

Document:-
A/CN.4/2911

Summary record of the 2911th meeting

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

Extract from the Yearbook of the International Law Commission:-
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2911th MEETING

Wednesday, 9 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

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

CHAPTER X. *Effects of armed conflicts on treaties (concluded)* (A/CN.4/L.698)

B. Consideration of the topic at the present session (*concluded*)

1. GENERAL REMARKS ON THE TOPIC (*concluded*)

Paragraph 8

Paragraph 8 was adopted.

2. ARTICLE 1. SCOPE

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

3. ARTICLE 2. USE OF TERMS

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

1. Mr. BROWNLIE (Special Rapporteur) said that the awkward wording of the final phrase in the penultimate sentence would be improved if it were reformulated to read: “such as the regime based upon the Oslo Accords”.

Paragraph 14, as amended, was adopted.

Paragraph 15

2. Mr. GAJA said that the paragraph dealt with two entirely different matters: the definition of armed conflict and the way that the report should address the issue of internal conflicts. It would therefore be preferable to divide the paragraph into two, with the break coming between the second and third sentences.

3. Mr. MOMTAZ said that, since the reference, in the second sentence, to “conflicts not involving States”, applied to rebel groups that were fighting each other, the final phrase of the second sentence after the reference to the definition in the *Tadić* case would be more appropriately reworded to read: “because it included internal conflicts in which Government forces were not involved”.

Paragraph 15, as amended, and new paragraph 15 bis were adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

4. Mr. ECONOMIDES said that the word “reiterated” did not adequately reflect the Commission’s discussion on a crucial aspect of the topic. He proposed that the following sentence should be inserted at the end of the paragraph: “This was the view of the majority of the members of the Commission.”

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 20

Paragraphs 18 to 20 were adopted.

4. ARTICLE 3. *IPSO FACTO* TERMINATION OR SUSPENSION

Paragraph 21

Paragraph 21 was adopted.

Paragraph 22

5. Ms. ESCARAMEIA said that the last sentence was misleading; more than mere doubts had been expressed about the proposed drafting change. She therefore proposed that the final sentence should be replaced by the following: “Others were against the proposed drafting change and preferred to keep the expression ‘*ipso facto*’ to indicate that the outbreak of an armed conflict did not have the automatic consequence of terminating or suspending a treaty.”

Paragraph 22, as amended, was adopted.

5. ARTICLE 4. THE INDICIA OF SUSCEPTIBILITY TO TERMINATION OR SUSPENSION OF TREATIES IN CASE OF AN ARMED CONFLICT

Paragraph 23

6. Mr. PELLET said he found it strange that the Special Rapporteur should openly state in the report that he shared the scepticism expressed concerning a central aspect of the topic, thereby destroying the rationale for his role.

7. Mr. BROWNLIE (Special Rapporteur) said that the paragraph accurately reflected the fact that there had been strong scepticism expressed at the meeting, which he shared. He saw no point in seeking other language.

Paragraph 23 was adopted.

Paragraph 24

Paragraph 24 was adopted.

Paragraph 25

8. Mr. PELLET suggested that the following phrase should be added at the end of the first sentence: “owing to

the strengthening of the principle that recourse to armed force is prohibited in international relations”.

9. Mr. BROWNLIE (Special Rapporteur) said that such an amendment would misrepresent the course of the debate. Mr. Koskenniemi and others had made reasonable points about the difficulty of proving intention, and Mr. Pellet had also expressed his views, but no connection had been made between that and the prohibition of the use of force.

10. Mr. PELLET said that Mr. Brownlie was incorrect. He had made such a connection, and so had Mr. Economides, as his notes of the debate showed.

11. Mr. MELESCANU said that, in fact, several speakers had stressed that they could not accept the criterion of intention, given that, once the Charter of the United Nations had been adopted, parties could not conclude a treaty with the intention of resorting to force leading to armed conflict. There was a link between intention and the regime concerning the use of force, and that link had been made during the Commission’s debate. Secondly, the penultimate sentence should be strengthened, in his view. He therefore suggested that the words “Reference was also made to” should be deleted and the following phrase added at the end of the sentence: “were considered by many speakers to be essential to the application and operation of the article”.

12. Ms. ESCARAMEIA suggested the following form of words for that sentence: “Several members also referred to the criteria of the object and purpose” and so forth. That would indicate that more than one speaker had preferred those criteria to the criterion of intention.

13. Mr. ECONOMIDES said that the reason for the loss of significance of the criterion of intention after the Second World War had been the introduction of the Charter of the United Nations, which had made war illegal.

14. Ms. ESCARAMEIA concurred but said that she took the point that not all members held that view. She suggested that the following sentence could be inserted, to follow the first sentence: “Some thought this was due to the principle of the prohibition of the use of force.”

15. Mr. BROWNLIE (Special Rapporteur) said that he would be happy to accept that amendment. What he found unacceptable was the suggestion that the debate as a whole had linked intention with the prohibition of the use of force, whereas most of the debate had concerned the technical viability of the criterion of intention, in particular, the difficulties of proving intention. Admittedly, some speakers had linked the two, but that was because they thought that the whole topic concerned the use of force, whereas, in fact, it concerned the law of treaties.

16. The CHAIRPERSON, noting that many members appeared to share the view that the issue of the criterion of intention was linked to the prohibition against the use of force, suggested that, with the Special Rapporteur’s concurrence, the amendment proposed by Mr. Pellet to the first sentence and the amendment proposed by Ms. Escarameia to the penultimate sentence could be adopted.

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

6. ARTICLE 5. EXPRESS PROVISIONS ON THE OPERATION OF TREATIES

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

7. ARTICLE 6. TREATIES RELATING TO THE OCCASION FOR RESORT TO ARMED CONFLICT

Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

8. ARTICLE 7. THE OPERATION OF TREATIES ON THE BASIS OF NECESSARY IMPLICATION FROM THEIR OBJECT AND PURPOSE

Paragraphs 31 to 33

Paragraphs 31 to 33 were adopted.

Section B, as amended, was adopted.

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

CHAPTER XII. Fragmentation of international law: Difficulties arising from the diversification and expansion of international law (A/CN.4/L.700)

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

17. Mr. PELLET said that it would only be fair to add a footnote providing the names of the authors of the five specific studies mentioned in paragraph 2.

18. Ms. ESCARAMEIA said that the Study Group had discussed the paper on the “Disconnection clause” in the same way as the other five studies. She therefore suggested that it should not be mentioned separately in the final sentence of the paragraph, but at the end of the previous sentence, which would then read “... as conflict rules, and (f) an informal paper on the ‘Disconnection clause’”.

19. After a drafting discussion between the CHAIRPERSON, Ms. XUE and Ms. ESCARAMEIA, Mr. GAJA drew attention to the fact that paragraph 2 followed the model of paragraph 442 of the report of the International Law Commission on its fifty-seventh session,³⁸⁷ where the informal paper on the “Disconnection clause” had formed the subject of a separate sentence at the end of the paragraph, and no authors had been mentioned.

Paragraph 2 was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Section A was adopted.

³⁸⁷ Yearbook ... 2005, vol. II (Part Two), document A/60/10.

B. Consideration of the topic at the present session

Paragraph 5

20. Mr. GAJA said that the last sentence implied that the Study Group's conclusions were obscure. He therefore proposed that it should read "... these conclusions should be read against the background of the analytical study ...", which conveyed the idea that the analytical study, while important, was not the key to understanding the perfectly intelligible report produced by the Study Group.

21. Mr. PELLET suggested that it would be simpler and more rational to delete the phrase "could only be fully understood".

22. Mr. GAJA noted that the English text would then read "these conclusions should be read in connection with the analytical study".

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

23. Mr. PELLET said that it might be advisable for paragraph 7 to state that the Commission had requested that the analytical study finalized by the Chairperson of the Study Group should be posted on the Commission's website and published in the Part One of volume II of the *Yearbook*.

24. The CHAIRPERSON said that wording to that effect would give the erroneous impression that it was the first time that such a procedure was being followed.

25. Mr. PELLET said that, in that case, after the parenthesis "(sect. D.2, below)" the phrase should be added "and requested that, in accordance with practice, the analytical study of the Chairperson of the Group should be posted on the Commission's website and published in Part One of volume II of the Commission's *Yearbook*".

26. Mr. MIKULKA (Secretary to the Commission) urged the Commission to be cautious, because that wording might be misinterpreted to mean that, in the absence of an explicit request and express authorization from the Commission, the Secretariat was not entitled to publish studies exceeding a certain number of pages in the *Yearbook*. The study would be published in the *Yearbook* as a matter of course.

27. Mr. CANDIOTI said that readers of the report would wish to know where they could find the study, which was of great importance. He was therefore also in favour of adding a footnote saying that it would be published in due course in the *Yearbook* and posted on the Commission's website.

28. In response to a suggestion from Mr. GAJA, Mr. MIKULKA (Secretary to the Commission) said that the analytical study would certainly be distributed to members of the Sixth Committee and participants in its meetings.

29. Mr. PELLET said that, in that case, it would be useful to state, in a footnote, that the study would be circulated to the members of the Sixth Committee. Moreover, since it was rather cavalier to merely take note of the well-crafted report of the Study Group, he maintained his above-mentioned proposal, in preference to that of Mr. Candiotti, in order to emphasize the fact that the Commission wished to publicize the report.

30. Mr. GAJA said that it might help the Secretariat if the Commission's report contained a recommendation that the analytical study should be distributed to members of the Sixth Committee. Furthermore it would be a means of giving some formal recognition to Mr. Koskenniemi's contribution.

31. Mr. BROWNLIE said that he strongly supported Mr. Pellet's proposal, because the subject of fragmentation generated enormous interest in universities and elsewhere. It would therefore enhance the Commission's reputation if the report were to be made easily accessible.

32. Mr. ECONOMIDES asked whether the Commission's practice would permit a reference in the report to a proposal submitted by a member which had, however, been rejected. He had presented a written and an oral proposal that the Commission should consider on "positive" and "negative" fragmentation, a suggestion which had not received the support of either the Study Group or the Commission meeting in plenary session.

33. Mr. PELLET proposed the wording "A member's proposal that a distinction should be drawn between 'positive' and 'negative' fragmentation was not endorsed by the Commission."

Paragraph 7, as amended, was adopted.

Section B, as amended, was adopted.

34. The CHAIRPERSON announced that Chapter XII of the draft report of the International Law Commission on the work of its fifty-eighth session would be supplemented with a section C containing a tribute to the Study Group and its Chairperson and a section D containing the material in section B (Background) and Section C (Conclusions of the work of the Study Group) from document A/CN.4/L.702.

35. He took it that the Commission wished to include the following text in Chapter XII of the report on the work of its fifty-eighth session:

"At its 2911th meeting, on 9 August 2006, the Commission adopted the following resolution by acclamation:

'The International Law Commission,

'Having taken note of the report and conclusions of the Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law,

'Expresses its deep appreciation and warm congratulations to the Study Group and its Chairman, Mr. Martti Koskenniemi, for the outstanding contribution they have made to the preparation of the report on the fragmentation of international law and for the results they have achieved in drawing up conclusions and the accompanying study on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, which were finalized by the Chairman''.

It was so decided.

New Sections C and D were adopted.

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

CHAPTER VIII. Reservations to treaties (A/CN.4/L.696 and Corr.1 and Add.1 and Corr.1 and Add.2-3)

36. The CHAIRPERSON invited the Commission to begin its consideration of chapter VIII of the report and drew attention in that connection to the portions of the chapter contained in documents A/CN.4/L.696 and Corr.1.

A. Introduction (A/CN.4/L.696)

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.696 and Corr.1)

Paragraph 10

Paragraph 10, as corrected by document A/CN.4/L.696/Corr.1, was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted, subject to their completion by the Secretariat.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

Paragraph 15 was adopted, subject to its completion by the Secretariat.

Paragraph 16

Paragraph 16 was adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT GUIDELINES

Paragraph 17

Paragraph 17 was adopted.

37. Mr. KATEKA said that he wished to pay tribute to the Special Rapporteur's wisdom in reproducing all the guidelines which had been provisionally adopted. That practice was most helpful to the reader.

The portion of chapter VIII contained in document A/CN.4/L.696 and Corr.1, as a whole, as amended, was adopted, subject to the addition of the numbers and dates of the meetings in paragraphs 11, 12 and 15.

38. The CHAIRPERSON drew attention to the portion of chapter VIII contained in document A/CN.4/L.696/Add.1 and Corr.1.

B. Consideration of the topic at the present session (A/CN.4/L.696/ Add.1 and Corr.1)

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE SECOND PART OF HIS TENTH REPORT

Paragraph 18

39. Mr. GAJA said that the phrase "had not been able to be" should be replaced by "could not be".

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19, as corrected by document A/CN.4/L.696/Add.1/Corr.1 in Arabic, Chinese, English, Spanish and Russian, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

Paragraph 23

40. Mr. GAJA said that the word "reinforcing" should be replaced by "supportive".

Paragraph 23, as amended, was adopted.

Paragraph 24

41. Mr. GAJA said that the word "non-validity" should be replaced by "invalidity".

Paragraph 24, as amended, was adopted.

Paragraph 25

42. Mr. GAJA said that the words "one school of legal writers" should be replaced by the words "certain authors".

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 28

Paragraphs 26 to 28 were adopted.

2. SUMMARY OF THE DEBATE

Paragraph 29

43. Mr. GAJA said that in the second sentence, the phrase "had to do with the aim" should be replaced by "consisted in the objective" and the word "with" in the last line should be replaced by "in".

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

44. Mr. GAJA said that the word “reworked” should be replaced by “revised”.

Paragraph 31, as amended, was adopted.

Paragraph 32

Paragraph 32 was adopted.

Paragraph 33

45. Ms. ESCARAMEIA said that at the end of the final sentence, the words “and was an essential element of interpretation according to article 31 of the Vienna Convention on the Law of Treaties” should be inserted.

46. Mr. PELLET proposed an editorial correction to the French text.

Paragraph 33, as amended, was adopted.

Paragraphs 34 to 39

Paragraphs 34 to 39 were adopted.

Paragraph 40

47. Ms. ESCARAMEIA said the final sentence was inaccurate and should be amended by the deletion of the words “included those” and the addition, at the end of the sentence, of the phrase “could rule on the legality of reservations formulated by States even if such a power was not expressly foreseen in the treaty”.

48. Mr. PELLET proposed an editorial correction to the French text.

Paragraph 40, as amended, was adopted.

Paragraph 41

49. Ms. ESCARAMEIA proposed the addition, at the end of the sentence, of a new sentence to read: “Others held the contrary view.”

Paragraph 41, as amended, was adopted.

Paragraph 42

50. Ms. ESCARAMEIA proposed an amendment following from the one to the preceding paragraph: in the first sentence, the phrase “Following the same line of thought” should be replaced by “Some members thought that”.

51. Mr. GAJA said that in the second sentence, the word “raised” should be replaced by “made”.

52. Mr. PELLET said that the French text of the final sentence should be aligned with the English. The words “*au fond*” should be replaced by “*au cœur*” and the words “*autour de*” by “*relative à*”.

Paragraph 42, as amended, was adopted.

Paragraphs 43 to 44

Paragraphs 43 to 44 were adopted.

Paragraph 45

53. Mr. GAJA said that the phrase “have the effect” should be replaced by “entail the risk” and the words “in order” inserted between “use” and “to criticize”.

54. Mr. PELLET said that the French text should be corrected accordingly through the replacement of the word “*comporter*” by “*entraîner*” and of the words “*de les utiliser*” by “*qu'ils soient utilisés*”.

Paragraph 45, as amended, was adopted.

Paragraph 46

55. Mr. PELLET proposed that the words “such as what would happen if” be replaced by “in the event that” and that the words “or its validity” be added after “assessment of the reservation”.

Paragraph 46, as amended, was adopted.

Paragraph 47

56. Mr. PELLET proposed that the word “recalled” be replaced by “said”.

Paragraph 47, as amended, was adopted.

Paragraph 48

57. Mr. ECONOMIDES said that in the French text of the second sentence the word “*constitution*” should be corrected to “*proposition*”. In that same sentence the words “did not seem to be compatible with the law of international responsibility and” should be inserted after the word “assertion”.

58. Ms. XUE (Rapporteur), supported by Mr. PELLET, made a proposal to differentiate the second sentence, which outlined one member’s view, from the first, which stated a view held by a number of members. The words “such an assertion” should be preceded by “It was said that”.

Paragraph 48, as amended, was adopted.

Paragraphs 49 to 50

Paragraphs 49 to 50 were adopted.

Paragraph 51

59. Mr. GAJA said that the word “arbiter” should be replaced by “arbitrator”.

Paragraph 51, as amended, was adopted.

Paragraph 52

60. Mr. PELLET proposed an editorial correction to the French text.

Paragraph 52 was adopted with that correction.

Paragraph 53

61. Mr. GAJA proposed that in the first sentence, the words “owing to the normative gap in the Vienna Conventions there was no indication whether” be replaced by “there was no indication in the Vienna Conventions that”.

Paragraph 53, as amended, was adopted.

The portion of chapter VIII contained in document A/CN.4/L.696/Add.1, as amended, was adopted.

62. The CHAIRPERSON drew attention to the portion of chapter VIII contained in document A/CN.4/L.696/Add.2.

B. Consideration of the topic at the present session (continued)

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS (A/CN.4/L.696/Add.2)

Paragraphs 54 to 57

Paragraphs 54 to 57 were adopted.

Paragraph 58

63. Mr. GAJA said that the word “start” should be replaced by “beginning”, which suggested a somewhat broader period of time in a treaty's life.

Paragraph 58, as amended, was adopted.

Paragraphs 59 to 68

Paragraphs 59 to 68 were adopted.

The portion of chapter VIII contained in document A/CN.4/L.696/Add.2, as amended, was adopted.

CHAPTER VII. Responsibility of international organizations (concluded) (A/CN.4/L.695 and Corr.1 and Add.1 and Corr.1 and Add.2)

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (concluded) (A/CN.4/L.695/Add.1 and Corr.1 and Add.2)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-EIGHTH SESSION (concluded)

Commentary to article 30 (Effect of this chapter) (concluded)

New paragraph (1)

64. Mr. GAJA (Special Rapporteur) proposed the insertion of a new paragraph (1), which would read:

“The present draft article finds a parallel in draft article 16, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is ‘without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization’.”

The subsequent paragraphs would then be renumbered accordingly.

New paragraph (1) was adopted.

65. The CHAIRPERSON recalled that original paragraph (1), which was to become paragraph (2), had been adopted at the previous meeting.

Original paragraph (2)

66. Mr. GAJA read out a proposal drafted with the assistance of Mr. Economides. In the first sentence, “a similar” would be replaced by “an analogous”. The third sentence would be replaced by: “On the contrary, a ‘without prejudice’ provision analogous to that of article 19 on Responsibility of States for internationally wrongful acts³⁸⁸ would have some use if it concerned international organizations. The omission in the chapter of a provision analogous to article 19 could have raised doubts”. The rest of the paragraph would remain unchanged.

Original paragraph (2), as amended, was adopted.

Original paragraph (3)

67. Mr. PELLET said that to align the French text with the English, references to “*article*” be replaced by “*projet d'article*”.

Original paragraph (3) was adopted with that amendment to the French text.

The commentary to article 30, as amended, was adopted.

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

CHAPTER I. Introduction (A/CN.4/L.689)

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

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

CHAPTER II. Summary of the work of the Commission at its fifty-eighth session (A/CN.4/L.690)

Paragraph 1

68. Mr. PELLET pointed out that the paragraph needed to be completed before it could be adopted. He wished to have it placed on record that he was in disagreement with the Commission's decision to recommend the elaboration of a convention on the basis of the draft articles on diplomatic protection. Like Mr. Candioti, he did not think that that decision was logical; the topic should have followed the fate of the draft articles on responsibility of States.

Paragraph 1 was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

³⁸⁸ Yearbook...2001, vol. II (Part Two) and corrigendum, p. 27.

Paragraph 4

69. Mr. GAJA noted that the Commission had adopted 14 draft articles dealing with circumstances precluding wrongfulness and with the responsibility of a State in connection with the act of an international organization, and not 13 as indicated.

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

70. Mr. PELLET said that the square brackets in the second sentence should be removed, and the text should read “The Commission adopted 10 guiding principles ...”.

71. Mr. RODRÍGUEZ CEDEÑO said that, in fact, the text should read “The Commission adopted 10 guiding principles and the commentary thereto”.

72. Mr. PELLET pointed out that it would be premature to assume that the commentary would be adopted the next day.

The adoption of paragraph 6 was postponed.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

73. Mr. GALICKI (Special Rapporteur) pointed out that “*judicare*” had been spelled throughout the consideration of the topic with a “j”, and not with an “i”.

Paragraph 8 was adopted with that editorial correction.

Paragraph 9

74. Ms. ESCARAMEIA said that in her view, the text in square brackets should be retained. The Commission should also take note of the large analytical study on fragmentation of international law, because otherwise it might seem that it did not exist.

75. Mr. PELLET said that he sympathized with the substance of Ms. Escarameia’s suggestion. However, the Commission had just adopted the material in document A/CN.4/L.700, paragraph 7 of which stated that the Commission had decided merely to take note of the conclusions of the Study Group; it would not be logical for it to go any further than that in the summary.

76. Ms. ESCARAMEIA said that the text could at least say that the Commission had had the two documents before it so as to acknowledge that the large analytical document existed, and that it had considered and taken note of the report. It should say nothing further on the large analytical document, because it had not considered it.

77. Mr. MANSFIELD suggested reversing the order of two parts of the paragraph, which would then read: “... the Study Group thus completed its substantive work (2003–2006) on the basis of a final report prepared by its Chairman (A/CN.4/L.682 and Corr.1 and Add.1),

and the Commission took note of that report and of the report of the Study Group containing a set of 42 conclusions (Chap. XII)”.

78. Mr. ECONOMIDES said that the words “*en s’appuyant*” in the French version were meaningless and should be corrected. Although the Chairperson had presented the document, the Study Group had adopted it, and it had considered and adopted all the recommendations. Thus, it was the Study Group’s work, which had been carried out at the Chairperson’s suggestion. He agreed that reference should be made to Mr. Koskenniemi’s large analytical study; unfortunately, it was still not available in French. He asked the Secretariat whether the French version of the document would be ready before the end of the session.

79. Mr. CANDIOTI said that paragraph 9 should be recast so as to present matters in their chronological order. First, it should refer to the Chairperson’s large analytical report. He did not see why it was termed “final”—it would be preferable to speak of “the comprehensive analytical study prepared by the Chairman”. That would be followed by the report of the Study Group and then the conclusions, of which the Commission had merely taken note.

80. Mr. PELLET agreed with Mr. Mansfield and Mr. Candiotti that the paragraph should follow the chronological order of events. Although it was very regrettable that the large analytical study had not yet been translated, the Study Group had after all worked on the basis of the original. In any case, the Secretariat had indicated that the translation into other languages would be ready very shortly. The text should also link the work of the Planning Group with the analytical study and not speak of the analytical study in the context of the Commission, which had not considered it. The last sentence should read that the Commission, and not the Study Group, had thus completed its substantive work on the topic.

81. The CHAIRPERSON suggested that the paragraph could read “... the Commission considered and took note of the report of the Study Group containing a set of 42 conclusions established on the basis of the analytical study prepared by the Chairman of the Study Group”.

82. Mr. MANSFIELD suggested returning to the question later with a new draft. The analytical study had in effect been prepared by the Chairperson, but he had taken account of the work of others in the Study Group.

83. Mr. PELLET agreed and stressed that the new paragraph should draw closely on the formulation in paragraphs 5 and 7 of document A/CN.4/L.700.

The adoption of paragraph 9 was postponed.

Paragraph 10

The adoption of paragraph 10 was postponed.

Paragraph 11

84. Mr. PELLET said that it would be only reasonable to place the ICJ at the top of the list of organizations with which the Commission had continued traditional exchanges of information.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

Paragraph 13 was adopted, subject to the insertion of the relevant dates and section.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.691)

85. Mr. PELLET pointed out that some parts of A/CN.4/L.691 had been prepared in French and that the document should therefore state that the original languages were both English and French.

86. The CHAIRPERSON said that the Secretariat would make the necessary correction.

A. Shared natural resources

Section A was adopted.

B. Responsibility of international organizations

87. Mr. PELLET said that, in the second paragraph, subparagraph (a), of the French version, the words “*la partie lésée*” should be amended to read “*la personne lésée*”.

88. Mr. CANDIOTI, also referring to subparagraph (a), said that compensation was only one form of reparation; it would be preferable to use a more general expression. He therefore proposed that the phrase “have an obligation to provide compensation” be replaced by “have an obligation to provide reparation”.

89. Mr. PELLET said that he disagreed: the question arose only in the case of compensation; it did not if *restitutio in integrum* was at issue, and it certainly did not for satisfaction.

90. Mr. GAJA (Special Rapporteur) said that the proposal by Mr. Pellet to replace “*la partie lésée*” by “*la personne lésée*” concerned the French version only.

91. As to the proposal by Mr. Candiotti, he felt that the question should focus on compensation, which was the most realistic eventuality. It was true that an international organization might not necessarily provide compensation, but the issue was whether member States of an international organization that were not responsible had an obligation to provide funds or to pay the injured party directly. If the idea of reparation were introduced, it would again raise the question of subsidiary responsibility, which the Commission had already dealt with in draft article 29.

92. Mr. RODRÍGUEZ CEDEÑO said that although Mr. Candiotti’s comment on reparation was well taken, he also appreciated Mr. Gaja’s explanation. In his view, the Spanish version, which used the word “*reparación*”, should be brought into line with the word used in the French version (“*indemniser*”).

Section B was adopted with the proposed amendments to the French and Spanish versions.

C. Reservations to treaties

Section C was adopted.

D. The obligation to extradite or prosecute (“*aut dedere aut judicare*”)

93. Mr. PELLET, referring to subparagraphs (c) and (d) in the first paragraph, said that it was confusing for States to be asked for information on practice concerning both universal jurisdiction and the obligation *aut dedere aut judicare*. He was in favour of deleting the reference to “the principle of universal jurisdiction”, because the Commission would be committing itself to an approach to the subject that had been contested during the debate and which might awaken useless and dangerous expectations.

94. Mr. GALICKI (Special Rapporteur) said that, as Mr. Pellet had no doubt noticed, he had eliminated any reference to universal jurisdiction from subparagraphs (a) and (b). His intention in subparagraphs (c) and (d) had been to provoke States to respond, but if it was felt that such provocation was not necessary, he was prepared to endorse Mr. Pellet’s proposal to eliminate the reference to universal jurisdiction.

95. Mr. MOMTAZ said that more than 100 States had made provision for universal jurisdiction in their legislation, but only a few had actually implemented it. It would be useful to know the reason for that hesitation.

96. Mr. GAJA said that universal jurisdiction was not yet a part of the topic and perhaps never would be. It would be confusing to mention it, because it would convey the idea that the topic had been broadened, which was an option, but one which neither the Special Rapporteur nor the Commission had yet taken. It would be preferable to focus on the obligation *aut dedere aut judicare* as suggested by Mr. Pellet.

97. Mr. CANDIOTI was in agreement with Mr. Gaja and Mr. Pellet. He wondered, however, whether the subject of subparagraph (d) was not already included in subparagraph (b).

98. Mr. GALICKI (Special Rapporteur) said that Mr. Candiotti was correct to some extent. However, he was particularly interested in obtaining a direct response to the question in subparagraph (d), because if the Commission was to limit the obligation, on the basis of practice, to certain types of crimes and offences, it would need to know which crimes and offences were acceptable to the individual States. On the other hand, it would also be useful to obtain the broader information requested in subparagraph (b) on all domestic legal regulations concerning not only crimes and offences, but also criminal procedures relating to the obligation to extradite or prosecute. He had separated the two questions because States, in replying to the request for broader information in subparagraph (b), might fail to provide the specific information requested in subparagraph (d).

Section D, as amended, was adopted.

E. Other decisions and conclusions of the Commission

Section E was adopted.

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

The meeting rose at 1.05 p.m.

2912th MEETING

Thursday, 10 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Commissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Koskenniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

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

CHAPTER VIII. *Reservations to treaties (continued)* (A/CN.4/L.696 and Corr.1 and Add.1 and Corr.1 and Add.2-3)

1. The CHAIRPERSON invited the members of the Commission to continue consideration of document A/CN.4/L.696/Add.3.

C. **Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission**

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-EIGHTH SESSION (A/CN.4/L.696/Add.3)

3. VALIDITY OF RESERVATIONS AND INTERPRETATIVE DECLARATIONS

Commentary

Paragraph (1)

2. Mr. BROWNLIE said that the word “of” should be inserted in the second line of the English version after “procedure”.

Paragraph (1), as amended in the English text, was adopted.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were adopted.

Commentary to draft guideline 3.1 (Permissible reservations)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

3. Ms. ESCARAMEIA said she was very surprised that the first sentence, which had already appeared in the Special Rapporteur’s report and had been heavily criticized during the debate, should reappear in the

commentary and suggested that the second part of the sentence should be amended to read: “even though the Convention proceeds from a presumption in favour of the possibility of formulating reservations”.

4. Mr. PELLET (Special Rapporteur) said that he could go along with the deletion of the word “undoubtedly”, but not with an amendment to the end of the sentence. He suggested that the following new sentence should be added between the first and second sentences: “Some members questioned whether such a presumption existed.”

Paragraph (5), as amended by the Special Rapporteur, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

5. Ms. ESCARAMEIA suggested that the words in parentheses, i.e. “and, by extension, the presumption of their validity”, should be deleted.

Paragraph (8), as amended, was adopted.

Paragraph (9)

6. Mr. GAJA said it was odd to say that a convention “has not been greatly inconvenienced” and suggested that the last sentence should end after the words “Vienna Convention”.

7. Mr. PELLET (Special Rapporteur) proposed that the words “which has not been greatly inconvenienced by it” should be replaced by “which has allowed the drawback to persist”.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to draft guideline 3.1, as amended, was adopted.

Commentary to draft guideline 3.1.1 (Reservations expressly prohibited by the treaty)

Paragraph (1)

8. Ms. ESCARAMEIA suggested that the second sentence, which was too categorical, should be replaced by a sentence that would read: “This does not seem to be the case.”

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

9. Ms. ESCARAMEIA said that the words “the great liberalism” in the last sentence should be replaced by a less categorical formulation.