 11 and not to article 10, because in the situation covered in article 12, an offer of assistance had already been made, so the question of whether a State could or should seek assistance no longer arose. He would suggest, however, that in Sir Michael’s amendment, the words “in accordance with” should be replaced with “provided it acts in a manner consistent with article 11”.

37. Mr. SABOIA said that he supported Sir Michael’s proposal.

38. Mr. PETRIČ said that he agreed with Mr. Wisnumurti that the Commission should not propose changes and additions to the commentaries without very good reason, since doing so might upset the delicate balance achieved over the past six years of work on the topic. He could accept the text as it stood, but if there was a consensus to adopt Sir Michael’s amendment, he would go along with it.

39. Mr. TLADI said that he supported the original amendment by Sir Michael and opposed the sub-amendment put forward by Mr. Murphy. The original proposal was more neutral and referred readers back to draft article 11 in its entirety, from which they could draw their own conclusions, whereas the reference to acting consistently with article 11 pushed the balance in a particular direction.

40. Mr. WISNUMURTI said that in the interests of compromise, he could agree to Sir Michael’s amendment, but he could not accept Mr. Murphy’s sub-amendment.

41. Mr. VALENCIA-OSPINA (Special Rapporteur) said that there appeared to be a trend towards accepting Sir Michael’s amendment, without the sub-amendment proposed by Mr. Murphy. If that was to be the decision, he could go along with it.

42. The CHAIRPERSON asked whether the Commission wished to adopt paragraph (2), with Sir Michael’s amendment and without the sub-amendment put forward by Mr. Murphy.

43. Mr. TLADI said that he felt he must press for the adoption of his own proposal as well. It was only fair that when the Sixth Committee considered the commentaries, it should have the opportunity to consider all the views that had been expressed in the debate, even minority views.

44. After a procedural discussion in which Mr. SABOIA, Mr. CANDIOTI, Mr. MURPHY, Sir Michael WOOD, Mr. PETRIČ, the CHAIRPERSON, speaking as a member of the Commission, Mr. NOLTE, Ms. ESCOBAR HERNÁNDEZ and Mr. EL-MURTADI SULEIMAN GOUIDER participated, Mr. VALENCIA-OSPINA (Special Rapporteur) said that the report of the Commission to the General Assembly on the work of its sixty-third session, held in 2011, contained a summary of his introduction to his fourth report, in which he had originally proposed draft article 12.<sup>176</sup> It also contained a summary of the Commission’s plenary debate on draft article 12 in which the views expressed by Mr. Tladi had been incorporated.<sup>177</sup> A full account of the debate on draft article 12 was to be found in the relevant summary records, which were posted on the Commission’s website.

45. In chapter III of the Commission’s 2011 report, States had been informed that the Commission had taken the view that States had a duty to cooperate with the affected State in disaster relief matters. They had then been asked whether that duty to cooperate included a duty to provide assistance when requested by the affected State.<sup>178</sup> He had included in his fifth report a summary of the debate on that issue in the Sixth Committee, at its 18th to 28th meetings, during the sixty-sixth session of the General Assembly.<sup>179</sup>

<sup>176</sup> The summary of the presentation is reproduced in *Yearbook ... 2011*, vol. II (Part Two), paras. 275–277; the fourth report of the Special Rapporteur (A/CN.4/643) is reproduced in *ibid.*, vol. II (Part One); with regard to draft article 12 proposed by the Special Rapporteur in his fourth report, see *ibid.*, para. 109.

<sup>177</sup> *Ibid.*, vol. II (Part Two), paras. 278–283.

<sup>178</sup> *Ibid.*, paras. 43–44.

<sup>179</sup> The fifth report of the Special Rapporteur (A/CN.4/652) is reproduced in *Yearbook ... 2012*, vol. II (Part One), pp. 11 *et seq.*; with

46. At the Commission's sixty-fourth session, the Chairperson of the Drafting Committee had indicated that the Drafting Committee had taken the stance that the majority of the responses given by States to the question posed by the Commission in its 2011 report, as well as the views expressed in the plenary Commission, had given a clear indication that there was currently no legal obligation on States to provide assistance to affected States.<sup>180</sup> There was thus a wealth of official documents summarizing all the views expressed on draft article 12. However, in order to accommodate Mr. Tladi, he was willing to include a footnote to paragraph (2) to indicate that the question of whether States had a duty to provide assistance when requested to do so by the affected State had been debated fully in the Commission and in the Sixth Committee, and to include references to the relevant documents.

*Paragraph (2), as amended by Sir Michael and with a footnote to be prepared by the Special Rapporteur, was adopted.*

Paragraph (3)

47. Mr. MURPHY said that in the first sentence, the term "*per se*" was superfluous and should be deleted.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

48. Sir Michael WOOD suggested that the last sentence should be deleted, since the reference to national law was unclear.

49. Mr. NOLTE said that the last sentence was intended to explain why the Commission had drawn a distinction between States, which had the right to offer assistance, and NGOs, which did not have that right but could offer assistance. However, he would also be in favour of deleting the last sentence.

50. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the Commission had decided to distinguish between States and NGOs with regard to offers of assistance in response to comments by States in the Sixth Committee that NGOs could not be placed on the same juridical level as States or intergovernmental organizations.

51. Mr. FORTEAU suggested that the last sentence should be deleted and that, in the preceding sentence, the phrase "to stress the distinction that exists between the position of those organizations and that of States and intergovernmental organizations" should be amended to read "to stress the distinction, in terms of nature and legal status, that exists between those organizations and States and intergovernmental organizations" [*"de façon à souligner la distinction de nature et de statut juridique qui existe entre ces organisations et les États et organisations intergouvernementales"*].

*Paragraph (4), as amended, was adopted.*

regard to the discussion on the topic held in the Sixth Committee, see *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 18th–28th meetings (A/C.6/66/SR.18–28).

<sup>180</sup> *Yearbook ... 2012*, vol. I, 3152nd meeting, para. 58.

Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to draft article 12, as a whole, as amended and supplemented with a footnote, was adopted.*

*Commentary to draft article 13 (Conditions on the provision of external assistance)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

52. Mr. FORTEAU said that, in the second sentence of the French text, the word "*volontaire*" should be replaced by "*consensuel*".

53. Sir Michael WOOD said that in the first sentence, the word "responsibility" should be replaced by "role", in order to bring it into line with the wording of draft article 9, and the words "disaster relief and" should be inserted before "assistance on its territory". In the second sentence, the words "known actors" should be replaced with "particular actors".

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

Paragraph (6)

54. Mr. MURPHY suggested that in the first sentence, the word "ensures" should be replaced by "takes all appropriate measures to ensure".

55. Mr. NOLTE drew attention to the fact that the phrase "national laws and standards" appeared twice in that paragraph and that it was unclear what "standards" meant in that context. He proposed that the phrase should read "national laws and regulations". In the last sentence, to avoid speaking of respecting the "authorities of the affected State", he suggested that the words "to cooperate with" should be inserted before "the ... authorities".

56. Sir Michael WOOD proposed that the phrase "is a manifestation of compliance with" should be replaced with the more succinct wording "accords with".

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

57. Sir Michael WOOD proposed that in the second sentence, the words "conditions put forth" should be amended to read "conditions set".

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

Paragraph (8)

58. Sir Michael WOOD said that “conditions are put forth” should also be amended to read “conditions are set”. He drew attention to the last sentence, which he thought needed rephrasing.

59. Mr. MURPHY suggested that in the last sentence, the word “import” should be replaced with “encompass” and that the text following the word “women” should be replaced with “children, the elderly, persons with disabilities and other vulnerable or disadvantaged groups”.

60. Mr. FORTEAU endorsed that amendment but proposed the insertion of the words “persons and” before “groups”.

*Paragraph (8), as amended, was adopted.*

Paragraphs (9) to (11)

*Paragraphs (9) to (11) were adopted.*

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

*Commentary to draft article 14 (Facilitation of external assistance)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

61. Mr. NOLTE said that in the third sentence, the word “permissible” should be inserted before the words “temporary adjustment” in order to convey the idea that the special measures suggested would be those adopted within the framework of national law or the national constitution.

62. Sir Michael WOOD said that “facilitate” would be more apt than “achieve” in the first sentence.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

63. Mr. NOLTE proposed that in the first sentence, the words “not stand in the way” should be replaced with “enable the taking of appropriate measures”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

64. Ms. ESCOBAR HERNÁNDEZ said the Spanish version of the second sentence should read “*El personal de socorro militar es el que presta asistencia humanitaria, y no ayuda militar*”.

65. Mr. FORTEAU suggested the deletion of the phrase “and not of military aid” and its equivalents in all language versions.

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

*The commentary to draft article 14, as a whole, as amended, was adopted.*

*Commentary to draft article 15 (Termination of external assistance)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

66. Mr. NOLTE said that the second sentence should refer to “recognizing” rather than “granting” a unilateral right of termination for the affected State.

67. Mr. VALENCIA-OSPINA (Special Rapporteur), suggested that “recognizes” should then be replaced with “acknowledges” in the following sentence to avoid repetition.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

68. Mr. MURPHY said that in the first sentence, the phrase “is laid down by the Commission in” should be replaced by the less emphatic word “reflects”. The words “in the context of the entire” should be replaced by the more succinct “throughout the”.

69. Sir Michael WOOD said that, at the end of the paragraph, the words “and how far” should be inserted after “whether”.

70. Mr. FORTEAU said that, in the French version of the third sentence, the word “*approprié*” or “*nécessaire*” would be more apt than the term “*logique*”.

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

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

71. Ms. ESCOBAR HERNÁNDEZ said that the Spanish version of the start of the second sentence should be reworded to read: “*Una notificación apropiada es necesaria para garantizar un cierto grado de estabilidad de la situación*”, in order to make it consistent with the English and French texts.

*Paragraph (7) was adopted with that amendment to the Spanish text.*

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

*The meeting rose at 1.05 p.m.*

## 3191st MEETING

*Monday, 5 August 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Mursase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

#### CHAPTER VI. *Protection of persons in the event of disasters (concluded)* (A/CN.4/L.821 and Add.1–2)

#### C. *Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission (concluded)*

#### 2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (*concluded*)

1. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, draft articles 5 *ter* and 16 and their related commentaries, as contained in document A/CN.4/L.821/Add.2.

*Commentary to draft article 5 ter* (Cooperation for disaster risk reduction)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

2. Mr. KITTICHAISAREE proposed that, in the last sentence, the adverb “specifically” should be inserted in place of “primarily”, which could exclude more secondary measures. Furthermore, it should be explained that the term “intended” in the text of the draft article should be interpreted in the light of the principle of good faith, because it could happen that cooperation had an ulterior motive to prevention.

3. Mr. VALENCIA-OSPINA (Special Rapporteur), while agreeing to the proposed amendment, said that the principle of good faith underpinned all the work of the Commission, and to emphasize its importance in the draft article might detract from it elsewhere.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

*The commentary to draft article 5 ter, as a whole, as amended, was adopted.*

*Commentary to draft article 16* (Duty to reduce the risk of disasters)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

4. Mr. MURPHY proposed that a footnote should be added to make a clearer reference to the Yokohama Strategy<sup>181</sup> and the Hyogo Framework for Action.<sup>182</sup>

*Paragraph (2) was adopted with that addition and a minor editorial amendment proposed by Sir Michael Wood to the English text.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

5. Mr. NOLTE said he considered that the Commission was going too far by referring to an affirmative obligation to prevent the occurrence of human rights violations, since, in fact, it was an obligation of conduct and not of results. It should say that States had an affirmative obligation to take measures designed to prevent the occurrence of such violations. In the last sentence it would be more logical in the light of the preceding sentence to refer first of all to decisions relating to human rights and thereafter to international environmental law.

*The two proposals by Mr. Nolte were adopted.*

6. Mr. PARK recalled that throughout its work on the topic the Commission had endeavoured to maintain a balance between the principle of national sovereignty and the principles of human rights. However, it did not seem to be doing that by stating that it based itself on the former and drew on principles emanating from the latter.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the expression “emanating from” did not imply that human rights were less important, but simply meant that the Commission also drew on other principles, for example, from environmental law or refugee law. In any case, mention must be made of the sovereignty of States, at least in the commentary, since several members had stressed its importance.

8. Mr. MURPHY was of the opinion that the reference to the principle of non-intervention should be deleted; it was not relevant since the issue at stake was measures to be taken at the national level to prevent disasters. Furthermore, it might be considered that failure to meet the obligations laid down in draft article 16 would permit some form of intervention. At the end of the paragraph, it should be made clear that it was in the context of the European Convention on Human Rights that the European Court of Human Rights had affirmed the duty to take preventive measures.

<sup>181</sup> Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation, containing the Principles, the Strategy and the Plan of Action, Report of the World Conference on Natural Disaster Reduction (A/CONF.172/9 [and Add.1]), chap. I, resolution 1, annex I.

<sup>182</sup> 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. I, resolution 2.

9. Mr. NOLTE, supported by Ms. JACOBSSON, said that one should not give the impression that the European Court of Human Rights had been the only court to affirm that duty with regard to human rights; many others had done so. The specificity of the cases cited in the paragraph<sup>183</sup> was that the Court had applied the rule to natural disasters.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he was surprised by Mr. Murphy's interpretation, but agreed that draft article 16 did not concern inter-State relations, which were covered by the articles on cooperation. However, certain measures to be taken at the national level could require cooperation with other States, for example, the establishment of an early warning system. It was also conceivable that modern technology carried a risk of interference. However, since the principle of non-intervention emanated from the principle of national sovereignty, perhaps a reference to it was not essential.

11. Mr. TLADI said that, while he was an advocate of the principle of non-intervention, he shared Mr. Murphy's opinion regarding its lack of relevance to the case in point. In the draft articles under consideration, the notion of sovereignty did not have the same meaning as in other areas of the Commission's work, where, in addition to the State's freedom to do whatever it wished, it implied a duty to protect. The text did not reflect that but, rather, seemed to create a dichotomy between national sovereignty and the protection of human rights.

12. Mr. WISNUMURTI said he considered it important to keep the reference to non-intervention, particularly since it had happened that a State had refused foreign assistance based on that principle, as mentioned by Mr. Kittichaisaree. As for the question of balance between respect for national sovereignty and respect for human rights, it emerged clearly from the draft articles as a whole.

13. Mr. KITTICHAISAREE said he also considered that mention must be made of non-intervention, since in the Sixth Committee many States had expressed concern about the risk of rules being imposed on States affected by disasters. He proposed that the second sentence should be reworded to the effect that the Commission based itself on the fundamental principle of State sovereignty including non-intervention in the domestic affairs of another State, and thereafter to make reference to international human rights law as in the original text.

*Following a discussion in which Mr. Valencia-Ospina, Sir Michael Wood, Mr. Petrič, Mr. Saboia, Ms. Jacobsson and Mr. Murphy took part, Mr. Kittichaisaree's proposal was adopted.*

*On that understanding, paragraph (4), as amended, was adopted.*

Paragraph (5)

14. Mr. NOLTE said that in the light of the preceding paragraph it seemed contradictory to state that the "primary foundation" of draft article 16 was the practice of

States. Instead he proposed the phrase "a most important legal foundation".

*That proposal was adopted.*

15. Mr. MURPHY proposed that the word "commitment" should be used instead of "obligation" in the first sentence, since State practice mostly consisted of political declarations which did not entail any legal obligation. He also proposed that the third sentence should be deleted and that, instead, the multilateral, regional and bilateral agreements concluded concerning the prevention of disasters, listed in paragraph 33 of the sixth report (A/CN.4/662), should be added at the end of the second sentence. That would show that draft article 16 was based not only on the general principles set forth in paragraph 4, but also on a large number of binding and non-binding instruments. In the last sentence the term "obligation" should also be replaced with the term "commitment" and a full list of examples of preventive measures incorporated in national policies and legal frameworks, particularly in connection with the Hyogo Framework for Action and the International Strategy for Disaster Reduction, should be added.

16. Mr. VALENCIA-OSPINA (Special Rapporteur) endorsed those proposals, in particular the choice of the term "commitment" which covered all initiatives, as well as legal instruments, political declarations, platforms and action plans. He also suggested that the term "agreements" in the second sentence should be replaced.

*On that understanding, paragraph (5), as amended, was adopted.*

Paragraph (6)

17. Sir Michael WOOD proposed that the words "is subject to" should be replaced with "is to be read together with".

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

18. Sir Michael WOOD proposed the deletion of the third sentence.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

19. Mr. FORTEAU (Rapporteur) proposed, for the sake of readability, that the second sentence, which concerned a very specific point, should be placed in a footnote.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to that proposal.

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

<sup>183</sup> Öneriyıldız v. Turkey and Budayeva and Others v. Russia.

Paragraph (10)

21. Mr. NOLTE proposed the deletion of the word “therefore” in the last sentence.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

22. Mr. NOLTE proposed, for the sake of clarity, that the words “of law” should be added after the word “manifestations” in the English text.

*Paragraph (11) was adopted with that amendment to the English text.*

Paragraph (12)

23. Sir Michael WOOD proposed that the words “types of rules” in the first sentence should be replaced with the word “arrangements”.

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

24. Ms. ESCOBAR HERNÁNDEZ said that the last sentence was not necessary and proposed its deletion.

*Paragraph (13), as amended, was adopted.*

Paragraph (14)

*Paragraph (14) was adopted.*

Paragraph (15)

25. Sir Michael WOOD proposed, for the sake of readability, that the last indent of subparagraph (b) should appear as a footnote, since it was a comment by the Commission and not a quotation.

26. Mr. VALENCIA-OSPINA endorsed the proposal provided that the text of the indent was shortened.

*On that understanding, paragraph (15), as amended, was adopted.*

Paragraph (16)

27. Sir Michael WOOD proposed that the verb “limit” in the third sentence should be replaced with “refer expressly”.

*Paragraph (16), as amended, was adopted.*

Paragraphs (17) to (20)

*Paragraphs (17) to (20) were adopted.*

Paragraph (21)

28. Mr. MURPHY proposed that, in the English text, the term “kick-starting” should be replaced with “initiating”.

*Paragraph (21) was adopted with that amendment to the English text.*

Paragraph (22)

*Paragraph (22) was adopted.*

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

*Chapter VI of the report of the Commission, as a whole, as amended, was adopted.*

**CHAPTER IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.819 and Add.1–3)**

29. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, document A/CN.4/L.819.

**A. Introduction**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

30. Mr. NOLTE proposed the addition of the word “also” before the word “decided”.

*Paragraph 4, as amended, was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

31. Mr. FORTEAU (Rapporteur) drew the attention of the Secretariat to an error in the way the chapters were numbered.

*Paragraph 6 was adopted, subject to the renumbering of the chapters.*

Paragraph 7

32. Mr. FORTEAU (Rapporteur) said that contrary to what was indicated in the paragraph, the Commission had referred to the Drafting Committee draft conclusions 1 to 5 and not “1 to 4”.

*Paragraph 7 was adopted with that correction.*

Paragraph 8

33. Mr. FORTEAU (Rapporteur) said that the Commission had not adopted four draft conclusions but five.

*Paragraph 8 was adopted with that correction.*

Paragraph 9

*Paragraph 9 was adopted.*

*Sections A and B contained in document A/CN.4/L.819, as a whole, as amended, were adopted.*

**C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session**

2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION

34. The CHAIRPERSON invited the members of the Commission to continue its consideration, paragraph by paragraph, of chapter IV, as contained in document A/CN.4/L.819/Add.1.

**Introduction**

Paragraph (1)

35. Mr. MURPHY proposed, in order to avoid any confusion, that the footnote at the end of the paragraph should be amended to read: “See below draft conclusion 1, paragraph 1, and the associated commentary.”

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

Paragraph (2)

*Paragraph (2) was adopted.*

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

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

36. Mr. TLADI proposed that the verb “is” should be replaced with “sets forth”.

37. Mr. FORTEAU (Rapporteur) proposed the addition of the words “or leads to a result which is manifestly absurd or unreasonable” [“ou conduit à un résultat qui est manifestement absurde ou déraisonnable”], at the end of the last sentence, to reproduce the text of article 32, which provided for not one hypothesis but two hypotheses.

38. Ms. ESCOBAR HERNÁNDEZ proposed the deletion of the words in brackets—“in the sense of article 32”—which did not only add nothing, but might even cause confusion.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

Paragraph (6)

39. Mr. FORTEAU (Rapporteur) said that, in the last footnote to the paragraph, the case law of the International Tribunal for the Law of the Sea should be cited before that of the European Court of Human Rights in order to go from universal to regional law, as in the sentence to which the footnote referred. In the last sentence, it seemed to be going too far to say “and no indications to the contrary”, since, for example, the *LaGrand* case might be interpreted as being an indication to the contrary; he therefore proposed the deletion of that phrase.

40. Ms. ESCOBAR HERNÁNDEZ said that, in the Spanish version, the tenses used should be changed and the use of several terms in the references to the case law of the International Court of Justice should be checked. She would send a note along those lines to the Secretariat.

41. Sir Michael WOOD said that, in the penultimate sentence, the word “asserted” should be replaced with “stated”, which was a more neutral term.

42. Mr. NOLTE, in response to Mr. Tladi’s concern, proposed that in the first sentence the word “also” should be replaced with the phrase “in particular”.

43. Mr. CAFLISCH and Mr. CANDIOTI said that the verbs “constitute”, in the English text, and “constituir”, in the Spanish text, were not appropriate and should be replaced with “reflect”, “expresar” or other equivalent terms, because codification did not constitute rules of customary international law but merely reflected them.

*Paragraph (6) was adopted subject to those amendments to the English and Spanish texts.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

44. Sir Michael WOOD proposed that, in the second sentence, the word “reasoning” should be replaced with the word “process” and that the last sentence, which seemed obscure, should be deleted.

45. Mr. NOLTE (Special Rapporteur) proposed that the end of the second sentence should be replaced with “is to be integrated into the process of interpretation according to article 31”. The last sentence stressed that subsequent agreements and subsequent practice played as important a role as other means of interpretation, an idea that was taken up again later in the text and which he would like to retain.

46. Sir Michael WOOD suggested that the Special Rapporteur should redraft the last sentence so as to clarify its meaning.

47. Mr. TLADI said that it might be a good idea to reflect the idea of a single integrated approach in the last sentence. At the end of the second sentence, it would be preferable to retain the words “paragraph 1” instead of replacing them with “article 31”.

48. Ms. ESCOBAR HERNÁNDEZ said she also considered that the last sentence was unclear and would like the Special Rapporteur to redraft it. She proposed that the phrase “as the main focus of the topic” should be deleted. If the Special Rapporteur preferred to keep it, for the sake of clarity, the word “current” should be added before “topic”, because in Spanish the term “tema” was not always the same as “topic” and could give rise to confusion.

49. Mr. FORTEAU (Rapporteur) proposed that the last sentence should be deleted and that the penultimate sentence should be reworded as follows: “Accordingly, the *chapeau* of article 31, paragraph 3, is maintained in order

to emphasize that the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 must be fully integrated as elements of the general rule of interpretation in article 31.” [*“En conséquence, le texte introductif de l’article 31, paragraphe 3, est conservé de façon à souligner que les moyens d’interprétation mentionnés à l’article 31, paragraphe 3 a et b, doivent être intégrés comme éléments à part entière de la règle générale d’interprétation de l’article 31”*].

50. Mr. NOLTE (Special Rapporteur) said that the sentence proposed by Mr. Forteau seemed to be fine, but that he would like to have a look at the English and Spanish versions before taking a decision. He therefore proposed that the paragraph should be held in abeyance.

*Paragraph (8) was held in abeyance.*

Paragraph (9)

51. Mr. FORTEAU (Rapporteur) proposed the deletion of the adverb “more” in the last sentence, since it gave the impression that in some respects article 31 was also based on discretionary application.

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

Paragraphs (10) to (13)

*Paragraphs (10) to (13) were adopted.*

Paragraph (14)

52. Sir Michael WOOD proposed that in the fourth sentence the term “factors”, which did not appear anywhere else, should be replaced with the word “elements”, and that in the last sentence the words “in an interactive process” should be deleted and the term “rule” should be replaced with the word “treaty”.

53. Mr. NOLTE (Special Rapporteur) pointed out that the term “factors”, covered the elements mentioned in article 32 as well as those mentioned in article 31 and referred to the function of those elements. The words “in an interactive process” conveyed the idea that it was a single integrated operation, which was a generally accepted idea. As for the object and purpose of a treaty, he considered that they included the object and purpose of the different rules of a treaty, and proposed that the phrase in question should read “the object and purpose of a treaty, and in particular a treaty rule”.

54. Sir Michael WOOD said that he was not convinced by the Special Rapporteur’s explanation concerning the term “factors”, and even less so concerning the object and purpose of a rule as opposed to the object and purpose of a treaty. The terms “object and purpose” had a very specific meaning in the 1969 Vienna Convention and that they of course applied to the treaty. However, the phrase could be made simpler by merely referring to “the purpose of a rule”.

55. Mr. FORTEAU (Rapporteur) endorsed the three points made by Sir Michael. He seemed to recall that in the separate opinion of Judge Torres Bernárdez in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case, the adjective

“combined” had been used to describe the process of interpretation. The expression “interactive process” could therefore be replaced with “combined operation” [*“démarche combinatoire”*], an expression found in the Commission’s work on the law of treaties.

56. Mr. NOLTE (Special Rapporteur) proposed that the wording of the 1969 Vienna Convention “the object and purpose of the treaty” should be followed, but that the words “including the purpose of a particular rule” should be added. While he could accept the expression “combined operation”, he regretted that the reference to the way in which the interpretation was done did not dare to stray a millimetre from the formula used in the 1960s.

57. Mr. CANDIOTI proposed that the word “interactive” should be replaced with “integrative”, “integrating” or another term with the same meaning.

58. Sir Michael WOOD said that he had nothing against new words if they made sense and might go along with Mr. Candiotti’s proposal, although it seemed to him that in the case in question the appropriate term in English would be “integral process”, which gave the idea of a single process. However, he considered that by adding the words “including of a particular rule”, the Commission would be introducing a novel element that should be given consideration before it was accepted.

59. Mr. TLADI endorsed Sir Michael’s comments and said that it might also be possible to use the term “integrated”.

60. Mr. NOLTE (Special Rapporteur) said he was surprised that it could be thought that there was only one “object and purpose” of the treaty and that it was exclusively in that light that the various treaty rules in question were interpreted. Different rules could have different objects and purposes that must ultimately be reconciled if the treaty was to be interpreted in an integrated fashion.

61. Mr. FORTEAU (Rapporteur) said that two issues were being confused: the Vienna Convention, which was simply the object and purpose of the treaty, and the means of interpretation, in particular the effectiveness of the provision. Since it was not the purpose of the exercise to codify all means of interpretation, the Commission should confine itself to what was stipulated in article 31, and he strongly supported those members who wished to retain the expression “the object and purpose of the treaty”.

62. The CHAIRPERSON suggested that the consideration of paragraph (14) should be deferred to give members time to reflect on the various proposals made.

*Paragraph (14) was deferred.*

Paragraph (15)

*Paragraph (15) was adopted with a minor editorial amendment to the French text.*

*The meeting rose at 1 p.m.*

**3192nd MEETING**

Monday, 5 August 2013, at 3 p.m.

Chairperson: Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

**CHAPTER IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.819 and Add.1-3)**

**C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session (continued)**

**2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (continued)**

1. The CHAIRPERSON invited the Commission to continue its consideration of the portion of chapter IV of the report contained in document A/CN.4/L.819/Add.1.

*Commentary to draft conclusion 1 (General rule and means of treaty interpretation) (continued)*

Paragraph (16)

*Paragraph (16) was adopted.*

*Commentary to draft conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

2. Sir Michael WOOD proposed that, in the first sentence, the phrase “‘authentic means of interpretation’” should be replaced with “‘authentic elements for the interpretation of the treaty’”. In the second sentence, he proposed replacing the words “also such a means” with “the authentic expression of the intentions of the parties”. The text of a treaty could not be a means of interpretation: it was what was being interpreted.

3. Mr. MURPHY proposed that the second sentence should instead be reformulated to read: “Analysing the ordinary meaning of the text of a treaty, in particular, is such a means.”

4. Mr. NOLTE (Special Rapporteur) endorsed that amendment.

5. Sir Michael WOOD, referring to the final sentence in the paragraph, queried the phrase “‘proof’ of conduct of the parties”. Did it refer to proof of the intention of the parties?

6. Mr. NOLTE (Special Rapporteur) said that the word “conduct” encompassed everything the parties did to express their intentions, including formulating the text of a treaty, formulating a subsequent agreement and engaging in a subsequent practice.

*Paragraph (2), as amended by Mr. Murphy, was adopted.*

Paragraph (3)

7. Mr. FORTEAU said that the second sentence was confusing because the first part referred to the parties to “a treaty”, while the second part referred to “legal texts”. That term in French, “*textes de lois*”, was used to denote legislation, not treaties. He proposed deleting the sentence.

8. Ms. ESCOBAR HERNÁNDEZ said that there was a similar problem with the Spanish version, for which an alternative to the expression “*textos jurídicos*” would have to be found.

9. Mr. NOLTE (Special Rapporteur) said that the aim of the second sentence was to draw attention to the fact that the use of subsequent agreements and subsequent practice as means of interpreting a legal document, such as a contract, was uncommon in national law but was well established, with respect to treaties, in international law.

10. Mr. FORTEAU said that one could not confidently reach such a conclusion without conducting a thorough analysis of comparative law. There were operations in certain domestic legal systems that were quite comparable to what was practised under the law of treaties.

11. Mr. NOLTE (Special Rapporteur) said that, for the sake of compromise, the word “some” might be inserted before “domestic legal systems” in the second sentence. In the same sentence, the expression “legal texts” should be replaced with “legal instruments”.

*Paragraph (3), as thus amended, was adopted.*

Paragraph (4)

12. Sir Michael WOOD proposed that, in the second sentence, the word “all”, after “among”, should be deleted, as it was superfluous.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

13. Sir Michael WOOD said that in the first sentence, the word “necessarily” should be inserted before “conclusive”, to emphasize the point that subsequent agreements were not automatically binding but could be made so by agreement among the parties.

14. Mr. NOLTE (Special Rapporteur) said that the point was that the subsequent agreements and subsequent

practice referred to in article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention, were not conclusive or binding as such. However, it was possible to reach a binding agreement regarding the interpretation of a treaty on the basis of subsequent agreements and subsequent practice, if there were specific indications that the parties so intended, and such agreements and practice would then be conclusive.

15. Responding to a comment by Sir Michael, he said that the reference to domestic law in the final sentence served as an important reminder to all those called upon to interpret the law that there were other rules that might need to be taken into account when establishing the agreement of the parties regarding the interpretation of a treaty. When discussing the scope of the topic, a number of Commission members had expressed concern that the Commission might inadvertently enunciate rules that would make it easy for States to agree to terms that would have the effect of overriding the original treaty. He suggested including a footnote to indicate that this issue would be addressed in greater detail at a later stage of work on the topic.

16. Mr. TLADI said that he was opposed to Sir Michael's amendment to the first sentence and would prefer to delete the words "conclusive or". The idea that subsequent agreements could be conclusive went against the notion that the process of interpretation was a single, combined operation in which all the means of interpretation were equal.

17. Mr. MURPHY proposed, in an effort to bridge the diverging views on the first sentence, that the words "are not" should be replaced with "need not be".

18. Sir Michael WOOD said that he could go along with that amendment and agreed with the Special Rapporteur that it would be helpful to include a footnote to the effect that the issue would be dealt with at a later stage in the work on the topic. In the final sentence, the word "prevent" should be replaced with "prohibit", because the provisions of domestic law could prohibit but not prevent a State from entering into a binding agreement regarding the interpretation of a treaty.

19. Mr. NOLTE (Special Rapporteur) endorsed that proposal.

*The proposal was adopted.*

20. Mr. NOLTE (Special Rapporteur), referring again to the first sentence, said that the Commission had come very close to saying that subsequent agreements could be conclusive, in the sense of overriding all other means of interpretation, when it had characterized a subsequent agreement as representing an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation. Thus, it was not helpful simply to ignore that question by deleting the word "conclusive"; rather, it had to be dealt with in the commentary. He could not accept Mr. Murphy's proposal, because if the Commission stated that subsequent agreements and subsequent practice under

article 31, paragraph 3 (a) or (b), need not be conclusive or binding, it was implying that they could be.

21. Mr. FORTEAU said that, since the final two sentences of paragraph (4) explained that subsequent agreements and subsequent practice that established the agreement of the parties regarding the interpretation of a treaty were not necessarily conclusive or legally binding, the beginning of paragraph (5) should simply refer back to paragraph (4) and be reformulated to read: "This does not exclude that the parties to a treaty, if they wish ..." ["*Ce qui précède n'exclut pas que les parties à un traité puissent, si elles le souhaitent ...*"].

22. Mr. NOLTE (Special Rapporteur) endorsed Mr. Forteau's proposal.

*The proposal was adopted.*

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

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

23. Sir Michael WOOD proposed that, in the first sentence, the words "to a certain degree" should be replaced with "more or less".

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

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

24. Mr. FORTEAU proposed that in the final sentence, the words "and thus in its evidentiary character" should be replaced by "the greater ease with which the agreement of the parties may be established" ["*la facilité plus grande avec laquelle on peut établir l'accord entre les parties*"].

25. Mr. NOLTE (Special Rapporteur) endorsed that proposal.

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

Paragraphs (10) to (12)

*Paragraphs (10) to (12) were adopted.*

*The commentary to draft conclusion 2 as a whole, as amended, was adopted.*

*Commentary to draft conclusion 3* (Interpretation of treaty terms as capable of evolving over time)

Paragraph (1)

26. Mr. HMOUD proposed replacing the words "terms of" with "a term used in", which was closer to the wording of the draft conclusion.

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

Paragraph (2)

27. Sir Michael WOOD proposed inserting the phrase “In the case of treaties,” at the beginning of the first sentence, so as to avoid implying that intertemporal law applied only to treaties.

*That amendment was adopted.*

28. Mr. PARK said that the final sentence conveyed the erroneous impression that many leading academics favoured the evolutive approach to the interpretation of treaties. Yet paragraphs (4) to (6) of the commentary to draft conclusion 3 made it plain that the Commission itself had not yet taken a position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation. He therefore proposed deleting the sentence.

29. Mr. NOLTE (Special Rapporteur) said that the sentence was an effort to frame the discussion that followed, which did not take as a given that there was a general tendency to support the evolutive approach to interpretation. In fact, the discussion put the phrase into the appropriate context, which was that evolutive interpretation, as far as it was practised and had been recognized—not only by academic commentators but also by courts and tribunals—was the result of the proper application of the means of interpretation referred to in articles 31 and 32 of the Vienna Convention. It was undeniable that many academic commentators favoured evolutive interpretation, and international courts and tribunals had taken note of that fact. The quotation of the arbitral tribunal used as an example in the final sentence<sup>184</sup> made that position particularly clear. Framing the elaboration of draft conclusion 3 in the light of the academic perspective added to the persuasiveness of the Commission’s arguments.

30. Mr. MURPHY said that, in order to meet the Special Rapporteur’s objective and to address Mr. Park’s concern that the Commission itself should not appear to be advocating the evolutive approach to the interpretation of treaties, the sentence could be reworded along the following lines: “At the same time, the Tribunal in the *Iron Rhine* case asserted that there was ‘general support among the leading writers today for evolutive interpretation of treaties’”.

31. Mr. FORTEAU supported Mr. Murphy’s proposal. In the second sentence, he proposed deleting the word “Originally” [*Initialement*] in order to make the sentence more neutral.

32. Mr. NOLTE (Special Rapporteur) endorsed the amendments proposed by Mr. Murphy and Mr. Forteau.

*Those amendments were adopted.*

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

33. Mr. HMOUD proposed the deletion of the words “(or rule)” at the end of the paragraph.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

34. Mr. HMOUD suggested that in the third sentence, the words “recognize that the meaning of a treaty rule has evolved over time” should be replaced with “support an evolutive interpretation”.

*That amendment was adopted.*

35. Mr. KITTICHAISAREE said that the Special Rapporteur should make it clear whether he was quoting the judgments in the cases cited<sup>185</sup> or the declaration of Judge *ad hoc* Guillaume. The first footnote to the second sentence should refer to the arbitral award of 21 October 1994 in *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*. He queried the accuracy of the pages and paragraphs mentioned in the second and fourth footnotes to the same sentence.

36. Mr. NOLTE (Special Rapporteur) explained that the quotations came from the judgments of the International Court of Justice and not from Judge Guillaume’s declaration. It was true that in the first footnote to the second sentence, the reference should be to page 16, not page 14. He agreed with Mr. Hmoud’s proposal.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

37. Mr. FORTEAU said that at the end of the paragraph, the words “must ... be justifiable” should be replaced with “must ... be justified” [*doit ... être justifiée*].

38. Sir Michael WOOD suggested that the text should be amended to read “must therefore result from the ordinary process of treaty interpretation”.

39. Mr. NOLTE (Special Rapporteur) said that he had used the word “justifiable” since there were courts which did not provide a detailed explanation of how they had arrived at a particular interpretation, although it could be assumed that they had done so in the manner prescribed by articles 31 and 32 of the Vienna Convention. However, he had no objection to Sir Michael’s proposal.

*Paragraph (8), as amended, was adopted.*

<sup>184</sup> Award in the Arbitration regarding the Iron Rhine (“*Ijzeren Rijn*”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands.

<sup>185</sup> Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua).

Paragraph (9)

40. Mr. HMOUD said that he could accept the paragraph only if a new sentence was added at the end, to read: “Ultimately, the interpreter has to answer the following question: Can it be presumed that the parties have intended, when they concluded the treaty, to give the term under consideration an evolving character?” The presumption of intention was an objective test that took into account how the drafters of a treaty would have interpreted, in contemporary circumstances, a term whose meaning had subsequently evolved.

41. Mr. MURPHY and Ms. JACOBSSON supported Mr. Hmoud’s proposal.

42. Mr. SABOIA said that the addition proposed by Mr. Hmoud would disturb the delicate balance of the text, and the objective test that he proposed was overly strict. In paragraph (6) of the commentary, the Commission had explicitly referred to the International Court of Justice’s two strands of jurisprudence, whereby some treaties could be interpreted by an evolutive approach, while others called for a contemporaneous interpretation.

43. Mr. NOLTE (Special Rapporteur) said that Mr. Hmoud’s proposal oversimplified a complex issue and elevated the *travaux préparatoires* to a higher status than they were given in the Vienna Convention. He proposed that the sentence to be added to the end of the paragraph should read: “The interpreter thus has to answer the question whether the parties can be presumed to have intended, upon the conclusion of the treaty, to give a term used a meaning which is capable of evolving over time.”

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

Paragraph (10)

44. Mr. HMOUD, supported by Sir Michael WOOD, Mr. FORTEAU and Mr. MURPHY, proposed that, in the last sentence, the word “rule” should be replaced with “term”, which was the expression used in the draft conclusion.

45. Mr. NOLTE (Special Rapporteur) said that when the meaning of a term changed as a result of an evolutive interpretation given to that term, then the meaning of the rule in which the term occurred also changed. However, he acknowledged that paragraph (10) was not the best place to address the issue of whether the meaning of a “rule” could evolve over time and therefore agreed to the replacement of that word with “term”.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted.*

Paragraph (12)

46. Mr. FORTEAU said that the first sentence was rather complicated and should be streamlined by replacing the words “contribute to understanding under which circumstances the interpretation of a treaty results in” with “assist

in determining whether a term should be given” [“*aider à déterminer s’il convient de donner à un terme*”].

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

47. Ms. ESCOBAR HERNÁNDEZ said that in the first sentence, the word “member”, before “States”, was superfluous and should be deleted.

*Paragraph (13), as amended, was adopted.*

Paragraphs (14) to (17)

*Paragraphs (14) to (17) were adopted.*

Paragraph (18)

48. Mr. NOLTE (Special Rapporteur) pointed out that the second sentence should be amended to avoid repetition of the word “phrase”.

49. Sir Michael WOOD suggested that the sentence should read “The expression ‘term’ is not limited to specific words ...”.

50. Mr. FORTEAU said that the final phrase should be worded more explicitly. He proposed that the words “the respective rules are covered accordingly” should be replaced with “the evolving meaning of a term affects the rule in which it is contained” [“*le sens évolutif du terme a un effet sur le sens de la règle qui le contient*”].

51. Mr. MURPHY agreed with Mr. Forteau that the last sentence could be worded more clearly, but he suggested simply replacing the word “covered” with “affected”.

52. Sir Michael WOOD said that the words “respective rules” might be replaced with “rules concerned”.

53. Mr. NOLTE (Special Rapporteur) said that the very artificial distinction between terms and rules would merely be emphasized by using the word “affected”. He did not see any reason not to use the word “covered”.

54. Mr. PETRIČ, supported by Mr. SABOIA, noted that the Special Rapporteur had a *primus inter pares* position and other members should respect his wish to maintain a particular word.

*Paragraph 18, with the two amendments by Sir Michael, was adopted.*

*The commentary to draft conclusion 3 as a whole, as amended, was adopted.*

55. The CHAIRPERSON invited the Commission to resume its consideration of paragraphs (8) and (14) of the commentary to draft conclusion 1 that had been left in abeyance at the previous meeting.

*Commentary to draft conclusion 1 (General rule and means of treaty interpretation) (continued)*

Paragraph (8) (*concluded*)

56. Mr. NOLTE (Special Rapporteur) said that, although he still maintained that the final sentence was substantive, he would be willing to delete it, since some members considered it obscure.

57. With respect to the second sentence, there had been some debate about whether the phrase “the reasoning set out in paragraph 1” was a reference to paragraph 1 in article 31 of the Vienna Convention or to paragraph 1 of the draft conclusion. It was a reference to the process of interpretation described in draft conclusion 1, and he therefore proposed amending the phrase to read “the application of the rules of interpretation set out in paragraph 1”.

58. Mr. TLADI said that the amendment introduced an element of circuitous reasoning: the means of interpretation were to be integrated into the application of a general rule of interpretation, of which they were already a part.

59. Sir Michael WOOD said that in his view, the final phrase should read “set out in paragraph 1 of article 31”.

60. Mr. FORTEAU suggested that the end of the sentence should be reworded to read “are an integral part of the general rule of interpretation reflected in article 31” [*“sont une partie intégrante de la règle générale d’interprétation reflétée à l’article 31”*].

61. Mr. TLADI said that the proposal by Mr. Forteau met his concern, but to track the language of the draft conclusion, he suggested that the words “set forth” should be used rather than “reflected”.

*Paragraph (8), as thus amended, was adopted.*

Paragraph (14) (*continued*)

62. Mr. NOLTE (Special Rapporteur) said that three points remained open. On the question of whether to use the word “factors” or “elements”, he agreed with Sir Michael that “elements” was preferable in that context.

63. On the interactive process, he pointed out that paragraph (8) of the Commission’s 1966 commentary on interpretation of treaties said that the various elements present in any given case would be thrown into a crucible, and their “interaction” would give the legally relevant interpretation.<sup>186</sup> The term “interactive process” was not such a leap from “interaction”.

64. On whether to use the word “rule” in the phrase “analyze those terms in their context and in the light of the object and purpose of a rule”, he proposed a compromise formula, using the word “treaty”, thus reproducing the language of the Vienna Convention, but adding a footnote with references to case law and the literature, including the writings of former Commission member Yasseen, that indicated that a treaty did not necessarily have a single object and purpose.<sup>187</sup>

<sup>186</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1 (Part II), pp. 219–220, paragraph (8) of the commentary to articles 27 and 28.

<sup>187</sup> M. K. Yasseen, “L’interprétation des traités d’après la Convention de Vienne sur le droit des traités”, *Collected Courses of The Hague Academy of International Law, 1976-III*, vol. 151, pp. 1 *et seq.*, at p. 58.

65. Mr. MURPHY said he feared that the Commission might be bringing in aspects of the Vienna Convention other than those covered in articles 31 and 32.

66. Mr. FORTEAU said that the object of draft conclusion 1 was not to give guidelines on interpreting the provisions of article 31 but to provide a reminder of the general rule of interpretation. Emphasizing the difference between the object and purpose of the treaty and the object and purpose of a rule was not relevant to the draft conclusion and might create legal difficulties in the future. Simply referring to the object and purpose of the treaty would be perfectly clear, and a footnote would then not be needed.

67. Sir Michael WOOD said that the compromise of referring in the text to the object and purpose of “the treaty” and, in a footnote, to at least some of the sources cited by the Special Rapporteur might be acceptable.

68. The CHAIRPERSON suggested that the Commission leave the paragraph in abeyance until a later meeting.

#### CHAPTER X. *The obligation to extradite or prosecute (aut dedere aut judicare)* (A/CN.4/L.825)

69. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of chapter X of the draft report as contained in document A/CN.4/L.825.

##### A. Introduction

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

##### B. Consideration of the topic at the present session

Paragraph 4

*Paragraph 4 was adopted.*

Paragraph 5

70. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute) said he would prefer the report of the Working Group (A/CN.4/L.829) to be included in the body of chapter X rather than annexed to the report. He noted that the report of the Study Group on fragmentation of international law had been incorporated in the report of the Commission to the General Assembly on the work of its fifty-fourth session.<sup>188</sup>

71. The CHAIRPERSON said that it was standard practice for the reports of working groups that had not yet completed their work to be annexed to the Commission’s report. Only when groups had concluded their work were their reports included in the report itself.

72. Mr. CANDIOTI supported Mr. Kittichaisaree’s position that the Working Group’s report should be included in chapter X.

<sup>188</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. IX, pp. 97–99, paras. 495–513.

73. Mr. MURPHY opposed that position, since the incorporation of the Working Group's report would create the impression that it reflected the views of the Commission as a whole. Moreover, placing the Working Group's report in an annex would give it greater visibility.

74. Mr. CANDIOTI pointed out that the composition of the Working Group, which was a working group of the whole, was the same as that of the plenary. Given the extensive delays in the work on the topic and the expectations in the Sixth Committee, the Working Group's report must not be relegated to an annex.

75. Sir Michael WOOD said that as he understood it, it had already been agreed in the Working Group and in the plenary that the report would be annexed. It would be more prominent as a separate annex, facilitating its consideration by the members of the Sixth Committee.

76. Mr. SABOIA said that he supported the views expressed by Mr. Candiotti. The Commission had made substantial progress on the topic, and that progress should be well publicized.

77. Mr. PETRIČ suggested that, as in similar situations in the past, the Commission should take an indicative vote.

*Following an indicative vote, paragraph 5 was adopted.*

*Chapter X of the report of the Commission, as a whole, was adopted.*

*The meeting rose at 6.05 p.m.*

## 3193rd MEETING

*Tuesday, 6 August 2013, at 10 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

1. Mr. CANDIOTI said that, at the previous meeting, the Commission had decided that the report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), contained in document A/CN.4/L.829, should be annexed to the report of the Commission on the work of its sixty-fifth session, which was not its usual practice and should not set a precedent.

### CHAPTER XI. *The most-favoured-nation clause (A/CN.4/L.826)*

2. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, chapter XI of the draft report, as contained in document A/CN.4/L.826.

#### A. Introduction

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

#### B. Consideration of the topic at the present session

Paragraph 3

3. Mr. FORTEAU (Rapporteur) said that the last sentence should be aligned with the English text.

*Paragraph 3 was adopted subject to the necessary amendments to the French text.*

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

*Chapter XI of the report of the Commission as a whole, as amended, was adopted.*

### CHAPTER IV. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.819 and Add.1-3)*

#### C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session (continued)

2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (continued)

Document A/CN.4/L.819/Add.2

*Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

4. Following a debate in which Sir Michael WOOD and Mr. FORTEAU, speaking both as Rapporteur and in his capacity as an expert, took part, Mr. NOLTE (Special Rapporteur) proposed, in response to Sir Michael's concern about the inaccuracy of the term "conclusion", that the third sentence should be reworded: "Various provisions in the Vienna Convention (for example, article 18) show that a treaty may be 'concluded' before its actual entry into force." The next sentence should read: "For the purpose of the present topic, 'conclusion' is whenever the text of the treaty has been established as definite"; and the reference to the existing footnote should be retained. Lastly, the problem raised by Sir Michael could be resolved by adding the following sentence at the end of the paragraph: "The possibility that subsequent agreements and subsequent practice can occur before the entry into force of a treaty implies that the word 'parties' is used in a wider sense than the definition in article 2 (g) of the Vienna Convention."

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

5. Sir Michael WOOD said that the expression in the second sentence “‘in connection with the treaty’” needed to be more clearly defined; he would leave it to the Special Rapporteur to amend the paragraph along those lines.

6. The CHAIRPERSON suggested that the Commission should defer its consideration of the paragraph and invited the Special Rapporteur to submit a new version at a later date.

*Paragraph (3) was deferred.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

7. Mr. NOLTE (Special Rapporteur) said that, in his view, customary international law had no requirement that treaties should be in written form; however, to meet the concern of Mr. Forteau who held a different view, he endorsed the deletion of the reference to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* in the footnote at the end of the third sentence.

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

Paragraphs (6) to (8)

*Paragraphs (6) to (8) were adopted.*

Paragraph (9)

8. Mr. NOLTE (Special Rapporteur) proposed that, in the last sentence, the words “an ... interpretation” should read “an ... means of interpretation”.

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

Paragraphs (10) and (11)

*Paragraphs (10) and (11) were adopted.*

Paragraph (12)

9. Sir Michael WOOD proposed that, in the first sentence, the word “normally” should be inserted between the words “is not” and “‘a’ subsequent agreement”, so as not to exclude the case where a series of separate subsequent agreements was deliberately intended to constitute a subsequent agreement under article 31, paragraph 3 (a).

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

*Paragraph (13) was adopted.*

Paragraph (14)

10. Sir Michael WOOD said that he was neither sure about the meaning nor the usefulness of the footnote at the end of the paragraph and proposed its deletion. He noted that in the last sentence of the paragraph, the word “parties” was used in a different sense from in the Vienna Convention, which could give rise to confusion.

11. Mr. NOLTE (Special Rapporteur) said that the footnote could be deleted and that he would like to draft a brief explanation to clarify the meaning of the word “parties” in the context.

*Paragraph (14), as amended, was adopted, subject to the inclusion of the explanation to be drafted by the Special Rapporteur.*

Paragraph (15)

*Paragraph (15) was adopted with an editorial amendment to the Spanish text.*

Paragraph (16)

*Paragraph (16) was adopted.*

Paragraph (17)

12. Sir Michael WOOD proposed that the words “court judgments” should be replaced with “court proceedings”.

13. Mr. NOLTE (Special Rapporteur) asked whether Sir Michael was trying to exclude the decisions of national courts from subsequent practice.

14. Sir Michael WOOD said that it was precisely the term “court judgments” that seemed to refer exclusively to the decisions of international courts.

15. Mr. MURPHY proposed, for the sake of clarity, that the words “court judgments” should be replaced with “judgments of domestic courts”.

*It was so decided.*

*Paragraph (17), as amended, was adopted.*

Paragraph (18)

16. Sir Michael WOOD proposed the deletion of the words “clearly intentional or otherwise”.

*Paragraph (18), as amended and with an editorial amendment to the Spanish text, was adopted.*

Paragraphs (19) and (20)

*Paragraphs (19) and (20) were adopted.*

Paragraph (21)

17. Mr. FORTEAU (Rapporteur) proposed that, in the second sentence, the term “primarily” (“*avant tout*”) should be replaced with the words “in principle” (“*en principe*”).

18. Mr. NOLTE (Special Rapporteur) said that it would be preferable to redraft the sentence: “It is, however, the parties *themselves*, acting through their organs *or by way of conduct which is attributed to them*, who engage in practice ...”. That would introduce the notion of attribution, which was important.

*Paragraph (21), as amended, was adopted.*

Paragraph (22)

19. Ms. ESCOBAR HERNÁNDEZ proposed the deletion of the brackets around the adjective “all”.

*Paragraph (22), as amended, was adopted.*

Paragraphs (23) to (33)

*Paragraphs (23) to (33) were adopted.*

Paragraph (34)

*Paragraph (34) was adopted with an editorial amendment to the English text.*

Paragraph (35)

20. Sir Michael WOOD proposed that the adjective “agreed”, which appeared in brackets, and the phrase “in the sense of any particular instance of application of a treaty” should be deleted.

*Paragraph (35), as amended, was adopted.*

Paragraph (36)

*Paragraph (36) was adopted.*

Document A/CN.4/L.819/Add.3

*Commentary to draft conclusion 5 (Attribution of subsequent practice)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

21. Mr. FORTEAU (Rapporteur) proposed, in order to reflect more accurately the opinion of the International Court of Justice in the *Kasikili/Sedudu Island* case, that the first sentence should be expanded by replacing the phrase “is not (only) performed by State parties” (“*n’est pas (seulement) la conduite des États parties*”) with “does not directly arise from the conduct of State parties, but nevertheless constitutes an example of subsequent practice” (“*ne découle pas directement de la conduite des États parties mais constitue tout de même une pratique ultérieure*”).

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (7)

*Paragraphs (4) to (7) were adopted.*

Paragraph (8)

22. Sir Michael WOOD proposed, for the sake of consistency in the English text, that the words “an intentional or clear” should be replaced with “a manifest”.

*Paragraph (8) was adopted with that amendment to the English text.*

Paragraphs (9) and (10)

*Paragraphs (9) and (10) were adopted.*

Paragraph (11)

23. Sir Michael WOOD said that he did not understand the meaning of the phrase “for example by supervision” and proposed its deletion.

24. Mr. NOLTE (Special Rapporteur) said that while he was in favour of deleting the phrase, he would like to keep the footnote; since, in the case cited,<sup>189</sup> one judge had considered that the application of a treaty could be attributed to a State party when it was the conduct of non-State actors under the strict supervision of that State.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

*Paragraph (13) was adopted with an editorial amendment to the Spanish text.*

Paragraphs (14) and (15)

*Paragraphs (14) and (15) were adopted.*

Paragraph (16)

25. Mr. PARK recalled that the ICRC was not only an NGO but had a unique status.

26. Sir Michael WOOD proposed, in order to remedy the problem, that the words “Non-governmental organizations (NGOs)” should be replaced with “Other non-State actors”.

*Paragraph (16), as amended, was adopted.*

Paragraph (17)

*Paragraph (17) was adopted.*

Paragraph (18)

27. Mr. FORTEAU (Rapporteur) said it seemed to be going too far to state that the assessments of non-State actors could be biased. The statement that they needed to be critically reviewed was sufficient.

*Paragraph (18), as amended, was adopted.*

Paragraphs (19) to (22)

*Paragraphs (19) to (22) were adopted.*

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

28. The CHAIRPERSON invited the members of the Commission to resume consideration of a paragraph that had been held in abeyance.

Document A/CN.4/L.819/Add.1

*Commentary to draft conclusion 1 (General rule and means of treaty interpretation) (concluded)*

<sup>189</sup> *The United States of America, and others and The Islamic Republic of Iran, and others.*

Paragraph (14) (*concluded*)

29. Mr. NOLTE (Special Rapporteur), following up on the comments of some members, proposed that the words “object and purpose of a rule”, already used by the Commission in its 1966 commentary to the draft articles on the law of treaties, should be replaced with “the object and purpose of the treaty”, as in the Vienna Convention, and that a footnote should be added referring to various authors to show that the notion of “object and purpose” was not as simple and homogenous as it seemed. As for the expression “interactive process” that some members found too modern, it was also drawn from the 1966 commentary, which could be referred to in a new footnote. Lastly, in response to Sir Michael’s request, in the fourth sentence, the word “factors” should be replaced with “elements”.

*Paragraph (14), as amended, was adopted.*

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

**CHAPTER V. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.820 and Add.1–3)**

30. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, the part of chapter V of the draft report contained in document A/CN.4/L.820.

**A. Introduction**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

**B. Consideration of the topic at the present session**

Paragraph 4

*Paragraph 4 was adopted.*

Paragraph 5

31. Mr. NOLTE asked what were the “basic norms” of the regime of immunity *ratione personae*.

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the exact words used in the original Spanish version were “*elementos normativos*” and that the translations should be aligned accordingly.

*Paragraph 5 was adopted subject to that amendment and a minor editorial amendment to the English text.*

*The meeting rose at 1 p.m.*

## 3194th MEETING

*Tuesday, 6 August 2013, at 3 p.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna,

Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

**CHAPTER V. Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/L.820 and Add.1–3)**

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.820.

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

Paragraphs 6 to 8

*Paragraphs 6 to 8 were adopted.*

**C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission**

1. TEXT OF THE DRAFT ARTICLES

Paragraph 9

*Paragraph 9 was adopted.*

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION

Paragraph 10

*Paragraph 10 was adopted.*

2. The CHAIRPERSON invited the Commission to consider the portion of chapter V of the draft report contained in document A/CN.4/L.820/Add.2.

*Commentary to draft article 1 (Scope of the present draft articles)*

Paragraph (1)

3. Mr. MURPHY said that, as at a later stage the Commission intended to adopt a draft article on definitions, it would be better not to employ the word “definition” in the first sentence. He therefore suggested the deletion of the phrase “the definition of”. He questioned the need for the second sentence and suggested that the fourth and fifth sentences should be deleted, since there was no need to overload the commentary with a description of the drafting history.

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), responding to Mr. Murphy’s first proposal, said that it would be preferable to replace the words “the definition of” with “determining”. As for his second and third proposals, she drew attention to the fact that the decision to merge the two draft articles which she had originally proposed had been taken after lengthy debates in plenary meetings and in the Drafting Committee, during which the reasons for combining the two articles had been considered in

depth and a comparison drawn with article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The second part of the paragraph was therefore substantive in nature and should be retained. The best way to facilitate the Sixth Committee's comprehension of the draft articles was to chart the evolution of the Commission's reasoning about them.

5. Sir Michael WOOD, Mr. CANDIOTI and Mr. VÁZQUEZ-BERMÚDEZ expressed support for retaining the second half of the paragraph.

6. Mr. MURPHY withdrew his proposal to delete the second sentence and the last half of the paragraph.

*Paragraph (1), as amended by the Special Rapporteur, was adopted.*

Paragraph (2)

7. Mr. TLADI said that, in the footnote to the end of the second sentence, the draft article in question should be identified, namely draft article 1 of the text on expulsion of aliens.<sup>190</sup>

8. Mr. FORTEAU proposed an editorial correction to the French text of the footnote at the end of the paragraph.

*Paragraph (2) was adopted with those amendments to the footnotes.*

Paragraph (3)

9. Mr. TLADI queried the use of direct questions and the presentation of the paragraph in general.

10. Mr. HUANG said that the basis for immunity was international law, the equality of sovereign States and the representative function of the officials who enjoyed immunity. It was therefore not appropriate to say that State officials were the beneficiaries of immunity.

11. Mr. CANDIOTI said that, although paragraph (3) was extremely clear, the Spanish wording should be aligned on the English text.

12. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the paragraph was not solely formulated as questions: it also identified the issues covered in the draft article, in order to make it easy for both specialists and non-specialists to understand them. She agreed with Mr. Candiotti's suggestion to align the Spanish text on the English version. In response to Mr. Huang, she said that, as State officials enjoyed immunity in the interests of the State, the State was entitled to confer or revoke immunity. The term "State official" was being used provisionally, pending a more thorough consideration of the notion at the next session.

13. Sir Michael WOOD, supported by Mr. PETRIČ, suggested that, in the English version of the text, the term "beneficiaries" should be replaced with "persons

enjoying immunity", which echoed the language used in draft article 3. The term "beneficiaries" was inappropriate in the light of the preamble to the Vienna Convention on Diplomatic Relations, which stated that the purpose of privileges and immunities "is not to benefit individuals".

*Paragraph (3), as amended by Mr. Candiotti and Sir Michael Wood, was adopted.*

Paragraph (4)

14. Sir Michael WOOD suggested that, in the fifth sentence, the words after "apply" should be deleted, as they were superfluous.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

15. Mr. NOLTE said that, as the paragraph was designed to explain the term "criminal jurisdiction", it might be helpful to refer to the extensive jurisprudence of the European Court of Human Rights. He was somewhat surprised that, according to the fifth sentence, the reference to foreign criminal jurisdiction was to be understood as "the set of judicial processes whose purpose is to determine whether an individual bears criminal responsibility, including for coercive acts". The *Arrest Warrant* case had been cited to support that proposition, but he had always interpreted that case as referring to an act that infringed on immunity but was not coercive in any respect. He would therefore propose either deleting the last part of the fifth sentence or amending it to read "... including for non-coercive acts with respect to the beneficiaries of immunity in this context". In the next sentence, the words "the mere circulation of" should be inserted before "an arrest warrant".

16. Mr. TLADI pointed out that, in the English version, the reference to the "draft articles" in the third sentence should be in the singular, not the plural.

17. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that there were diverging views on the necessity of a definition of criminal jurisdiction, and she had endeavoured to find a middle ground. If a more detailed definition were to be given, the Commission could refer, not only to European case law, but also to the jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee. Paragraph (5) indicated that the understanding of the term would be developed later in the Commission's treatment of the topic. A preliminary description of criminal jurisdiction was necessary in the commentary to the text on the scope of the draft articles, however, since foreign criminal jurisdiction was one of the elements of the scope. The inclusion of coercive acts among the processes whose purpose was to determine whether an individual bore criminal responsibility reflected points raised in the debates in plenary and in the Drafting Committee. In the judgment of the International Court of Justice in the *Arrest Warrant* case, the Court had noted that although the warrant had not been executed, in and of itself it had been coercive in nature. She would therefore propose maintaining the paragraph as currently drafted.

<sup>190</sup> Draft articles on the expulsion of aliens adopted by the Commission on first reading in 2012, *Yearbook ... 2012*, vol. II (Part Two), paras. 45–46.

18. Sir Michael WOOD suggested that a solution might be to retain the first four sentences of paragraph (5), which seemed to contain the essence, and to delete the remainder. In the English text, the term “judicial processes” was problematic. In his country, for example, the police and prosecution services were not part of the judicial process.

19. Mr. FORTEAU said that the paragraph was very useful in describing the current stage of the Commission’s work on the topic. Given that, in its judgment in the *Arrest Warrant* case, the International Court of Justice had described the warrant as “enforceable” (para. 63), he suggested that the fifth sentence could refer to “enforceable or coercive acts”.

20. Mr. GEVORGIAN said that he agreed with Sir Michael: the term “judicial processes” was problematic in Russian as well, since it did not cover certain pretrial stages of the judicial process under the legal system of the Russian Federation. He agreed with Mr. Nolte that the link between the decision in the *Arrest Warrant* case and coercive acts was not entirely justified, and he was not convinced that Mr. Forteau’s proposal would resolve the problem.

21. Mr. PETRIČ said that perhaps Sir Michael’s suggestion would provide the best solution. To ensure consistency, the reference to “beneficiaries” should be amended, as in previous paragraphs. If the *Arrest Warrant* case was cited, the Commission’s reasoning must be solid enough to preclude any misunderstandings; Mr. Nolte’s cautions should therefore be heeded. He agreed that the term “judicial processes” was problematic. While it was not necessary to define what was understood by criminal jurisdiction now, that would have to be done sometime in the future, as it would be crucial whenever there were disputes concerning immunity. He agreed that, in the English text, the third sentence must refer to “This draft article” rather than “The draft articles”.

22. Mr. NOLTE said that he agreed with the proposal by Sir Michael to delete the latter part of the paragraph. Given that the readers of the Commission’s commentaries were not necessarily experts in international law, they would not immediately identify the reference to “enforceable” acts proposed by Mr. Forteau. If the sixth sentence were retained, it should be specified very clearly that the Court had taken into account the “international circulation” of the arrest warrant (paras. 62 and 64), thus indicating the way in which the warrant affected immunity.

23. Mr. KITTICHAISAREE said that he agreed fully with the views expressed by Mr. Petrič. He proposed that only the first two sentences should be retained, and the footnote at the end of the third sentence, which captured the main of what the Special Rapporteur was trying to explain, should be moved to the end of the first sentence. In that footnote, he would replace the word “progressively” with “gradually” and insert the word “criminal” between “the concept of” and “jurisdiction”.

24. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that while she understood the intention behind the latter proposal, she was concerned that it would oversimplify the commentary. If only the first two

sentences were maintained, the Commission would be saying little of substance to describe the issues it had debated, including what “criminal jurisdiction” should be understood to mean. While consideration could be given to deleting the references to the judgments of the International Court of Justice, she believed they were both relevant. The concerns with regard to the term “judicial processes” could be resolved by choosing an alternative translation for the Spanish wording “*actuaciones vinculadas a la actividad judicial*”. She agreed with Mr. Petrič that it was necessary to exercise caution in choosing terminology. The proposal by Mr. Forteau would make the reference to the *Arrest Warrant* judgment more precise.

25. The CHAIRPERSON suggested that the Commission should revert to paragraph (5) at its next meeting.

Paragraph (6)

26. Sir Michael WOOD said that the phrases “international criminal jurisdictions” and “internationalized criminal jurisdictions” should be replaced with “international criminal tribunals” in the third and fourth sentences.

27. Mr. MURPHY, referring to the fourth to seventh sentences, said that he found the references to “a member” and “another member” to be unfortunate. He would suggest reformulating them as “some members”. He also proposed inserting the words “immunity from” before the words “the so-called mixed or internationalized criminal jurisdictions” in the fourth sentence, and “under national law” after “cooperate” in the fifth sentence. The final sentence might be replaced with a simpler formulation: “As such, the Commission has decided to exclude these issues from the scope of this topic.”

28. Mr. CAFLISCH said that, in keeping with the general practice, the word “norms” [“*normes*”] should be replaced with “rules” [“*règles*”] throughout the text.

29. Mr. VALENCIA-OSPINA, supported by Mr. NOLTE, Mr. SABOIA and Sir Michael WOOD, said that he shared Mr. Murphy’s position on the words “a member” and “another member”. As to the substantive points, paragraph (6) should simply indicate that the Commission was aware of the problems posed by the so-called mixed or internationalized criminal tribunals and the potential effect on the present draft articles of the application of certain rules of international law. The final sentence could then outline the Commission’s conclusion on those points.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that in drafting the commentary to the draft articles, the Commission was transmitting information to the Sixth Committee, and more generally, to the international law community. If it was considered preferable not to mention that a particular point had been raised by an individual Commission member but rather to reflect members’ views more generally, she could agree to do so, but only if that was to be a general policy for all the texts produced by the Commission. Although she could not endorse the proposal to delete the last sentence which, in her view, expressed the most important point of the paragraph, she could agree to the inclusion of a more specific

statement to the effect that what was excluded from the scope of the draft articles was immunity from the jurisdiction of international criminal tribunals.

31. Sir Michael WOOD said that it was unclear whether the “mixed or internationalized criminal jurisdictions” referred to in the fourth sentence were the same as the international criminal tribunals mentioned in the second. That made it difficult to know whether the exclusion of international criminal jurisdictions to which reference was made in the final sentence also applied to mixed or internationalized criminal courts. The final sentence was not merely stating that the Commission was excluding international criminal tribunals from the scope of the current topic, but rather that their exclusion from the scope of the topic meant that neither the rules that governed their functioning nor immunity with respect to the jurisdiction of an international criminal tribunal was affected by the present draft articles.

32. Mr. MURPHY said that the final sentence referred only to the exclusion of international criminal courts and tribunals from the scope of the topic, whereas the paragraph as a whole covered two issues: the so-called mixed or internationalized criminal tribunals and the international obligations towards those courts and tribunals with which States might have to comply under their national laws.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to address the various concerns expressed, she was prepared to propose a number of amendments to the text.

34. The CHAIRPERSON said that the Commission would defer consideration of paragraph (6) pending its reformulation by the Special Rapporteur.

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

35. Mr. NOLTE asked for clarification regarding the meaning of the phrase in the second sentence “criminal responsibility based on primary rules in the criminal domain” and queried the final sentence.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the phrase referred to by Mr. Nolte could be paraphrased to read: “criminal responsibility based on the substantive rules of criminal law”. With regard to the last sentence, several members of the Commission had expressed the view that, in addition to its procedural nature, immunity from foreign criminal jurisdiction also had a substantive or material component. Its application could, in certain circumstances, produce effects that would make it impossible to attribute individual criminal responsibility to a State official.

37. Mr. ŠTURMA proposed that, in the second sentence of the Spanish version, the phrase “*normas primarias de naturaleza penal*” should be replaced with “*normas sustantivas de naturaleza penal*”, which might be translated into English as “substantive rules of a criminal nature”.

38. Mr. SABOIA pointed out that even where immunity was procedural in nature, it could produce substantive effects on the attribution of criminal responsibility. For example, alleged offenders could die or the statute of limitations could expire, thus resulting in impunity for criminal acts.

39. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed Mr. Šturma’s new wording for the second sentence of the Spanish text. The final sentence reflected a concern that had been raised in the debate, but if the rest of the Commission wished to delete it, she would have no objection.

40. Ms. JACOBSSON said that the views expressed by Commission members were reflected in the commentaries to many of its texts for ease of reference, and in particular, for consultation by members of the Sixth Committee. In her view, the last sentence was important and worth retaining.

*Paragraph (8), as amended by the Special Rapporteur, was adopted.*

Paragraph (9)

41. Mr. TLADI, referring to the third sentence, said that the marker for the footnote in the third sentence should be positioned after the term “treaty-based”, since the footnote contained only examples of treaty-based practice. Failing that, the footnote should include examples of custom-based practice.

42. Mr. FORTEAU suggested that a better solution would be to delete the phrase “both treaty-based and custom-based” in the third sentence and, at the beginning of the footnote in question, to delete the phrase “To cite only examples of treaty practice”.

43. Sir Michael WOOD said that it was important to retain the phrase “both treaty-based and custom-based” in the text of paragraph (9), but he endorsed the proposal to move the footnote marker to appear after “treaty-based”, since the footnote gave examples only of such practice. In the second sentence, the expression “to a lesser degree”, which was ambiguous and superfluous, should be deleted.

44. After additional discussion in which Mr. MURASE, Mr. PETRIČ and Mr. MURPHY participated, Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no problem with deleting the words “to a lesser degree” in the second sentence. With regard to the footnote in the third sentence, she could agree to delete it since it added little to the text.

45. Sir Michael WOOD proposed that the footnote in question should simply be deleted.

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

*The meeting rose at 6 p.m.*

## 3195th MEETING

Wednesday, 7 August 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

*Present:* Mr. Cafilisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

#### CHAPTER V. Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/L.820 and Add.1-3)

#### C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (*continued*)

##### 2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration, paragraph by paragraph, of document A/CN.4/L.820/Add.2.

*Commentary to draft article 1* (Scope of the present draft articles) (*continued*)

Paragraph (10)

2. Mr. NOLTE proposed, in the third sentence, to delete the word “individually”, since the reference in question was to a category, not to individuals. He also proposed, in the fourth sentence, to delete the phrase “with no interference between the two”.

3. Mr. MURPHY proposed that, in the third sentence, the words “certain State officials” should be replaced with “persons connected with” in order to mirror the terminology found in draft article 1. In addition, the phrase “who are mentioned individually in view of the fact that they carry out their” should be deleted so that the end of the third sentence would read, “the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations”.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

4. Sir Michael WOOD proposed, in the third sentence, to delete the word “defence”, which did not appear in the 1969 Vienna Convention and which seemed out of place. He also proposed, in the penultimate sentence, to replace the word “establishment” with “stationing” in the English version and to delete the adjective “permanent”. In the final sentence, the word “non-permanent” should be deleted from the English version, and the term “*no permanentes*” should be deleted from the Spanish version of the text.

5. Mr. MURPHY proposed that, for the sake of consistency with paragraph (10), the phrase “State officials” in the third sentence, the phrase “individuals carrying out” in the fifth sentence and the words “members of” in the antepenultimate sentence should all be replaced with “persons connected with”.

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the concept of “defence ... of the interests of the State” had a precise meaning in Spanish, but that that concept was covered by the term “protection”, which meant that the term “defence” could be deleted. She proposed that, in the Spanish version, the words “*no permanentes*” should be replaced with “*de corta estancia*”.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

7. Sir Michael WOOD proposed deleting the second sentence, whose meaning seemed obscure.

8. Mr. FORTEAU (Rapporteur) agreed that the second sentence was not very clear and proposed adding to the end of the first sentence the phrase “in order to indicate that the ‘without prejudice’ clause is not necessarily restricted to the persons expressly mentioned in the clause”.

9. Mr. NOLTE said that the final sentence gave the impression that the Commission regarded certain categories of immunity as unimportant; he therefore proposed deleting the words “these cases in practice are not sufficiently significant, so”. The end of the sentence would then read: “it has considered that there is no need to mention them in paragraph 2”.

*It was so decided.*

10. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to take into account the concerns expressed by Sir Michael and Mr. Forteau, the first sentence should be redrafted so that it would read: “The list of the special rules described in the previous paragraph is preceded by the words ‘in particular’ to indicate that the saving clause does not apply exclusively to those special rules.”

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

11. Mr. FORTEAU (Rapporteur) proposed deleting the words “and freely”, whose meaning was unclear.

*It was so decided.*

12. Mr. PARK said that, since he found the question of immunity that was granted on a unilateral basis to be a very important one, he proposed, at the end of the paragraph, adding a sentence that would read something along these lines: “This type of situation will be revisited at a later stage in the work on the topic.”

13. Mr. MURPHY proposed replacing the phrase “in view of the nature of such acts” with “since States remain free to provide additional immunities in accordance with their national law”.

14. Mr. SABOIA said that the phrase proposed by Mr. Murphy gave the impression that a State could, if it considered its law to permit it, grant refugee status to a criminal who was wanted for serious international crimes. In his view, the question of immunity that was granted on a unilateral basis warranted in-depth consideration before the Commission took a position on the matter.

15. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she endorsed Mr. Park's proposal. With regard to the question raised by Mr. Murphy and Mr. Saboia, she recalled that the two opinions they had expressed had been conveyed to the Drafting Committee but that the Commission had not settled the matter. She would therefore propose, in the last sentence, to simply replace the verb "include" with that of "mention" and to add the sentence proposed by Mr. Park.

*It was so decided.*

16. Sir Michael WOOD asked whether the Commission had already agreed to revisit that point in the course of its work on the topic or whether it was simply a possibility.

17. Mr. HMOUD said that the question of immunity granted on a unilateral basis was extremely important, and he hoped that the Special Rapporteur would fairly reflect the two opinions that had been expressed in the Commission.

18. Ms. JACOBSSON said that she shared the opinions stated by Mr. Saboia and Mr. Hmoud and was of the view that the Commission should consider that question in any event.

19. Mr. PETRIČ said that he had always been convinced that the question of immunity that was granted on a unilateral basis would be taken up at a later stage since failure to do so would leave a gap in the Commission's work, in addition to the fact that States would step into the breach. He wished to know whether that question would indeed be taken up.

20. Mr. KITTICHAISAREE said that he also considered it necessary to address that question.

21. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she wished to assure Mr. Petrič that the Commission would not fail to consider the question. The addition of the sentence proposed by Mr. Park consequently seemed to be both useful and necessary.

*Paragraph (13) was adopted, subject to amendments to be made in accordance with the approved proposals and to a minor editorial amendment to the English text.*

Paragraphs (14) and (15)

*Paragraphs (14) and (15) were adopted.*

22. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, document A/CN.4/L.820/Add.3, which contained the text of draft article 3 and the commentary thereto.

*Commentary to draft article 3 (Persons enjoying immunity *ratione personae*)*

Paragraph (1)

23. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), referring to the fact that some members were wondering what was meant by the "significance" of immunity *ratione personae*, proposed to refer instead to the "substantive scope" of that category of immunity.

*Paragraph (1) was adopted, subject to that amendment and to a minor editorial amendment to the English text.*

Paragraph (2)

24. Mr. NOLTE said that it was unclear what the difference was between the two reasons for granting immunity *ratione personae* to certain individuals, which were that they *personified* the State and that they *represented* it by virtue of their functions. He was of the view that, if the Commission wished to say that immunity was historically linked to the person of the sovereign, it should substantiate that affirmation by means of appropriate footnote references.

25. Mr. KITTICHAISAREE said that, in paragraph (2) of the commentary to draft article 4 (A/CN.4/L.820/Add.1), the Commission justified the grant of immunity *ratione personae* on the basis of only one of the two reasons cited in the present paragraph.

26. Mr. TLADI proposed deleting the entire reference to personification. There had never been any question of considering that Heads of Government, much less Ministers for Foreign Affairs, personified the State, even symbolically. The Commission had historically considered that only the Head of State should be granted immunity *ratione personae*. However, it presently considered that such immunity should also be granted to the two other members of the troika, owing to the dual functional and representative nature of their functions and taking into account the judgment of the International Court of Justice in the *Arrest Warrant* case. That was the consensus that had been reached by the members of the Commission. The idea of personification was a new one that the Commission could not introduce at the present stage.

27. Sir Michael WOOD shared that view. The Commission had extended immunity *ratione personae* to the three members of the troika, owing to their dual representative and functional links to the State, as stated at the end of the paragraph. On the other hand, the irrelevance of their nationality was a secondary point that should be placed in a separate sentence.

28. Mr. PETRIČ said that he, too, felt that the Commission was going too far in claiming that the three members of the troika personified the State. Ministers for Foreign Affairs, in particular, enjoyed special status only by virtue of their functions; in certain countries, such as the United States of America, he or she personified the State certainly to a lesser extent than did the Vice President.

29. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) recalled that opinions had been divided both within the plenary Commission and among the members of the Drafting Committee on the question of whether the troika personified the State. It was for that reason that she had

chosen to include the concept of “personification”, while nevertheless employing the adverb “symbolically” in order to show that it was not a question of identification with the State. That said, she proposed to reformulate the paragraph so as to incorporate the views expressed and to submit a new version of it to the members at the next meeting.

*It was so decided.*

*Paragraph (2) was left in abeyance.*

Paragraph (3)

*At the request of Mr. Nolte, Sir Michael and Mr. Forteau (Rapporteur), it was decided to include in the footnote at the end of the second indentation the source of the decisions cited, and to delete the reference to two irrelevant cases.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

30. Mr. NOLTE said that it was not necessary to state that, at a later date, it had been recognized that Heads of Government and Ministers for Foreign Affairs likewise enjoyed immunity *ratione materiae*. He therefore proposed to delete that statement.

*It was so decided.*

31. Mr. TLADI, referring to the second indentation, which mentioned the various conventions in which some form of immunity *ratione personae* of members of the troika was recognized, said that the varying treatment of such immunity from one instrument to another could give rise to uncertainty. In particular, the fact that the three offices were referred to in separate paragraphs could lead to the conclusion that the immunity granted to the individuals concerned was also different. In addition, in the third indentation, when citing the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, it would be useful also to cite the following sentence, in which the Commission pointed out that “[a] proposal ... to add after ‘heads of State’ ... heads of government and ministers for foreign affairs ... was not accepted by the Commission”.<sup>191</sup>

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the commentary, the Commission could restrict itself to mentioning the three conventions that recognized the immunity *ratione personae* of the Head of State, the Head of Government and the Minister for Foreign Affairs, and to specify in a footnote the way in which each one defined that immunity. She proposed, once again, to draft a new version of the entire text of paragraph (4) for submission to the Commission at the next meeting.

*It was so decided.*

*Paragraph (4) was left in abeyance.*

<sup>191</sup> Paragraph (7) of the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session (*Yearbook ... 1991*, vol. II (Part Two), p. 22).

Paragraph (5)

33. Mr. TLADI proposed, at the end of the last sentence, to replacing the phrase “the functions the Minister for Foreign Affairs performs in international relations” with “because the findings of the Court in the *Arrest Warrant* case was not opposed by States”.

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

Paragraph (6)

34. Mr. SABOIA proposed deleting the last two sentences since the Commission was not obliged to give an account of the various points of view expressed by its members in the commentaries to the draft articles.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

35. Mr. TLADI pointed out an error in the final sentence: the words “draft article 4” should be replaced with “draft article 3”.

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

Paragraph (8)

36. Mr. TLADI pointed out an error in the third sentence: the words “draft article 4” should be replaced with “draft article 3”.

37. Sir Michael WOOD proposed, in the third sentence, replacing the phrase “opening to extend the regime of immunity *ratione personae* to high-ranking State officials” with “as including within the regime of immunity *ratione personae* high-ranking officials other than the troika”.

38. Mr. NOLTE proposed deleting the adverb “precisely” in the penultimate sentence.

*Paragraph (8), as amended, was adopted, with the correction made by Mr. Tladi.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

39. Mr. MURPHY proposed, in the first sentence of the antepenultimate footnote, inserting the word “only” after “not” and inserting the word “especially” between “but” and “because”.

40. Mr. GEVORGIAN proposed replacing the adjective “small” with “narrow”.

41. Sir Michael WOOD said that, in the seventh sentence of the penultimate footnote, the words “federal bodies” should be replaced with “federal units”.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

*Paragraph (11) was adopted.*

Paragraph (12)

42. After an exchange of views in which Sir Michael WOOD, Mr. NOLTE, Mr. HMOUD, Ms. JACOBSSON and she herself had taken part, Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed adding the words “for the purposes of the present draft articles” after “*ratione personae*”.

*Paragraph (12), as amended, was adopted.*

Paragraph (13)

*Paragraph (13) was adopted.*

Paragraph (14)

43. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed the deletion of paragraph (14) in view of the fact that the Commission had decided not to reflect individual reservations expressed by Commission members in its draft commentaries.

*Paragraph (14) was deleted.*

44. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, document A/CN.4/L.820/Add.1, which contained the text of draft article 4 and the commentary thereto.

*Commentary to draft article 4 (Scope of immunity ratione personae)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

45. Mr. MURPHY proposed, in the second sentence, deleting the words “in fact”. He also proposed deleting the footnote at the end of the first indentation and, after the sixth sentence, adding a new sentence that would read: “The strict temporal scope of immunity is confirmed by a variety of national court decisions.” In addition, he proposed the insertion of a footnote that would refer to the relevant decisions listed in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction.<sup>192</sup>

46. Mr. TLADI proposed, in the sixth sentence, deleting the word “solution”.

47. Sir Michael WOOD, endorsing Mr. Murphy’s proposal, said that, if the Commission referred to national court decisions, it should delete the seventh sentence, which would be rendered superfluous. In the final sentence, the words “to a great extent” should also be deleted.

*The amendments proposed by Mr. Murphy, Mr. Tladi and Sir Michael Wood were adopted.*

*The meeting rose at 1.05 p.m.*

## 3196th MEETING

*Wednesday, 7 August 2013, at 3 p.m.*

*Chairperson: Mr. Bernd H. NIEHAUS*

*Present: Mr. Cafilisch, Mr. Candiotti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.*

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

CHAPTER V. *Immunity of State officials from foreign criminal jurisdiction (concluded)* (A/CN.4/L.820 and Add.1–3)

C. *Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (concluded)*

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the part of chapter V of the draft report contained in document A/CN.4/L.820/Add.1.

*Commentary to draft article 4 (Scope of immunity ratione personae) (concluded)*

Paragraph (2) (*concluded*)

2. Mr. NOLTE proposed rewording the fifth sentence to read: “The same applies, *a fortiori*, to the Head of State and the Head of Government, since no practice to the contrary is evident”, to be followed by the footnote proposed by Mr. Murphy at the previous meeting.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

3. Sir Michael WOOD suggested that the second footnote to the paragraph should simply list the names of the cases rather than describe them. He also proposed that the word “precedents” in the second sentence of the footnote should be replaced by “cases”.

4. Mr. FORTEAU, also referring to that footnote, suggested that the first sentence of the analysis of the judgment by the Paris *Cour d’appel* dated 13 June 2013 should be retained.

5. Mr. MURPHY proposed that the first sentence of the footnote in question should be replaced with a list of the cases mentioned in paragraphs 137 to 140 of the memorandum by the Secretariat.<sup>193</sup>

*That proposal was adopted.*

<sup>192</sup> A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

<sup>193</sup> A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

6. Mr. PARK suggested that at the end of the English text of the footnote, the words “cannot be derived” should be deleted.

7. Ms. ESCOBAR HERNÁNDEZ agreed with Sir Michael that simply citing the names of the relevant cases would make the footnote more succinct. However, she also agreed with Mr. Forteau that it was worth maintaining the first sentence of the description of the recent Paris *Cour d’appel* case, which read: “On the other hand, a recent judgment by the Paris *Cour d’appel*, dated 13 June 2013, appears to limit the immunity enjoyed by a sitting Head of State to immunity *ratione materiae*.”

8. Sir Michael WOOD said that he found the judgment by the Paris *Cour d’appel* obscure. The case was a very recent one; the Commission should not go on record as taking a position on it until all members had had time to study it carefully.

9. Mr. FORTEAU said that, as the case had been discussed in the plenary, there was no reason for the judgment not to be mentioned. A reading of the judgment supported the conclusion outlined in the footnote.

10. Sir Michael WOOD said that to say, as in the footnote, that the judgment appeared to limit the immunity enjoyed by a sitting Head of State to immunity *ratione materiae* was a misreading of the decision. He was opposed to maintaining that sentence.

11. Ms. ESCOBAR HERNÁNDEZ said that she agreed with Mr. Forteau’s interpretation of the judgment and would support retaining the sentence.

12. Mr. PETRIČ said that it would be sufficient simply to mention the judgment, as interested parties could read and interpret it for themselves.

13. Mr. MURPHY said that it would be misleading to simply mention the Paris *Cour d’appel* judgment without further comment. Given that the case was so recent and had not been included in the Special Rapporteur’s report or discussed in the Drafting Committee, he suggested that it could be omitted now, on the understanding that its relevance to the Commission’s commentary would be discussed later.

14. Mr. TLADI supported that proposal.

15. Sir Michael WOOD agreed that the Commission could discuss the case further and include it in its commentary if it concluded that it was of relevance.

16. Mr. FORTEAU said that he could go along with Mr. Murphy’s proposal but he did not believe the Commission was being objective by deleting the reference.

17. Ms. ESCOBAR HERNÁNDEZ said that she would support deleting the reference on the understanding that the Commission would reconsider the case the following year when dealing with immunity *ratione materiae*.

18. Mr. MURPHY, referring to paragraph (3), suggested replacing the words “this is explained by the need to” in

the fourth sentence with “extension of the immunity to acts performed in both a private and official capacity is necessary to”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

19. Mr. PETRIČ suggested that the last sentence of paragraph (4) should be deleted. If the sentence was maintained, the word “possible”, before “exceptions” should be deleted. It had been clear from the Commission’s discussions that there were exceptions: it was simply a matter of agreeing on which ones.

20. Mr. MURPHY said that while he understood Mr. Petrič’s concern with regard to the word “possible”, it made it clear that it could not be concluded unequivocally that there were or were not exceptions.

21. Mr. CANDIOTI, supported by Sir Michael WOOD, said that he agreed with maintaining the word “possible” before “exceptions”. Referring to the “issue” of exceptions indicated that it presented a problem on which the Commission members were not in agreement. While he agreed with Mr. Petrič on the substance of the matter, in his view it would be more neutral to leave the sentence as currently drafted.

22. Ms. ESCOBAR HERNÁNDEZ, responding to a comment by Mr. Murphy, said that the footnote at the end of the paragraph should refer to paragraph 55 of her report (A/CN.4/661) rather than paragraph 53.

*With that amendment, paragraph (4) was adopted.*

Paragraph (5)

23. Mr. NOLTE said that, as currently drafted, the penultimate sentence suggested a contradiction that did not exist. He therefore suggested replacing the words “but nevertheless” with “and also”.

24. Ms. ESCOBAR HERNÁNDEZ agreed and said that in the Spanish text, the word “*aunque*” should be deleted and the words “*y que*” inserted between “*Estados*” and “*definen conductas*”.

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

Paragraph (6)

25. Sir Michael WOOD suggested that in the eighth sentence of the English text, the words “or expunging” should be deleted, since the preceding word, “exonerating”, was sufficiently broad to convey what was meant.

26. Mr. KITTICHAISAREE pointed out that the term “beneficiaries” would have to be replaced throughout the text to ensure consistency.

*Paragraph (6) was adopted with those changes to the English text.*

Paragraph (7)

27. Mr. MURPHY proposed that, in order to improve its readability, the first sentence should be redrafted to read: “Paragraph 3 of the draft article addresses what happens with respect to acts carried out in an official capacity while in office by the Head of State, Head of Government or Minister for Foreign Affairs after their term of office ends.” In the sixth sentence, he proposed replacing the phrase “The Commission has answered this question by including in the present draft article” with “Thus, paragraph 3 sets forth”.

28. Mr. NOLTE, referring to the third sentence, said that the phrase “not even in the form of ‘residual immunity’” seemed to be contradicted by the quote in the footnote at the end of the first indentation from the Vienna Convention on Diplomatic Relations. He therefore proposed to delete that phrase.

29. Sir Michael WOOD said that the Special Rapporteur had, no doubt, used the expression “residual immunity” to refer to immunity *ratione personae*. However, that expression was commonly understood as referring to immunity *ratione materiae*, which did in fact continue to apply in respect of acts carried out in an official capacity after the term of office ended. Hence, the phrase referred to by Mr. Nolte was confusing, and he supported its deletion. In the footnote in question, he proposed deleting the second sentence because the quote it contained was oddly worded and was not particularly helpful or relevant.

30. Mr. NOLTE said that retention of the phrase “not even in the form of ‘residual immunity’” might create the misunderstanding that not even immunity *ratione materiae* subsisted after the term of office of the State official had ended.

31. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed Mr. Murphy’s proposals, which reflected different stylistic preferences. As to the third sentence, she admitted that the reference to residual immunity could be misleading, since it might not be clear which type of immunity was meant. She suggested redrafting the third sentence to read: “Consequently, such immunity *ratione personae* no longer exists after their term of office ends.” [*“Por tanto, la citada inmunidad ratione personae no subsiste tras la terminación del mandato de aquellos.”*]

*With those amendments, paragraph (7) was adopted.*

*The commentary to draft article 4, as a whole, as amended, was adopted.*

32. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.820/Add.2.

*Commentary to draft article 1 (Scope of the present draft articles) (concluded)*

Paragraph (5) (concluded)\*

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to meet the concerns expressed by Mr. Gevorgian, and in response to comments made in plenary meetings with reference to the judgments

of the International Court of Justice, she had recast paragraph (5) to read as follows:

“(5) Secondly, the Commission has decided to confine the scope of the draft articles to immunity from criminal jurisdiction.

“The present draft article is not intended to define the concept of criminal jurisdiction, which is being considered by the Commission in relation to another draft article.<sup>[footnote]</sup> Nevertheless, the Commission has debated the scope of ‘criminal jurisdiction’ in relation to the acts that would be covered by the concept, particularly with reference to the extension of immunity to certain acts that are closely linked with the concept of personal inviolability, such as the arrest or detention of an individual. With this in mind, and subject to later developments in the Commission’s treatment of this issue, for the purposes of determining the scope of the present draft articles, the reference to foreign criminal jurisdiction should be understood as meaning the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons who enjoy immunity in this context.”

<sup>[footnote]</sup> It must be kept in mind that the Special Rapporteur formulated a draft definition of criminal jurisdiction in her second report in the context of a draft article on definitions (A/CN.4/661, draft article 3. See also paragraphs 36 to 41 of the same report). This draft article has been referred to the Drafting Committee which, after extensive discussion, decided to take it up gradually throughout the quinquennium, and not to take a decision on it now. Nevertheless the concept of criminal jurisdiction has been discussed in both the plenary of the Commission and in the Drafting Committee.”

34. Sir Michael WOOD proposed the deletion of the last sentence in the footnote, as it merely repeated something that was already said in the third sentence of the commentary.

*Paragraph (5) was adopted with that amendment to the footnote.*

Paragraph (6) (continued)\*\*

35. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in response to the amendments suggested by Sir Michael and Mr. Cafisch, she had simplified the wording of paragraph (6) to read as follows:

“(6) Thirdly, the Commission decided to confine the scope of the draft articles to immunity from ‘foreign’ criminal jurisdiction, that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to the immunity from criminal jurisdiction ‘of another State’. Consequently, the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles.

“Nevertheless, the need to consider the special problem presented by so-called mixed or international criminal tribunals has been raised. Similarly, a question has been raised regarding the effect that existing

\* Resumed from the 3194th meeting.

\*\* Resumed from the 3194th meeting.

international obligations imposed on States to cooperate with international criminal tribunals would have on the present draft articles. Although diverse opinions were expressed with regard to both subjects, it is not possible at this stage to identify a definitive answer on either question. In any event, the Commission considers that the exclusion of international criminal tribunals from the scope of the present draft articles must be understood to mean that none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles.”

36. Mr. MURPHY said that he was still puzzled by the final sentence and proposed that it should be deleted or transposed elsewhere.

37. Sir Michael WOOD, supported by Mr. SABOIA and Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), proposed that the sentence should be transposed to follow the third sentence and shortened to read: “This exclusion must be understood to mean that none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles.”

*Paragraph (6), as amended, was adopted.*

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

38. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.820/Add.3.

*Commentary to draft article 3 (Persons enjoying immunity ratione personae) (concluded)*

*Paragraph (2) (concluded)*

39. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the new text she was proposing greatly simplified the original wording of paragraph (2). The new version basically rested on a proposal made by Sir Michael. It would read as follows:

“(2) The Commission considers that there are two reasons for granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs, representational and functional. First, under the rules of international law, these three office holders represent the State in its international relations simply by virtue of their office, directly and with no need for specific powers to be granted by the State.<sup>[footnote 1]</sup> Second, they must be able to discharge their functions unhindered.<sup>[footnote 2]</sup> It is irrelevant whether those officials are nationals of the State in which they hold the office of Head of State, Head of Government or Minister for Foreign Affairs.”

<sup>[footnote 1]</sup> The International Court of Justice has stated that ‘it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions’ (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, at p. 27, para. 46*).

<sup>[footnote 2]</sup> See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002,*

p. 3, at pp. 21–22, paras. 53–54, in which the International Court of Justice particularly emphasizes the second element with respect to the Minister for Foreign Affairs.”

40. Sir Michael WOOD said that the meaning would be clearer if the words “representational and functional”, in the first sentence, were transposed to follow the words “two reasons”.

*Paragraph (2), as amended, was adopted.*

*Paragraph (4) (concluded)*

41. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the amended version of the first sentence would read: “The recognition of immunity *ratione personae* in favour of the Head of Government and the Minister for Foreign Affairs is the result of the fact that, under international law, their international representative functions of the State have been gradually recognized as coming close to those of the Head of State.”

42. The third sentence had been deleted, and the fourth to sixth sentences combined and simplified to read: “The immunity from criminal jurisdiction of the Head of State, Head of Government and Minister for Foreign Affairs has been referred to in the Convention on special missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, and the United Nations Convention on Jurisdictional Immunities of States and Their Property.”

43. The seventh sentence had been deleted. As a result of those changes, the way in which the immunity of the troika was reflected in each of the Conventions was now described in a footnote instead of in the third to seventh sentences.

44. The ninth sentence had been deleted, and the tenth had been reformulated, as requested, in more neutral terms. It now read: “In this connection, there was particular consideration of the individualized treatment given to the Head of State in selecting the special regimes to be covered by the saving clause in article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property while excluding any reference to the Head of Government and Minister for Foreign Affairs.”

45. Sir Michael WOOD said that the tenth sentence should be simplified to read “In this connection, there was noted the specific mention of the Head of State in article 3 of the United Nations Convention on the Jurisdictional Immunities of States and Their Property without any reference to the Head of Government and Minister for Foreign Affairs.” In the first and second sentences, the word “international”, before “representational functions” and “representation”, respectively, should be deleted. In the second sentence, the word “phenomenon” should also be deleted.

46. Mr. NOLTE, supported by Mr. TLADI, said that the phrase “gradually recognized as coming close” in the revised version of the first sentence was rather obscure. He proposed the deletion of the word “gradual” and the replacement of “coming close to” with “approximate to”.

*Paragraph (4), as revised by the Special Rapporteur and amended by Mr. Nolte and Sir Michael Wood, was adopted.*

*The commentary to draft article 3, as a whole, as amended, was adopted.*

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

**CHAPTER IX. Protection of the environment in relation to armed conflicts (A/CN.4/L.824)**

**A. Introduction**

Paragraph 1

47. Mr. FORTEAU said that, in the first sentence, the French version of the title of the topic was incorrect and should be amended to read: “*Protection de l’environnement en rapport avec les conflits armés*”. The same correction should be made in several other paragraphs in the chapter, as well as in its title.

48. The CHAIRPERSON said that the Secretariat would ensure that the correct version of the title of the topic in French was accurately reproduced throughout the report.

*Paragraph 1 was adopted, subject to amendment of the French text.*

**B. Consideration of the topic at the present session**

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

**REPORT OF THE SPECIAL RAPPORTEUR ON THE INFORMAL CONSULTATIONS HELD ON THE TOPIC**

Paragraphs 4 to 15

*Paragraphs 4 to 15 were adopted.*

*Chapter IX of the report of the Commission, as a whole, was adopted, subject to amendment of the French text.*

**CHAPTER VII. Formation and evidence of customary international law (A/CN.4/L.822 and Add.1)**

Document A/CN.4/L.822

**A. Introduction**

Paragraph 1

*Paragraph 1 was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 2

*Paragraph 2 was adopted.*

**1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIRST REPORT**

Paragraph 3

49. Sir Michael WOOD (Special Rapporteur), referring to the last sentence, said that the expression “going forward” was superfluous, and he proposed deleting it.

*Paragraph 3, as amended, was adopted.*

Paragraph 4

50. Sir Michael WOOD (Special Rapporteur) proposed deleting the expression “going forward” in the penultimate sentence.

*Paragraph 4, as amended, was adopted.*

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

51. Mr. FORTEAU suggested that in the first sentence, the adjective “systemic” should be deleted.

52. Mr. VÁZQUEZ-BERMÚDEZ said that, in the first sentence of the Spanish text, the word “*determinación*” should be replaced by “*identificación*”, as the latter was the word that had been agreed for the new title of the topic.

*Paragraph 6, as amended, was adopted.*

Paragraphs 7 to 9

*Paragraphs 7 to 9 were adopted.*

**2. SUMMARY OF THE DEBATE**

Paragraph 10

*Paragraph 10 was adopted.*

Paragraph 11

*Paragraph 11 was adopted with a minor editorial amendment to the English text.*

Paragraph 12

*Paragraph 12 was adopted.*

Paragraph 13

53. Ms. ESCOBAR HERNÁNDEZ said that in the reference to the new title of the topic in the second sentence of the Spanish text, the word “*determinación*” should be replaced with “*identificación*”. The same correction should be made throughout the text.

54. The CHAIRPERSON said that the Secretariat would ensure that the correct version in Spanish of the new title of the topic was accurately reproduced throughout the report.

55. Mr. CANDIOTI asked whether the change to the title of the topic that had been agreed in the debate should be reflected in the title of chapter VII of the Commission’s report.

56. Mr. KORONTZIS (Secretariat) said that, in keeping with past practice, the title of chapter VII would remain the same as that which appeared in the agenda for the Commission’s sixty-fifth session. The new title would be used beginning with the agenda and documents pertaining to the sixty-sixth session.

*Paragraph 13 was adopted, subject to amendment of the Spanish text.*

Paragraph 14

57. Sir Michael WOOD (Special Rapporteur) proposed that, in the first sentence, the phrase “formative and evidentiary elements” should be replaced with “formation and evidence” and that in the third sentence, the words “formative elements” should be replaced with “formation”.

*Paragraph 14, as amended, was adopted.*

Paragraph 15

58. Sir Michael WOOD (Special Rapporteur) said that, in the first sentence, the word “detailed” should be deleted because the Commission was not going to undertake any study, detailed or otherwise.

59. Mr. FORTEAU, referring to the third sentence, said that the word “materially” was ambiguous and should be deleted, since the difference referred to could also be formal in nature.

60. Mr. MURPHY, referring to the fourth sentence, said that it was inappropriate to indicate that a separate topic on *jus cogens* was under consideration in the Working Group on the long-term programme of work, since the Commission’s usual practice was to disclose the Working Group’s deliberations only after it had reached a decision on the inclusion of a particular topic. He therefore proposed deleting the sentence.

61. Sir Michael WOOD (Special Rapporteur) said that the fourth sentence should be retained because it reflected statements made in the plenary as well as in the Working Group. Moreover, there was a connection between how the Commission had decided to handle *jus cogens* under the current topic and the fact that the addition of an item on *jus cogens* was under consideration in the Working Group.

62. Mr. HMOUD said that the fourth sentence should be retained so as to indicate to the Sixth Committee that the inclusion of an item on *jus cogens* had been discussed in the Working Group.

63. Mr. NOLTE said that by retaining the fourth sentence, the Commission was setting a precedent for revealing which topics for potential inclusion in the agenda were under consideration in the Working Group. Such a precedent risked putting the Commission under pressure to justify why it had decided not to include a particular topic.

64. Mr. TLADI recalled that the purpose of the Commission’s report was to accurately reflect what happened in its plenary meetings.

65. Mr. FORTEAU, supported by Mr. CANDIOTI, Mr. PARK and Mr. WISNUMURTI, said that, if the Commission decided to keep the fourth sentence, it should be worded more prudently.

66. Mr. PETRIČ, referring to the final sentence, proposed to delete the words “for the Commission”.

67. Sir Michael WOOD (Special Rapporteur) suggested that, in order to allay members’ concerns about the inclusion of a specific reference to the Working Group’s deliberations, the fourth sentence should be reformulated to read: “It was also noted that a proposal had been made for a possible new topic concerning *jus cogens*.” He endorsed the proposals made by Mr. Forteau and Mr. Petrič with regard to the third and final sentences, respectively.

*With those amendments, paragraph 15 was adopted.*

Paragraph 16

*Paragraph 16 was adopted.*

Paragraph 17

68. Mr. VÁZQUEZ-BERMÚDEZ proposed replacing the words “generate or disprove the existence” with “or generate rules”.

*Paragraph 17, as amended, was adopted.*

Paragraphs 18 to 27

*Paragraphs 18 to 27 were adopted.*

Paragraph 28

69. Sir Michael WOOD (Special Rapporteur) suggested that, in the fourth sentence, the words “and declarations” should be deleted.

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 to 32

*Paragraphs 29 to 32 were adopted.*

Paragraph 33

70. Mr. FORTEAU, referring to the second sentence, proposed deleting the word “integral”, which was confusing and superfluous.

*Paragraph 33, as amended, was adopted.*

Paragraphs 34 to 37

*Paragraphs 34 to 37 were adopted.*

71. The CHAIRPERSON invited the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.822/Add.1.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted with an editorial amendment to the Spanish text.*

*Chapter VII of the report of the Commission, as a whole, as amended, was adopted.*

CHAPTER IV. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties (concluded)\** (A/CN.4/L.819 and Add.1–3)

C. **Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session (concluded)\***

2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (concluded)\*

Document A/CN.4/L.819/Add.2

*Commentary to draft conclusion 4* (Definition of subsequent agreement and subsequent practice) (concluded)\*

Paragraph (3) (concluded)\*

72. Mr. NOLTE (Special Rapporteur) said that, in order to reconcile the views expressed by Sir Michael and Mr. Murphy, he had recast the second sentence of paragraph (3) of the commentary to read: “The term ‘in connection with the conclusion of the treaty’ should be understood as including agreements and instruments which are made in a close temporal and contextual relation with the conclusion of the treaty.”

*Paragraph (3), as amended, was adopted.*

*The commentary to draft conclusion 4, as a whole, as amended, was adopted.*

*Chapter IV of the report of the Commission, as amended, was adopted.*

*The meeting rose at 6.05 p.m.*

## 3197th MEETING

*Friday, 9 August 2013, at 10.05 a.m.*

*Chairperson: Mr. Bernd H. NIEHAUS*

*Present: Mr. Caffisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.*

### **Draft report of the International Law Commission on the work of its sixty-fifth session (concluded)**

CHAPTER VIII. *Provisional application of treaties* (A/CN.4/L.823)

1. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, chapter VIII of the draft report, as contained in document A/CN.4/L.823.

\* Resumed from the 3193rd meeting.

### A. Introduction

Paragraph 1

*Paragraph 1 was adopted.*

### B. Consideration of the topic at the present session

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

#### 1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE FIRST REPORT

Paragraph 4

*Paragraph 4 was adopted subject to minor editorial amendments.*

Paragraphs 5 and 6

*Paragraphs 5 and 6 were adopted.*

Paragraph 7

2. Mr. FORTEAU (Rapporteur) proposed, in the first sentence of the French text, to add the words “*sur ce sujet*” after “*les deux rapporteurs spéciaux*”.

*Paragraph 7, as amended in the French version, was adopted.*

Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted.*

#### 2. SUMMARY OF THE DEBATE

Paragraph 10

*Paragraph 10 was adopted.*

Paragraph 11

3. Mr. NOLTE proposed, at the end of the final sentence, replacing the phrase “to join treaty regimes” with “to begin cooperation in accordance with a treaty”.

*Paragraph 11, as amended, was adopted.*

Paragraph 12

4. Sir Michael WOOD proposed replacing the phrase “the entry into force of” with “participation in”.

5. Mr. FORTEAU (Rapporteur) proposed, at the beginning of the final sentence, to replace the word “This” with “This clarification”.

*Paragraph 12, as amended, was adopted.*

Paragraph 13

*Paragraph 13 was adopted, subject to a minor editorial amendment.*

Paragraph 14

*Paragraph 14 was adopted.*

Paragraph 15

6. Mr. FORTEAU (Rapporteur), supported by Mr. PARK, proposed deleting the adverb “simply”, which appeared to introduce a hierarchical relationship between international customary law and general international law.

7. Sir Michael WOOD and Mr. NOLTE said that they were not sure that such a comparison was relevant in that context and would prefer to delete the phrase “or simply as rules of general international law”.

8. Mr. KITTICHAISAREE proposed, in order to resolve the problem, replacing that phrase with “or otherwise”.

*Mr. Kittichaisaree’s proposal was approved.*

*Paragraph 15, as amended, was adopted, subject to an editorial amendment.*

Paragraph 16

9. Mr. FORTEAU (Rapporteur) proposed adding the phrase “in the context of provisional application” after “the rules on interpretation of treaties”.

10. Sir Michael WOOD proposed to align the text of the paragraph as far as possible with the 1969 Vienna Convention by replacing the words “reservations to treaties regime” with “rules on reservations to treaties”, and by replacing the phrase “the provisional application regime and that on final clauses in article 24, paragraph (4), of the 1969 Vienna Convention” with “the necessary application of certain provisions of a treaty from the time of the adoption of this text (art. 24, para. 4, of the 1969 Vienna Convention)”.

*Paragraph 16, as amended, was adopted.*

Paragraphs 17 to 22

*Paragraphs 17 to 22 were adopted.*

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

**CHAPTER XII. Other decisions and conclusions of the Commission (A/CN.4/L.827 and Add.1)**

11. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, chapter XII of the draft report, as contained in documents A/CN.4/L.827 and Add.1.

Document A/CN.4/L.827

**A. Programme, procedures and working methods of the Commission and its documentation**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

2. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraphs 3 and 4

*Paragraphs 3 and 4 were adopted.*

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 67/97 OF 14 DECEMBER 2012 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 5 to 11

*Paragraphs 5 to 11 were adopted.*

Paragraph 12

12. Mr. FORTEAU (Rapporteur) said that, in the last sentence, the words “and national” should be inserted before “international rule of law”.

*Paragraph 12, as amended, was adopted.*

Paragraph 13

*Paragraph 13 was adopted, subject to a minor editorial amendment.*

Paragraph 14

*Paragraph 14 was adopted.*

4. HONORARIA

Paragraph 15

*Paragraph 15 was adopted.*

5. DOCUMENTATION AND PUBLICATIONS

Paragraphs 16 to 19

*Paragraphs 16 to 19 were adopted.*

Paragraph 20

13. Sir Michael WOOD said that the text of paragraph 20 already appeared in paragraph 16.

*Paragraph 20 was deleted.*

14. Mr. PETER said that, in its report on the work of the sixty-fourth session, the Commission had expressed its gratitude to the Library of the Office of the United Nations at Geneva<sup>194</sup> and that the same should be done in the present document.

*That proposal was adopted.*

6. TRUST FUND ON THE BACKLOG RELATING TO THE YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

Paragraph 21

*Paragraph 21 was adopted.*

7. YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

Paragraph 22

*Paragraph 22 was adopted.*

8. ASSISTANCE OF THE CODIFICATION DIVISION

Paragraph 23

*Paragraph 23 was adopted.*

9. WEBSITES

Paragraph 24

*Paragraph 24 was adopted.*

<sup>194</sup> Yearbook ... 2012, vol. II (Part Two), para. 286.

**B. Commemoration of the 50th anniversary of the International Law Seminar**

Paragraphs 25 to 27

*Paragraphs 25 to 27 were adopted.***C. Date and place of the sixty-sixth session of the Commission**

Paragraph 28

*Paragraph 28 was adopted.*

Document A/CN.4/L.827/Add.1

**A. Programme, procedures and working methods of the Commission and its documentation (concluded)****1. INCLUSION OF NEW TOPICS ON THE PROGRAMME OF WORK OF THE COMMISSION**

Paragraph 1

15. Mr. FORTEAU (Rapporteur) said that the title in the French text should read “*Protection de l’environnement en rapport avec les conflits armés*”.

*Paragraph 1 was adopted with that amendment to the French text.***D. Cooperation with other bodies**

Paragraph 2

*Paragraph 2 was adopted.*

Paragraph 3

16. Sir Michael WOOD said that, in the English text, the following sentence should be added to the end of the paragraph: “An exchange of views followed.”

*Paragraph 3 was adopted with that amendment to the English text.*

Paragraphs 4 and 5

*Paragraphs 4 and 5 were adopted.*

Paragraph 6

17. Mr. PETER said that in English, the title of the presiding officer of the African Union Commission on International Law was “Chairperson” and not “Chairman”, and that the exact spelling of his name should be checked.

*Paragraph 6 was adopted with that amendment to the English text.*

Paragraph 7

18. Mr. VALENCIA-OSPINA said that it was not necessary to indicate twice that an exchange of views had taken place and proposed deleting the final sentence.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted.*

Paragraph 10

19. Mr. PETER said that some facts concerning Mr. Paulo Borba Casella, such as his nationality or functions, should be added.

*That proposal was adopted.*

20. Mr. KITTICHAISAREE proposed to add that the Gilberto Amado Memorial Lecture had been followed by an “exchange of views”.

21. Mr. NOLTE said that the phrase “exchange of views” was perhaps a bit too formal and proposed to opt instead for the word “discussion”.

*Mr. Nolte’s proposal was adopted.**Paragraph 10, as amended, was adopted.*

Paragraphs 11 to 15

*Paragraphs 11 to 15 were adopted.*

Paragraph 16

22. Mr. FORTEAU (Rapporteur), speaking on behalf of Ms. Jacobsson (Special Rapporteur), proposed, in the first line, adding the word “brainstorming” before “session”.

*Paragraph 16, as amended, was adopted.*

Paragraphs 17 to 24

*Paragraphs 17 to 24 were adopted.**Chapter XII of the draft report of the Commission, as a whole, as amended, was adopted.***CHAPTER II. Summary of the work of the Commission at its sixty-fifth session (A/CN.4/L.817)**

23. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, chapter II of the draft report, as contained in document A/CN.4/L.817.

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

Paragraphs 3 and 4

24. Mr. FORTEAU (Rapporteur) said that, in the third line of paragraph 3 and the last line of paragraph 4, in the French text, the term “*réduction*” should be replaced with “*prévention*”.

*Paragraphs 3 and 4 were adopted with that amendment to the French text.*

Paragraphs 5 and 6

*Paragraphs 5 and 6 were adopted.*

Paragraph 7

25. Mr. FORTEAU (Rapporteur) said that the title of the topic in French was the following: “*Protection de l’environnement en rapport avec les conflits armés*”.

*Paragraph 7 was adopted with that amendment to the French text.*

Paragraph 8

26. Mr. KITTICHAISAREE proposed reformulating the second sentence so that it would read: “The Commission took note of the report of the Working Group, which is annexed to the Commission’s report (chap. X and annex ...).”

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

*Chapter II of the draft report of the Commission, 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.818)**

27. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, chapter III of the draft report, as contained in document A/CN.4/L.818.

**A. Immunity of State officials from foreign criminal jurisdiction**

Paragraph 1

*Paragraph 1 was adopted, subject to editorial amendments to the French text.*

**B. Formation and evidence of customary international law**

Paragraph 2

*Paragraph 2 was adopted.*

**C. Provisional application of treaties**

Paragraph 3

*Paragraph 3 was adopted.*

**D. Protection of the environment in relation to armed conflicts**

Paragraph 4

28. Sir Michael WOOD, speaking on behalf of Ms. Jacobsson (Special Rapporteur), proposed, in the introductory sentence, inserting the words “in relation” between the words “applicable” and “to”.

*Paragraph 4, as amended, was adopted.*

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

*The draft report of the International Law Commission on the work of its sixty-fifth session, as a whole, as amended, was adopted.*

**Other business**

[Agenda item 14]

29. Mr. MURASE said that, in accordance with a proposal formulated and approved in the course of informal consultations, and under the guidance of the Chairperson

of the Commission, a group of members including himself, Mr. Murphy, Mr. Nolte, Mr. Tladi, Mr. Vázquez-Bermúdez and Sir Michael Wood, had considered how to approach the Commission’s work on the topic “Protection of the atmosphere”. The outcome of those consultations had been a proposal in which he had expressed his conception of the scope of the topic.

30. The CHAIRPERSON invited Mr. Murase to read aloud his proposal concerning the scope of the new topic “Protection of the atmosphere”.

31. Mr. MURASE said that his proposal took the form of five-part understanding. First, work on the topic would proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. The topic would not deal with, but was also without prejudice to, questions such as liability of States and their nationals, the “polluter pays” principle, the precautionary principle, common but differentiated responsibilities and the transfer of funds and technology to developing countries, including intellectual property rights. Second, the topic would also not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which were the subject of negotiations among States. The project would not seek to fill gaps in the treaty regimes. Third, questions relating to outer space, including its delimitation, were not part of the topic. Fourth, the outcome of the work on the topic would be draft guidelines that did not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. Fifth, the Special Rapporteur’s reports would be based on that understanding.

32. The CHAIRPERSON said he took it that the Commission wished to include the topic “Protection of the atmosphere” in its programme of work on the basis of the proposal that Mr. Murase just read aloud and to designate Mr. Murase as the Special Rapporteur for that subject.

*It was so decided.*

**Chairperson’s concluding remarks**

33. The CHAIRPERSON said that it had been a pleasure to chair the sixty-fifth session of the Commission and thanked all the members for their contributions. He also thanked the Secretariat for its steadfast and efficient assistance and the conference services staff members, including the interpreters and précis-writers, for their cooperation and assistance.

**Closure of the session**

34. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-fifth session of the International Law Commission closed.

*The meeting rose at 11.30 a.m.*

