Document:-
A/CN.4/3384

Summary record of the 3384th meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-ninth session

Extract from the Yearbook of the International Law Commission:-
2017, **vol. I**

Commentary to draft article 15 (Settlement of disputes)

Paragraph (1)

84. Mr. MURPHY (Special Rapporteur) proposed that, in the third sentence, the phrase "can be resolved" be amended to read "are addressed".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

85. Ms. ESCOBAR HERNÁNDEZ said that, when the draft article had been adopted, she had expressed the opinion that the inclusion of a provision on the settlement of disputes was unnecessary. She would therefore appreciate the insertion of an additional paragraph in the commentary, which should read:

> "The view was expressed according to which the draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. In addition, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide."

86. Mr. MURPHY (Special Rapporteur) proposed that the wording suggested by Ms. Escobar Hernández become paragraph (6) of the commentary.

87. Mr. JALLOH said that he endorsed the second sentence in the new paragraph proposed by Ms. Escobar Hernández for the sake of consistency with the Convention on the Prevention and Punishment of the Crime of Genocide. That had been his own position in the Drafting Committee.

88. The CHAIRPERSON asked Ms. Escobar Hernández to provide the secretariat with a written version of the paragraph she was proposing, for circulation to the members of the Commission and discussion at the following meeting.

The meeting rose at 1.05 p.m.

3384th MEETING

Monday, 31 July 2017, at 3 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

Chapter IV. *Crimes against humanity* (*concluded*) (A/CN.4/L.900 and Add.1/Rev.1 and Add.2–3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.900/Add.2.

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading (*concluded*)

2. Text of the draft articles and commentaries thereto (*concluded*)

Commentary to draft article 15 (Settlement of disputes) (*concluded*)

2. The CHAIRPERSON said that Ms. Escobar Hernández had drafted a proposal for an additional paragraph (6) to be inserted in the commentary, which read:

> "The view was expressed according to which the draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. In addition, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide."

3. Ms. ESCOBAR HERNÁNDEZ said that Mr. Jalloh had proposed a few editorial changes to the English version of the text, all of which she found acceptable, and said that it would be advisable for him to explain them to the Commission.

4. Mr. JALLOH said that he had discussed the minor changes in question with Ms. Escobar Hernández and the Special Rapporteur, Mr. Murphy, and that they had both found the changes acceptable. The first sentence should begin with the words "A view" instead of "The view", and at the beginning of the second sentence, the words "In addition" should be replaced with "On the other hand".

5. The CHAIRPERSON said he took it that the Commission agreed to the proposal to insert additional paragraph (6), as amended, in the commentary to draft article 15.

It was so decided.

The commentary to draft article 15, as amended, was adopted.

6. The CHAIRPERSON invited the Commission to consider the commentary to the annex to the draft articles.

Commentary to the annex

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Designation of a central authority

Paragraph (3)

Paragraph (3) was adopted.

Procedures for making a request

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Response to the request by the requested State

Paragraphs (8) to (15)

Paragraphs (8) to (15) were adopted.

Use of information by the requesting State

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Testimony of person from the requested State

Paragraphs (19) to (21)

Paragraphs (19) to (21) were adopted.

Transfer for testimony of person detained in the requested State

Paragraphs (22) to (25)

Paragraphs (22) to (25) were adopted.

Costs

Paragraphs (26) to (30)

Paragraphs (26) to (30) were adopted.

The commentary to the annex to the draft articles was adopted.

7. The CHAIRPERSON invited the Commission to consider the portion of chapter IV of the draft report contained in document A/CN.4/L.900/Add.3.

Commentary to draft article 6 (Criminalization under national law) (*concluded*)

Commentary to draft article 6, paragraph 4 bis

Subheading and paragraphs (1) and (2)

8. Mr. MURPHY (Special Rapporteur) said it had been agreed that paragraph 4 *bis* of draft article 6 would be renumbered 5. The references to paragraph 4 *bis* in the commentary would be amended accordingly. Since the rest of the commentary to draft article 6 contained small subheadings, he proposed adding a subheading, "*Official position*", before paragraph (1).

9. Mr. JALLOH said that, in his view, paragraph (1) could have given more comprehensive coverage to the prior positions of the Commission on the issue of irrelevance of official capacity. Specifically, the Commission's commentary to the 1996 draft code of crimes against the peace and security of mankind,[417] as well as other instruments adopted before then, had addressed in great detail the notion that the official position or capacity of a person had no bearing on his or her criminal responsibility, nor could a person's official status be invoked as a way to seek mitigation during sentencing. In that regard, the commentary to the provision under consideration, which aimed to accomplish the same thing in relation to the draft articles on crimes against humanity, could have included additional references to materials and shown the pedigree of that notion going as far back as the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[418] and Control Council Law No. 10.[419] Further on in the commentary, the Special Rapporteur had indeed included references to article 27, paragraph 1, of the Rome Statute of the International Criminal Court, which had been the basis of the paragraph in question, but he had not mentioned the equivalent provisions of statutes for *ad hoc* tribunals such as article 7 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,[420] article 6 of the Statute of the International Tribunal for Rwanda[421] and article 6 of the Statute of the Special Court for Sierra Leone.[422] He asked whether it would be possible to insert that additional information on second reading.

10. His second comment was more substantive. As currently written, the commentary as a whole seemed directed at the question of a reduction of sentence. In the past, the Commission's commentary distinguished between the question of mitigation or reduction of sentence and the use or invocation of official position as a substantive defence to criminal responsibility. During the Nuremberg trials, the convicted individuals had been denied the possibility of invoking their official positions as a mitigating factor during sentencing, as well as the possibility of claiming that their official position as State officials exonerated them from any criminal responsibility. In his view, the text under consideration conflated the two ideas. He asked whether the Special Rapporteur could address that issue by adding some of the text from paragraph (4) of the Commission's commentary to article 7 of the 1996 draft code of crimes against the peace and security of mankind, which dealt more precisely with the question. In the interest of consistency, it would also be advisable to add to the text the words "for the authorities", in line with the Commission's previous positions, as reflected in prior commentaries.

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[417] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq*., para. 50.

[418] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[419] See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, *The Medical Case*, Washington, D.C., United States Government Printing Office, 1949. Available from: www.gutenberg.org/files/54899/54899-h/54899-h.htm#axvi.

[420] The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1933, is annexed to the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1).

[421] The Statute of the International Tribunal for Rwanda is annexed to Security Council resolution 955 (1994) of 8 November 1994.

[422] The Statute of the Special Court for Sierra Leone is annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (signed at Freetown on 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

11. Mr. MURPHY (Special Rapporteur) said that the issues raised by Mr. Jalloh had already been addressed earlier in the current session. When the draft paragraph had been discussed within the Drafting Committee, he had circulated the commentary, more or less as it currently stood, so that all the members of the Drafting Committee could understand the intentions behind the commentary. He had welcomed their views, which had been presented both during the work of the Drafting Committee and afterwards. It was regrettable that Mr. Jalloh should for the first time signal problems with the commentary at the current juncture. The goal of the text was to indicate basic parameters, citing the trials before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo, the 1954 draft code of offences against the peace and security of mankind,[423] the 1996 draft code of crimes against the peace and security of mankind and the Rome Statute of the International Criminal Court, as well as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. The goal was not to try to feature, for each of those instruments, the *travaux préparatoires* and explanatory materials. In his view, there was plenty more information that could have been included, but doing so would render the text heavy, and a balance had to be struck. He would prefer to leave the commentary as it stood. As for the issue of the distinction between mitigation and reduction of sentence, he considered that it would be better addressed under paragraph (5). If the proposal consisted in replacing the word "reduction" with "mitigation", he was open to it. However, if the proposed change went farther than that, it might raise a series of new problems.

12. The CHAIRPERSON said that, at the current stage, it would be most helpful if specific proposals were put forward.

13. Mr. JALLOH said that he had in fact raised his concerns with the Special Rapporteur, who had said that the material in question had to be sent to the Secretariat before being discussed in plenary session. He had understood that it had been impossible to make changes at that earlier stage and that he should raise any issues in the current plenary meeting. He acknowledged that the Special Rapporteur had asked members of the Drafting Committee to provide their comments at an earlier stage, but the timing had unfortunately not been right, and he had shared his concerns with the Special Rapporteur subsequently. The question of mitigation and reduction of sentence could indeed be discussed when the Commission considered paragraph (5). It was important for the Commission to ensure consistency with the language it had used in the past. Bringing the text in line with the language used in paragraph (4) of the commentary to article 7 of the 1996 draft code of crimes against the peace and security of mankind would underscore the point the Commission was trying to make, without departing from the carefully negotiated text. He expressed concern that a lack of coherence between the paragraphs in the commentary might leave readers at a loss to understand the Commission's reasoning behind a clause as important as the irrelevance of official position in determining or mitigating the criminal responsibility of a person for horrific crimes against humanity.

14. As to the Special Rapporteur's proposal, both mitigation and reduction of sentence were important concepts. It was not necessarily best in all cases to simply remove one term and replace it with another. He proposed that the Commission take a closer look at their usage when considering changes in paragraph (5). He agreed to the adoption of paragraph (1), on the understanding that such issues could be revisited on second reading of the draft articles on crimes against humanity.

15. The CHAIRPERSON expressed concern that the heading proposed by the Special Rapporteur for insertion above paragraph (1), "*Official position*", was excessively vague. He suggested instead the subheading "*Official position as a ground for excluding criminal responsibility*".

16. Mr. MURPHY (Special Rapporteur) said that while such wording would be accurate, it would not be in line with the formulations used in other subheadings, which were shorter.

17. Mr. JALLOH proposed, as a compromise, that the subheading should be worded "*Irrelevance of official capacity*", which was standard language currently used in legal instruments, or "*Official position and responsibility*", which was the heading used in the 1996 draft code of crimes against the peace and security of mankind to address the same concept.

18. The CHAIRPERSON said that he preferred the words "*Official position and responsibility*", as "*Irrelevance of official capacity*" could include aspects other than those addressed by the text.

19. Sir Michael WOOD said that he preferred to use the term "*Official position*" and that including the word "*responsibility*" in the subheading would be excessive and would risk repeating the meaning of the article. Obviously, official position was not a ground for excluding criminal responsibility. The same could be said for superior orders, but those words were used in a subheading too.

20. Mr. TLADI said that he could accept the wording "*Official position*", or, if more clarity was desired, "*Official position and responsibility*". He would not be very comfortable using "*Irrelevance of official capacity*". While that wording was common in recent instruments, the Commission had used different formulations.

21. Mr. GROSSMAN GUILOFF noted that "*Official position*" was the term of art and had been used in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and in the Charter of the International Military Tribunal for the Far East.[424] He supported its use in the current text as well.

[423] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

[424] Charter of the International Military Tribunal for the Far East, in C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4, Washington, D.C., State Department of the United States of America, 1968, pp. 20–32.

22. The CHAIRPERSON said he took it that the Commission would prefer to use the term "*Official position*" in the subheading preceding paragraph (1).

It was so decided.

The subheading and paragraphs (1) and (2) were adopted.

Paragraph (3)

23. Mr. GROSSMAN GUILOFF proposed adding the words "For example" at the beginning of the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

24. Mr. PARK said that in the third sentence, the words "any procedural immunity" should be replaced with the phrase "any procedural issues in the context of immunity".

25. Mr. JALLOH said that in relation to the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* and the decision of the International Criminal Court, the footnote to the paragraph should make reference to the opinion of Judge Perrin de Brichambaut. The decision of the Court had been unanimous, but the judges had arrived at their opinions for different reasons. The footnote should put forward the reasoning used not only by the majority.

26. Ms. ESCOBAR HERNÁNDEZ said that in the third sentence the words "or international" should be deleted. There was no reason to include a reference to immunity before international courts. The reference had perhaps been included owing to the wording of article 27, paragraph 2, of the Rome Statute of the International Criminal Court, which read "under national or international law", and its relationship with article 98, paragraph 1, of the same Statute. In her view, article 98 referred not to immunity, but to the cooperation of States parties with the International Criminal Court. That article did not bar the Court's jurisdiction; it merely prevented its application at a given moment. In the context of the paragraph under consideration, the reference to international jurisdiction was not entirely appropriate in the light of current international criminal law. The deletion of the words "or international" would thus in no way diminish the meaning of the paragraph.

27. If the proposal put forward by Mr. Park was adopted, then the meaning of the sentence would change, as procedural issues in the context of immunity clearly would include questions related to cooperation. In any case, she preferred to leave the paragraph as it stood, and simply delete the words "or international". The Commission would thus avoid taking a position on the very sensitive subject of the relationship between article 27, paragraph 2, and article 98, paragraph 1, of the Rome Statute of the International Criminal Court.

28. Mr. TLADI said that he endorsed the position taken by Ms. Escobar Hernández, but did not support Mr. Park's proposal for the addition of the words "issues in the context of" before the word "immunity", as that would lead to a slight change in meaning. He said he understood the need for balance, but the purpose of the commentary was to explain the meaning of the draft articles, and he expressed concern that the inclusion of the text proposed by Mr. Jalloh might suggest that the Commission's position was wrong. In any case, the judge's opinion mentioned by Mr. Jalloh was a minority opinion.

29. Mr. MURPHY (Special Rapporteur) said he was concerned that the amendment proposed by Mr. Park might make the text less clear, as a number of issues could arise in the context of procedural immunity. The focus of the text was the procedural immunities themselves. He supported the deletion of the words "or international". In fact, the original version of the text had not included those words, which had been added on the suggestion of a member of the Drafting Committee. While Mr. Jalloh was correct that a minority view had been expressed in the case cited in the footnote, that had also been true in many other cases cited in the text. The aim of the Commission was not to offer a comprehensive report on the minority or majority opinions, but to direct the reader's attention to the positions taken by the bodies in question. While he did not strongly object to Mr. Jalloh's proposal, he said he tended to agree with Mr. Tladi that it would be best not to include a reference to the minority opinion.

30. Mr. JALLOH said that Judge Perrin de Brichambaut's opinion had in fact been issued not in dissent; it concurred with the majority opinion. The judge's opinion differed from that of the majority on a point of law that was significant. The footnote's reference only to the majority glossed over the fact that it was important to the judge that his opinion be noted. The judge had given a different interpretation of a point of law, an interpretation on an issue that was in fact heavily debated between him and the majority, as well as outside the court, including in the academic literature. He agreed with the Special Rapporteur that the Commission should advance its own view, but that did not mean it should exclude the plausible views of others. He supported the proposal to delete "or international", by Ms. Escobar Hernández.

31. Mr. PARK asked whether the word "procedural" could be deleted before the word "immunity". Academic scholars agreed that immunity was by nature procedural. If the text used the word "procedural", then more clarification was required.

32. The CHAIRPERSON said that one reason for the use of the word "procedural" was to establish a contrast with the term "substantive defence" mentioned in the preceding sentence. In that context, the footnote to the paragraph provided an explanation when it cited the *Arrest Warrant of 11 April 2000* case.

33. Sir Michael WOOD said that he too had understood the use of the word "procedural" to be linked with the preceding reference to "substantive defence". He supported keeping the paragraph as it stood, but with the deletion of the words "or international". He agreed with Mr. Tladi that there was no need to cite a minority opinion. It would be odd to refer to a concurring opinion that took a radically different legal view in contradiction with the view of the Commission itself.

34. The CHAIRPERSON said that the text of the footnote already contained an implicit reference to the concurring minority opinion, as it referred to the existence of a majority on the Court. He took it that the Commission wished to adopt paragraph (4), with the deletion of the words "or international", as proposed by Ms. Escobar Hernández.

Paragraph (4), as amended, was adopted.

Paragraph (5)

35. Mr. JALLOH, referring to his earlier comments about the need for a clear distinction between the concepts of mitigation and reduction of sentence, proposed simply inserting the words "mitigation or" immediately before the words "reduction of sentence" in both the first and last sentences of the paragraph.

36. Mr. TLADI said that while he agreed with the substance of the proposed amendment, it would be more logical if the word order were "reduction of sentence or mitigation" so that the word "mitigation" did not qualify the word "sentence".

37. The CHAIRPERSON said that mitigating factors were normally considered prior to reduction and so mitigation should be mentioned before reduction of sentence.

38. Mr. JALLOH, endorsing the Chairperson's comment, said that, once an individual was convicted, a judge considered aggravating or mitigating factors and then handed down a sentence; reduction of a sentence could be considered at a later point. However, he understood Mr. Tladi's point and, in the interest of time, would support his proposed amendment.

39. Mr. MURPHY (Special Rapporteur) said that he, too, in the interest of time, would support Mr. Tladi's amendment.

40. Mr. GROSSMAN GUILOFF said that the qualifier "alleged" before the word "offender" was incorrect, given that the offender in the scenario presented was being sentenced and therefore had already been convicted; the word should be deleted where it appeared in the paragraph.

41. Mr. JALLOH said that he did not agree with the deletion of the word "alleged" since the individual in the given scenario could also be at the predicate stage of the consideration of mitigating factors. Removal of the term would, in such a context, be inappropriate.

42. The CHAIRPERSON said that there might well be some States where criminal law provided for a different procedure whereby mitigation and reduction of sentence could be considered simultaneously.

43. Mr. GROSSMAN GUILOFF said that he had never come across any such criminal law; in his view, the word "alleged" was a technical error and should be deleted.

44. Sir Michael WOOD said that he supported Mr. Jalloh's proposed amendment and would not oppose that made by Mr. Grossman Guiloff.

45. Mr. MURPHY (Special Rapporteur) proposed that, in the first sentence, the words "alleged offender's position" should be replaced with "official position". In the last sentence, the words "an alleged offender" should be deleted and the rest of the sentence reformulated accordingly.

Paragraph (5), as amended, was adopted.

The commentary to draft article 6, paragraph 4 bis*, as amended, was adopted.*

The commentary to draft article 6, as amended, was adopted.

Section C, as amended, was adopted.

46. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV contained in document A/CN.4/L.900.

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

Paragraphs 8 to 10

47. Mr. MURPHY (Special Rapporteur) proposed replacing, in paragraph 9, the deadline of 1 January 2019 with that of 1 December 2018. Although bringing forward the deadline by a month represented a change in the Commission's practice and would give Governments less time to submit comments and observations, such a change would make the Commission's work more efficient, not least because it would allow more time for the translation of such submissions.

48. The CHAIRPERSON said he was not opposed to the change, but wondered whether it might have implications for other special rapporteurs for other topics.

49. Sir Michael WOOD said that he would not be in favour of retrospectively changing the deadlines set with regard to other topics.

50. Mr. JALLOH said that while he appreciated the advantages that changing the deadline would represent for the Commission, especially the Special Rapporteur, whose work in that regard was important, he would prefer to retain the original date, in line with the Commission's practice. Many States, especially developing States, might find it challenging to submit their comments one month earlier. Nevertheless, he would not oppose the proposed change if the majority of members supported it.

51. Mr. MURASE said that he supported changing the deadline to 1 December 2018.

Paragraphs 8 to 10, as amended, were adopted, subject to their completion by the Secretariat and to an editorial amendment to the French text.

Section B, as amended, was adopted.

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

Chapter V. *Provisional application of treaties* (A/CN.4/L.901 and Add.1–2)

52. The CHAIRPERSON invited the Commission to consider chapter V of its draft report, beginning with the portion contained in document A/CN.4/L.901.

53. Mr. GÓMEZ ROBLEDO (Special Rapporteur), introducing chapter V, on provisional application of treaties, said that a number of changes, mostly stylistic, had been made to the commentaries to the draft guidelines on the basis of members' contributions within the Working Group, in plenary meetings and through written submissions.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted, subject to their completion by the Secretariat.

Section B was adopted.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

Paragraph 9

54. Mr. PARK said it appeared that the text of the draft guidelines contained in paragraph 9 had not been updated to reflect the most recent changes adopted in plenary session.

55. Following a discussion in which Mr. MURPHY, Mr. GÓMEZ ROBLEDO (Special Rapporteur) and Mr. SABOIA participated, the CHAIRPERSON said he took it that the Commission wished to adopt paragraph 9 on the understanding that the secretariat would replace the text of the draft guidelines with the most up-to-date version thereof.

It was so decided.

Paragraph 9 was adopted, subject to the requisite changes by the secretariat.

56. The CHAIRPERSON invited the Commission to consider the portion of chapter V contained in document A/CN.4/L.901/Add.1.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session

Paragraph 1

Paragraph 1 was adopted.

General commentary

Paragraph (1)

57. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the word "expand" be changed to "clarify".

58. The CHAIRPERSON observed that it was not the Commission's usual practice to explain the weight to be given to commentaries to draft guidelines. He suggested that paragraph (1) either be redrafted to reflect the wording used in previous commentaries or be deleted altogether.

59. Mr. PARK echoed the concern expressed by the Chairperson and his suggestion that paragraph (1) be deleted.

60. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he was not convinced of the need to delete the paragraph, which gave additional guidance to the reader and did not undermine the value of the commentaries, but that he would go along with the majority view.

61. Mr. VÁZQUEZ-BERMÚDEZ suggested altering the paragraph to the effect that the commentaries should be read in conjunction with the draft guidelines, in line with previous commentaries produced by the Commission.

62. The CHAIRPERSON acknowledged the importance of the issue of how the Commission characterized its commentaries and the need for consistency in terms of approach and wording. He suggested that discussion of paragraph (1) be suspended to allow for informal consultations.

It was so decided.

Paragraph (2)

63. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the words at the beginning of the second sentence "Owing to a lack of clarity of the applicable legal regime, they" be deleted and that the first two sentences be combined and amended to read: "The purpose of the draft guidelines is to provide assistance to practitioners concerning the law and practice on the provisional application of treaties, who may encounter difficulties …". It was not the applicable regime *per se* that lacked clarity but the manner in which it had been applied. He also proposed that, in the last sentence, the words "for the progressive development of such rules" be changed to "for contemporary practice", as the aim of the draft guidelines was to reflect the practice of States and international organizations, rather than to engage in progressive development of the applicable rules.

64. Mr. PARK proposed that, as contemporary practice did not seem relevant to international organizations in all cases, the sentence instead end at the word "solutions".

65. Mr. ŠTURMA said that he would welcome clarification as to whether the words "its commencement and termination, and its legal effects", in the second sentence, were intended to refer to the provisional application of a treaty or to the treaty itself.

66. Sir Michael WOOD proposed that, in the first sentence, the word "practitioners" be altered to "States, international organizations and others concerned", with a view to making the paragraph more comprehensive and allowing for the inclusion of academics. He echoed Mr. Šturma's request for clarification of the second sentence.

67. Mr. GÓMEZ ROBLEDO (Special Rapporteur), welcoming Sir Michael's suggestion, explained that the second sentence referred to the commencement, termination and legal effects of provisional application of a treaty. Any drafting suggestions to avoid ambiguity would be welcome. He disagreed with Mr. Park regarding the last sentence of the paragraph, but suggested that the alternative wording "solutions that seem most appropriate to reflect contemporary practice" might be clearer than his original proposal.

68. Mr. GROSSMAN GUILOFF said that, if Sir Michael's proposal were accepted, the last sentence of the paragraph should be similarly amended to refer to others concerned, as well as States and international organizations.

69. Mr. MURPHY expressed support for Sir Michael's proposal and Mr. Grossman Guiloff's related amendment. In order to clarify the second sentence, the words "its commencement and termination, and its legal effects" could be changed to "the commencement and termination of such an agreement, and its legal effects". With regard to the last sentence, he had intended to make a similar proposal to that made by Mr. Park; however, he could go along with the Special Rapporteur's suggestion, in which case the words "for contemporary practice" seemed most suitable.

70. Mr. JALLOH echoed Mr. Murphy's comments regarding the last sentence of the paragraph.

71. Mr. MURASE, expressing support for Sir Michael's point that academics should not be excluded from those to whom assistance was directed, suggested that the word "practitioners" be altered to "experts".

72. The CHAIRPERSON pointed out that the Commission used the term "experts" very specifically to exclude State officials and advised against introducing such a limitation in the text under consideration.

73. Sir Michael WOOD welcomed Mr. Murphy's suggestions, with the exception of the one to alter the phrase "its commencement and termination", which would be clearer if amended to "the commencement and termination of provisional application", in line with the wording of the draft guidelines.

74. Mr. PETRIČ urged members of the Commission to keep in mind the time constraints on their work and to restrict their comments to substantive matters. In the search for consensus, due consideration should be given to the views of the Special Rapporteur, who had explored the subject in the greatest depth.

75. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he favoured Sir Michael's proposal regarding the words "its commencement and termination" and had no objection to reverting to his original amendment to the last sentence of the paragraph.

76. Sir Michael WOOD said that it might be clearer not to combine the first two sentences of the paragraph, as suggested by the Special Rapporteur, but instead to replace the words "Owing to a lack of clarity of the applicable legal regime, they" with "They may".

77. Mr. GROSSMAN GUILOFF said that the assistance provided in the draft guidelines was not intended solely for those who encountered difficulties. He proposed that the first two sentences be combined and amended to read: "The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties, including, *inter alia*, the form …".

78. Mr. VÁZQUEZ-BERMÚDEZ suggested that Mr. Grossman Guiloff's proposal be followed but that the words "including, *inter alia*" be altered to "when dealing with issues, *inter alia*".

79. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he would prefer to keep the paragraph as close to the original drafting as possible. He therefore continued to favour Sir Michael's proposal.

80. The CHAIRPERSON encouraged members to discuss possible wording while the meeting was suspended to allow for a meeting of the Bureau.

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

81. The CHAIRPERSON said he understood that agreement on how to word paragraph (2) had nearly been reached and proposed that discussion on the issue be left in abeyance pending the results of informal consultations.

It was so decided.

Paragraph (3)

82. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the second sentence, the word "expand" should be changed to "explain".

Paragraph (3), as amended, was adopted.

Paragraph (4)

83. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the last sentence of paragraph (4) be amended to read: "Therefore, the draft guidelines allow States and international organizations to set aside, by mutual agreement, the practices addressed in certain draft guidelines, if they deem those provisions unsuitable, in a given treaty or a part of a treaty."

84. Mr. PARK said that the word "unsuitable" was insufficiently neutral. He suggested that the words "if they deem those provisions unsuitable" be altered to "if they decide otherwise".

85. Mr. MURPHY, welcoming the wording proposed by the Special Rapporteur and amended by Mr. Park, suggested deleting the words "in a given treaty or a part of a treaty", as the reference was unclear. The word "different", being superfluous, could be deleted from the first sentence of the paragraph.

86. The CHAIRPERSON said he took it that the Commission wished to adopt the paragraph as amended by the Special Rapporteur, Mr. Park and Mr. Murphy.

Paragraph (4), as amended, was adopted.

Paragraph (5)

87. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the first sentence, the word "correct" should be changed to "consistent". In the second sentence, the word "extended" should be changed to "extensive", the words "'provisional application'," should be deleted and the words "or 'definite entry into force' as if they were equivalent" should be changed to "as opposed to 'definite entry into force'". Furthermore, a footnote, reading "See the memorandums by the Secretariat on the origins of article 25 of the 1969 Vienna Convention and the 1986 Vienna Convention (A/CN.4/658 and A/CN.4/676)", should be inserted at the end of the third sentence.

88. Mr. MURPHY suggested that, in the first sentence, the words "avoid the confusion often associated with their misuse" be altered to "avoid confusion", thereby skirting the implication that States were prone to misuse terms.

89. Mr. GÓMEZ ROBLEDO (Special Rapporteur) endorsed that suggestion.

Paragraph (5), as amended, was adopted.

Paragraph (6)

90. The CHAIRPERSON suggested that, in the first sentence, the words "formal requirements" be changed to "all domestic and international procedural requirements". He also suggested that, in the last sentence, the words "for example" be inserted after "useful purpose" and that the phrase "or the implementation of the treaty or a part of a treaty is of great political significance" be deleted, as they carried a risk of unintended consequences. Referring to treaties of political significance being applied provisionally before procedural requirements were met might raise concern among States that important and sensitive requirements could be circumvented. In Germany, for instance, any internationally binding agreement of great political significance must be ratified by Parliament. Provisional application could prove problematic in that regard.

91. Sir Michael WOOD said that the inclusion of the word "procedural" might prove too limiting; instead, he suggested referring simply to completion of "the requirements".

92. The CHAIRPERSON expressed concern that referring only to "requirements" might not be sufficiently clear. He amended his suggested change to "all domestic and international procedural or other formal requirements".

93. Ms. GALVÃO TELES suggested that changing the words "formal requirements", in the sentence as originally drafted, to "all domestic and international requirements" would be sufficient to allay the Chairperson's concern.

94. The CHAIRPERSON endorsed her suggestion.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Commentary to draft guideline 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

95. Mr. GÓMEZ ROBLEDO (Special Rapporteur) suggested an editorial amendment to the numbering of the draft guidelines in the second sentence.

Paragraph (3), as amended, was adopted.

The commentary to draft guideline 1, as amended, was adopted.

Commentary to draft guideline 2 (Purpose)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

96. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that during a Drafting Committee meeting it had been suggested that a distinction be drawn between the level of acceptance of the 1969 Vienna Convention and the 1986 Vienna Convention and that it should be reflected in the commentary. He therefore proposed that the paragraph read: "The reference to 'provide guidance' is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, as well as on the 1986 Vienna Convention to the extent that the latter reflects customary international law."

97. The CHAIRPERSON said that although doubts had been expressed about whether the 1986 Vienna Convention reflected customary international law, it was clear that the 1969 Vienna Convention might not reflect customary international law in every respect either. He therefore suggested that the words "the latter reflects" should be replaced with "both treaties reflect".

98. Sir Michael WOOD said that the 1969 Vienna Convention was international law for the parties thereto and therefore he was not sure that the reference to the extent that it reflected customary international law was appropriate. His preference was for the simpler phrase used in the original version of the paragraph "are based on the 1969 Vienna Convention and the 1986 Vienna Convention and other rules of international law".

99. Mr. MURPHY said that the problem with the original version of the paragraph was that it did not reflect the text of draft guideline 2, which seemed to refer to the 1969 Vienna Convention only. He therefore suggested that the revised version should be retained but that the last phrase "as well as on the 1986 Vienna Convention to the extent that the latter reflects customary international law" be replaced with the new sentence: "Guidance may also be found in the 1986 Vienna Convention to the extent that it reflects customary international law."

100. Mr. SABOIA, supported by Ms. ESCOBAR HERNÁNDEZ, said that the commentary to a draft guideline was not the appropriate place to give different interpretations to the Vienna Conventions and agreed with Sir Michael that it would be better to revert to the Special Rapporteur's original version of the paragraph.

101. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he had no difficulty with reverting to the original text that he had changed only in the light of suggestions made in the Drafting Committee.

102. The CHAIRPERSON said he took it that the Commission wished to revert to the original version.

It was so decided.

103. Mr. MURPHY said that the paragraph should begin with the phrase "As was stated in the general commentary", since it related to the phrase "The reference to provide 'guidance'" and not the phrase "should not be interpreted as if the guidelines were merely recommendatory". Furthermore, the Commission needed to decide on the substantive matter of whether draft guideline 2 was supposed to cover both the 1969 Vienna Convention and the 1986 Vienna Convention and, if that was not the case, it must seek a suitable formulation that did not cast aspersions on the 1986 Vienna Convention.

104. The CHAIRPERSON suggested that the paragraph be simplified to read: "The reference to 'provide guidance' is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention."

105. Sir Michael WOOD said that he could endorse the Chairperson's suggestion, but that it would make more sense to begin the paragraph "Draft guideline 2 is intended to underline …".

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft guideline 2, as amended, was adopted.

Commentary to draft guideline 3 (General rule)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

106. Mr. MURPHY drew attention to a discrepancy concerning the last footnote to the paragraph and other footnotes.

107. The CHAIRPERSON said that the matter would be followed up by the Secretariat.

On that understanding, paragraph (4) was adopted.

Paragraph (5)

108. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the first sentence read: "The second phrase, namely, 'pending its entry into force between the States or international organizations concerned', is based on the *chapeau* of article 25." The last sentence of the paragraph should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

109. Sir Michael WOOD proposed that the third sentence be simplified to read: "Furthermore, the draft guideline envisages the possibility of a third State or international organization …".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Form)

Paragraph (1)

110. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed the deletion of the words "*inter alia*" in the second sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

111. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the word "expands" be replaced with "elaborates".

Paragraph (2), as amended, was adopted.

Paragraph (3)

112. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that since it had been agreed to replace the word "agreement" with the word "treaty" in the text of the draft guideline, the explanation of the word "agreement" contained in the second sentence was no longer necessary and could be deleted. The paragraph would thus read: "Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the principal treaty."

113. Mr. PARK questioned the appropriateness of the term "principal treaty".

114. Sir Michael WOOD proposed that the words "principal treaty" be replaced with "the treaty that is provisionally applied".

115. Mr. PARK said that the words "principal treaty" also appeared in the last footnote to the paragraph, which would need to be amended accordingly.

On that understanding, paragraph (3), as amended, was adopted.

Paragraph (4)

116. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that, in the first sentence, the words "separate instrument" be changed to "separate treaty". Furthermore, the last sentence should be reworded to read: "By way of providing further guidance, reference is made to two examples of such 'means or arrangements', namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference."

117. Mr. MURPHY proposed that the phrase "adopted by an international organization" be changed to "adopted at an international organization", to render the idea of States coming together to reach an agreement, rather than a decision being taken by an organization. He further proposed that the first and second footnotes to the paragraph be merged and that the reference in the following footnote to the resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization be deleted, since it was not a good example of provisional application of a treaty.

118. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he could endorse Mr. Murphy's first two proposals but not his last one. He had already discussed the last footnote to the paragraph with Mr. Murphy and the text had been amended to make clear that it concerned a resolution, adopted by a meeting of signatory States, whose purpose was to establish the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. It was not a resolution relating to provisional application *per se*, since the Treaty contained no provisional application clause. However, he wished to retain the reference to the resolution as a case *sui generis* that illustrated how, in fact, and as a result of certain decisions, parts of the Treaty were provisionally applied—a position supported by recent literature. Moreover, the Treaty was likely to continue to be provisionally applied indefinitely, since all the requirements for its entry into force were unlikely to be met.

119. Sir Michael WOOD said that he was not in favour of Mr. Murphy's proposal that the phrase "adopted by an international organization" be changed to "adopted at an international organization". The former was in line with the language used for other topics and covered the substantive point that there must be an agreement among States to provisional application by means of a resolution adopted. However, he was in favour of the proposal to delete the reference in the last footnote to the paragraph to the resolution relating to the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. It would merely confuse matters to suggest that the work done by the Preparatory Commission constituted provisional application in the sense of article 25 of the 1969 Vienna Convention and the project. Nevertheless, at some juncture, it might be useful to explain that it was an exceptional situation, but that preparatory work for the entry into force of a treaty did not amount to provisional application.

120. The CHAIRPERSON said that he too was concerned about Mr. Murphy's proposal, but suggested that "by or at an international organization" might be a solution. Likewise, he was concerned about referring to the establishment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in the last footnote to the paragraph as the first example of provisional application, when not all members of the Commission were in agreement. He suggested that it might be sufficient to refer to the article by Andrew Michie[425] on the provisional application of arms treaties mentioned in the footnote.

121. Mr. MURPHY said that Michie's article clearly stated that the Comprehensive Nuclear-Test-Ban Treaty was not an example of the provisional application of treaties and, in that connection, had noted that during the negotiations on the Treaty, the Government of Austria had made a proposal for a provisional application mechanism that had been rejected. Thus, while the source might well support the proposition that bilateral arms treaties had been provisionally applied, it was not relevant in the context under consideration.

122. Following further comments by Mr. MURPHY, the CHAIRPERSON and Sir Michael WOOD, the CHAIRPERSON suggested that discussion on paragraph (4) and its related footnotes be left in abeyance to allow for informal consultations.

It was so decided.

123. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that informal consultations on the matter were indeed necessary. Furthermore, he wished to underline that the information furnished by Mr. Murphy was incomplete. References by the same author that supported the opposite view could be found.

The meeting rose at 6.05 p.m.

3385th MEETING

Wednesday, 2 August 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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[425] A. Michie, "The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol. 10, No. 3 (2005), pp. 345–377.