

Document:-  
**A/CN.4/2912**

**Summary record of the 2912th meeting**

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

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*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.

10. Mr. BROWNLIE suggested that the words “with the great liberalism” should be replaced by “with the relative flexibility”.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (12)

*Paragraphs (7) to (12) were adopted.*

*The commentary to draft guideline 3.1.1, as amended, was adopted.*

*Commentary to draft guideline 3.1.2* (Definition of specified reservations)

Paragraph (1)

11. Mr. GAJA said that the word “details” in the fifth line of the English text should be replaced by “elements”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

12. Mr. GAJA suggested that a sentence should be inserted before the last sentence that would read: “Such a reservation may also be subject to other objections.” The last sentence, which, in his opinion, related to draft guideline 3.1.4, should be moved.

13. Mr. PELLET (Special Rapporteur) said that he had no objection to Mr. Gaja’s first suggestion, but thought that the end of the proposed sentence could be made clearer by saying: “Such a reservation may also be subject to an objection on another ground”. To avoid the repetition of the word “*telle*” in the French version, the last sentence could begin with the words “*C’est la raison pour laquelle*”. However, he was firmly opposed to Mr. Gaja’s proposal to move the last sentence because it related to a word used in draft guideline 3.1.2.

*Paragraph (3) was adopted with the insertion proposed by Mr. Gaja.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

Paragraph (10)

14. Mr. GAJA proposed that only the first sentence should be retained in the footnotes whose references were placed, respectively, after the words “object to reservations” and “authorized reservations”, because the following sentences contained explanations which were repeated later. To attenuate the text of the commentary, the word “expressly” in the second sentence should be deleted and the word “relatively” should be inserted before “open” in the third sentence.

*Paragraph (10), as amended, was adopted.*

Paragraphs (11) to (13)

*Paragraphs (11) to (13) were adopted.*

*The commentary to draft guideline 3.1.2, as amended, was adopted.*

*Commentary to draft guideline 3.1.3* (Permissibility of reservations not prohibited by the treaty)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

15. Mr. GAJA suggested that the word “eminent”, in the footnote whose reference was placed after the words “radical relativism”, should be deleted.

*Paragraph (2), as amended, was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

Paragraph (6)

16. Mr. GAJA suggested that the beginning of the sentence in the second indent should be amended to read: “The same applies to ‘specified’ reservations that are expressly authorized by the treaty with a defined content.”; the rest of the sentence would remain as it stood.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (10)

*Paragraphs (7) to (10) were adopted.*

*The commentary to draft guideline 3.1.3, as amended, was adopted.*

*Commentary to draft guideline 3.1.4* (Permissibility of specified reservations)

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.*

*The commentary to draft guideline 3.1.4, as amended, was adopted.*

*Commentary to draft guideline 1.6* (Scope of definitions)

Paragraph (1)

17. Mr. GAJA asked the Special Rapporteur to clarify the last sentence.

18. Mr. PELLET (Special Rapporteur) suggested that the last sentence should be reformulated to read: “specify the scope of the entire set of draft guidelines relating to the definition of all unilateral statements which are envisaged in order to make their particular object clear”.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (7)

*Paragraphs (2) to (7) were adopted.*

*The commentary to draft guideline 1.6, as amended, was adopted.*

*Commentary to draft guideline 2.1.8 [2.1.7 bis]*<sup>389</sup> (Procedure in case of manifestly invalid reservations)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

19. Ms. ESCARAMEIA suggested that, for the sake of clarity, the beginning of the last sentence should be amended to read: “The majority considered that this procedure applied to all the subparagraphs and therefore the Commission did not consider it justified”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

*The commentary to draft guideline 2.1.8 [2.1.7 bis], as amended, was adopted.*

*Section C, as a whole, as amended, was adopted.*

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

**CHAPTER XI. Obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.699)**

20. The CHAIRPERSON invited the members of the Commission to consider chapter XI of the draft report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/L.699).

**A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

**1. INTRODUCTION BY THE SPECIAL RAPPORTEUR**

Paragraphs 3 to 5

*Paragraphs 3 to 5 were adopted.*

Paragraph 6

21. Mr. MOMTAZ, noting that the last sentence referred to “the possibility that a State would wish to fulfil both parts of the obligation”, asked how a State could both extradite and prosecute.

22. Mr. GALICKI (Special Rapporteur) said that a State could try an individual and then extradite him to serve his

sentence. That sometimes happened in practice and was even provided for in a number of treaties. It might perhaps be preferable to say “surrender” rather than “extradite”, but the question could not be disregarded.

23. Mr. CANDIOTI recalled that the Commission had not yet defined what the obligation *aut dedere aut judicare* covered. In his own view, there was only one obligation: to try, or else to extradite. It would therefore be preferable to adopt more neutral wording.

24. Mr. Sreenivasa RAO, supported by Mr. MOMTAZ, pointed out that the serving of a sentence was not part of extradition.

25. Ms. ESCARAMEIA said that, on the contrary, the laws of many countries provided for extradition for both trial and enforcement of penalty. She suggested that the sentence should be amended to read: “Notwithstanding this, the possibility that the State would wish to try and then extradite for enforcement of penalty had also to be anticipated.”

26. Following a proposal by Mr. GALICKI (Special Rapporteur), which was endorsed by Mr. Sreenivasa RAO and Ms. XUE, the CHAIRPERSON said that the last sentence would be deleted pending more in-depth consideration of the question by the Special Rapporteur in his next report.

*Paragraph 6, as amended, was adopted.*

Paragraph 7

27. Mr. MELESCANU noted that a number of members had argued that there was no third alternative to the choice of trial or referral to another court—whether that of another State or an international tribunal. The paragraph should be deleted since the reference to a parallel jurisdictional competence to be exercised by an international criminal tribunal implied that a person could be tried twice for the same offence.

28. The CHAIRPERSON pointed out that paragraph 7 was part of the Special Rapporteur’s introduction, i.e. what the Special Rapporteur had said, and not of the summary of the debate, which began in paragraph 9.

29. Mr. CANDIOTI said that, in that case, the Commission should not have deleted the last sentence of paragraph 6.

30. Mr. ECONOMIDES said that Mr. Melescanu’s point was nevertheless well taken because the word “parallel” was poorly chosen. He suggested that the phrase “parallel jurisdictional competence to be exercised” should be replaced by “jurisdictional competence to be exercised instead”.

31. Mr. MANSFIELD proposed that the phrase should be reworded to read: “while the obligation to extradite or prosecute was traditionally formulated in the alternative, there was another issue to be considered, the possible jurisdictional competence to be exercised by an international criminal tribunal”.

<sup>389</sup> The numbering in square brackets corresponds to the original numbering of the draft guidelines in the report of the Special Rapporteur or, where applicable, the original numbering of the draft guideline in the report of the Special Rapporteur that was incorporated into a final draft guideline.

32. Mr. GALICKI (Special Rapporteur) suggested that the word “parallel” should be deleted and that the sentence should end with the words “which contemplated the existence of a jurisdictional competence to be exercised by an international criminal tribunal”.

*Paragraph 7, as amended by the Special Rapporteur, was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

## 2. SUMMARY OF THE DEBATE

Paragraph 9

33. Ms. ESCARAMEIA suggested that the words “crimes under national laws” in the last sentence should be replaced by “crimes that are solely foreseen under national laws”. Many national laws provided for the punishment of crimes under international law.

34. Mr. GAJA said that he had a suggestion along the same lines and that the words in question should be amended to read: “crimes that are not international crimes”. He also proposed that the word “conventional” in the penultimate sentence of the English version should be deleted because the reference to “treaty instruments” was sufficient.

*Paragraph 9 was adopted with the proposal by Ms. Escarameia for the last sentence and the proposal by Mr. Gaja for the English version.*

Paragraph 10

*Paragraph 10 was adopted.*

Paragraph 11

35. Mr. PELLET said that the second sentence was unrelated to the rest of the paragraph and should therefore be moved to the end of paragraph 14.

*It was so decided.*

36. Mr. MOMTAZ said that the first sentence was difficult to understand and needed to be clarified.

37. Mr. GAJA said that the problem was partly due to the French translation: the word “gaps” should be rendered in the French text by “lacunes”, not “déséquilibres”.

38. Mr. Sreenivasa RAO asked whether the monitoring system referred to at the end of the first sentence related to the execution of penalties.

39. Ms. XUE said that the use of the word “possible” in the third sentence of the English text was odd; she did not see what it meant.

40. Mr. GAJA suggested that, to meet Mr. Sreenivasa Rao’s concern, the words “with regard to compliance with the obligation to prosecute” could be added at the end of the first sentence. On Ms. Xue’s point, he suggested that the word “possible” in the English text should be replaced by “question of the existence of a”.

*Paragraph 11, as amended, was adopted.*

Paragraph 12

41. Ms. ESCARAMEIA said that, to take account of her own opinion and that of several other members, a new sentence should be added at the end of the paragraph, to read: “Some members considered that the obligation to extradite or prosecute had acquired a customary status, at least as far as crimes under international law were concerned.”

*Paragraph 12, as amended, was adopted.*

Paragraph 13

42. Mr. MOMTAZ said that he did not see why, as stated in the last sentence, limitations on extradition should be inapplicable in the situation of international crimes.

43. Mr. PELLET said that the sentence in question was correct because some limitations, such as rules making it permissible not to extradite nationals or rules granting immunity to political leaders, could be inapplicable. To take account of the concern expressed by Mr. Momtaz, he suggested that the word “many” should be replaced by “some”.

*Paragraph 13, as amended, was adopted.*

Paragraph 14

44. Mr. CANDIOTI said that, in paragraph 14, he recognized an opinion he himself had expressed. To make that idea clearer, he suggested that the third sentence should be amended to read: “What was specific to the topic and the precise meaning of the Latin maxim *aut dedere aut judicare* was that, failing an extradition, an obligation to prosecute arose”. For greater clarity, the words “to prosecute” should be inserted at the end of the paragraph.

45. Mr. PELLET said that, also for the sake of clarity, the order of the sentences should be changed. The paragraph should begin with the first sentence, followed by the third, the fourth and the second; the last sentence would be the one moved from paragraph 11.

*Paragraph 14, as amended, was adopted.*

Paragraph 15

*Paragraph 15 was adopted.*

Paragraph 16

46. Mr. MOMTAZ said that, in the light of the debate, it would be better to end the paragraph after the words “*lex specialis* rules”.

47. Mr. ECONOMIDES suggested that the following sentence should be added at the end of the paragraph in order to reflect one of the opinions expressed: “According to another view, the ‘triple’ alternative should be favoured as much as possible”.

*Paragraph 16, as amended, was adopted.*

Paragraphs 17 and 18

*Paragraphs 17 and 18 were adopted.*

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

Paragraph 19

48. Mr. MOMTAZ said that the word "parallel" in the last sentence should be deleted: the jurisdiction in question could be either exclusive or residual.

*Paragraph 19, as amended, was adopted.*

Paragraph 20

49. Mr. GALICKI (Special Rapporteur) said that the paragraph did not faithfully reflect his conclusions. The penultimate sentence should end after the words "human rights law" and a new sentence should be added before the last sentence, to read: "Furthermore, he agreed with the suggestion that the focus of the whole exercise should be on the elaboration of secondary rules". The last sentence would remain as it stood.

*Paragraph 20, as amended, was adopted.*

Paragraph 21

*Paragraph 21 was adopted.*

*Section B, as amended, was adopted.*

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

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

Paragraph 9 (concluded)

50. The CHAIRPERSON recalled that paragraph 9 of chapter II of the draft report of the Commission (A/CN.4/L.690) had been left in abeyance to allow Mr. Mansfield to draft a text for it. That text read:

"As regards the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", the Commission considered the report of the Study Group (A/CN.4/L.682 and Corr.1 and Add.1) and took note of its 42 conclusions (chap. XII). The report and its conclusions were prepared on the basis of an analytical study finalized by the Chairman of the Study Group which summarized and analysed the phenomenon of fragmentation taking account of studies prepared by various members of the Study Group, as well as discussion within the Study Group itself. The Commission requested that the analytical study should be made available on its website and published in its *Yearbook*.

51. Mr. KOSKENNIEMI (Chairperson of the Study Group), supported by Mr. KATEKA, Mr. CANDIOTI, Ms. ESCARAMEIA and Mr. MANSFIELD, said that, in the text just read out, he would like the Commission to do more than "take note" of the 42 conclusions of the Study Group if it wanted to make it clear that it attached to the

fragmentation of international law the importance that every member had attributed to it. He therefore suggested that the words "and endorsed" should be added in the first sentence after "took note of".

52. Mr. PELLET said that the Commission could not "endorse" conclusions which it had not considered in detail and to which members had not been able to make any amendments in plenary.

53. Following a discussion in which Mr. CHEE, Mr. BROWNLIE, Mr. Sreenivasa RAO, Mr. GAJA and Mr. MANSFIELD took part, Mr. VALENCIA-OSPINA suggested that the words "which it commends to the attention of the General Assembly" should be inserted in the first sentence after "conclusions".

*It was so decided.*

*Paragraph 9, as amended, was adopted.*

*The meeting rose at 12.25 p.m.*

## 2913th MEETING

*Friday, 11 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. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, 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 (concluded)

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

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

1. The CHAIRPERSON proposed that the following paragraph should be inserted in section B of chapter VIII: "The Commission had before it the eleventh report of the Special Rapporteur on the subject of reservations to treaties (A/CN.4/574). The Commission decided to consider the report at its next session in 2007."

*The new paragraph was adopted.*

*Section B, as amended, was adopted.*

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

**CHAPTER IX. Unilateral acts of States (A/CN.4/L.697, Add.1 and Corr.1, Add.2; A/CN.4/L.703)**

2. The CHAIRPERSON drew attention to section A of the chapter IX, contained in document A/CN.4/L.697.