

Document:-  
**A/CN.4/3072**

**Summary record of the 3072nd meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**2010, vol. I**

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15. The Working Group had also had before it a paper prepared by the Special Rapporteur, entitled “Bases for discussion in the Working Group on the topic ‘The obligation to extradite or prosecute (*aut dedere aut judicare*)’” (A/CN.4/L.774), containing observations and suggestions based on the general framework proposed in 2009 and further drawing upon the survey by the Secretariat. In particular, the Special Rapporteur drew attention to questions concerning: (a) the legal bases of the obligation to extradite or prosecute (paras. 5–8); (b) the material scope of the obligation (paras. 9–10); (c) the content of the obligation to extradite or prosecute (paras. 11–13); and (d) the conditions for triggering the obligation to extradite or prosecute (paras. 18–19).

16. In its discussions, the Working Group had affirmed the continuing relevance of the general framework agreed upon in 2009. It had recognized that the Secretariat survey had helped to elucidate aspects of the typology of treaty provisions, differences and similarities in the formulation of the obligation to extradite or prosecute in those provisions and their evolution. However, the treaty practice on which the Secretariat study focused needed to be complemented by a detailed consideration of State practice, including but not limited to national legislation, case law and official statements of government representatives. In particular, since the duty to cooperate in combating impunity seemed to underpin the obligation to extradite or prosecute, a systematic assessment needed to be made of the extent to which that duty could, as a general rule or in relation to specific crimes, help to elucidate work on the topic, including on the material scope, the content and the conditions for triggering the obligation to extradite or prosecute.

17. Taking into account the Commission’s practice in the progressive development of international law and its codification, the Working Group considered that the general orientation of future reports should be towards presenting draft articles for consideration by the Commission.

18. The CHAIRPERSON said he took it that the Commission wished to take note of the report.

*It was so decided.*

*The meeting rose at 10.30 a.m.*

### 3072nd MEETING

*Monday, 2 August 2010, at 3.05 p.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

### Draft report of the International Law Commission on the work of its sixty-second session

#### CHAPTER VI. *Effects of armed conflicts on treaties* (A/CN.4/L.766 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to adopt chapter VI of its report (A/CN.4/L.766 and Add.1), paragraph by paragraph.

#### A. Introduction (A/CN.4/L.766)

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

Paragraph 3

*Paragraph 3 was adopted with a minor editorial amendment to the English version.*

Paragraph 4

2. Mr. GAJA said that the paragraph suggested that Sir Ian Brownlie had resigned from his position as Special Rapporteur, which was not the case. In order to avoid confusion, he proposed that the words “from the Commission” should be inserted after “Sir Ian Brownlie”.

*Paragraph 4, as amended, was adopted.*

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

#### B. Consideration of the topic at the present session (A/CN.4/L.766 and Add.1)

Paragraphs 5 to 9

*Paragraphs 5 to 9 were adopted.*

Paragraph 10

3. Mr. NOLTE proposed the deletion of the last sentence, because its wording suggested that the topic raised essentially formal questions which, however, formed the subject of only a few draft articles, whereas, generally speaking, it concerned substantive issues.

*Paragraph 10, as amended, was adopted.*

Paragraphs 11 to 24

*Paragraphs 11 to 24 were adopted.*

Paragraph 25

4. Mr. NOLTE said that, contrary to the statement made at the beginning of the last sentence, the definition of “armed conflict” in the *Tadić* case did not contain “a certain degree of circularity”. He therefore proposed the deletion of the phrase “While admitting a certain degree of circularity in that definition.”

5. Mr. CAFLISCH (Special Rapporteur) approved of that proposal. When he had spoken of circularity, he had been referring to the Geneva Conventions for the protection of war victims and article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and

relating to the protection of victims of non-international armed conflicts (Protocol II), and not to the *Tadić* case.

*Paragraph 25, as amended, was adopted.*

Paragraphs 26 to 28

*Paragraphs 26 to 28 were adopted.*

Paragraph 29

6. Mr. CAFLISCH (Special Rapporteur) proposed the addition, at the end of that paragraph, of a sentence which would reproduce the wording used in paragraph 70 of the *Tadić* decision and which would read, "Moreover, in order to be consistent with the definition in the *Tadić* case, the words 'a situation in which there has been resort to armed force' should be replaced by 'a situation in which there is resort to armed force'."

*The proposal was adopted.*

7. Mr. NOLTE proposed the replacement of the words "element of longevity" with "element of duration and intensity" which was closer to what he had wanted to say when the report on effects of armed conflicts on treaties had been considered.

8. Mr. CAFLISCH (Special Rapporteur) approved of that proposal because the debate had concerned "intensity".

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 40

*Paragraphs 30 to 40 were adopted.*

Paragraph 41

9. Mr. McRAE said that he was uncertain that, as it stood, the third sentence really reflected the debate. He proposed that it should be recast or deleted.

10. The CHAIRPERSON said that he took it that the members of the Commission did not object to the deletion of the third sentence.

*It was so decided.*

*Paragraph 41, as amended, was adopted.*

Paragraphs 42 to 44

*Paragraphs 42 to 44 were adopted.*

Paragraph 45

11. Mr. NOLTE proposed, in order to provide a more accurate record of what the Special Rapporteur had said during the debate, that the word "primarily" should be inserted between "not" and "aimed" in the second sentence, so that it would read: "He recalled that some who had opposed it had pointed out that the application of articles 31 and 32 was not primarily aimed at determining the intention of the parties, but determining the content of the treaty."

12. Mr. CAFLISCH (Special Rapporteur) approved of that proposal.

*Paragraph 45, as amended, was adopted.*

Paragraphs 46 to 49

*Paragraphs 46 to 49 were adopted.*

Paragraph 50

13. After an exchange of views in which Mr. McRAE, Sir Michael WOOD and Mr. GAJA took part, the CHAIRPERSON proposed that, in the English version, the word "compromise" should be replaced with "encompass" and in the Spanish version, the words "*afectaría a*", by "*incluiría*".

*It was so decided.*

*Paragraph 50, as amended in the English and Spanish versions, was adopted.*

Paragraph 51

*Paragraph 51 was adopted.*

Paragraph 52

14. Mr. NOLTE said that he was surprised to see that the third sentence stated that doubts had been expressed regarding the inclusion of treaties relating to the protection of the environment. Since other categories of treaties had also been mentioned during the debate, they should likewise be mentioned, or any reference to the treaties in question should be removed.

15. Mr. CAFLISCH (Special Rapporteur) proposed that the words "treaties relating to the protection of the environment, not all" should be replaced with "categories of treaties, not all".

*Paragraph 52, as amended, was adopted.*

Paragraphs 53 to 62

*Paragraphs 53 to 62 were adopted.*

Paragraph 63

16. After an exchange of views between Mr. NOLTE and Mr. CAFLISCH (Special Rapporteur), the CHAIRPERSON proposed that the end of the last sentence should be amended to read, "since considering the fate of treaties may not be a priority for a State involved in an armed conflict".

*The proposal was adopted.*

*Paragraph 63, as amended, was adopted.*

Paragraphs 64 to 85

*Paragraphs 64 to 85 were adopted.*

*The portion of section B contained in document A/CN.4/L.766, as a whole, as amended, was adopted.*

17. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, the remainder of section B of chapter VI, contained in document A/CN.4/L.766/Add.1.

Paragraph 83 (A/CN.4/766/Add.1)

18. Mr. VASCIANNIE proposed that, in the third sentence, the phrase “alleged aggressor” should be replaced with “possible victim State”.

*Paragraph 83, as amended, was adopted.*

Paragraphs 84 to 91

*Paragraphs 84 to 91 were adopted.*

Paragraph 92

19. Mr. NOLTE proposed the addition, at the end of the paragraph, of the sentence, “Some members noted that the interpretation of Article 2, paragraph 4, of the Charter of the United Nations was also controversial and that this provision was not an exact counterpart to Article 51 of the Charter of the United Nations regarding the right to self-defence”.

*Paragraph 92, as amended, was adopted.*

Paragraphs 93 to 104

*Paragraphs 93 to 104 were adopted.*

Paragraph 105

20. Mr. NOLTE proposed that the meaning of the last sentence should be made clearer by amending it to read: “Instead, for non-international armed conflicts to have an effect on treaties, an additional outside involvement would be required.”

*Paragraph 105, as amended, was adopted.*

Paragraphs 106 and 107

*Paragraphs 106 and 107 were adopted.*

*The remainder of section B of chapter VI contained in document A/CN.4/L.766/Add.1, as amended, was adopted.*

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

**CHAPTER VII. Protection of persons in the event of disasters (A/CN.4/L.767 and Add.1)**

21. The CHAIRPERSON invited the members of the Commission to adopt chapter VII of the report, contained in documents A/CN.4/L.767 and Add.1, paragraph by paragraph.

**A. Introduction (A/CN.4/L.767)**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.767)**

Paragraphs 5 to 7

*Paragraphs 5 to 7 were adopted.*

Paragraph 8

22. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, acting on a proposal from Mr. Gaja, the Planning Group had decided to insert a footnote to paragraph 8, which reproduced the text of the draft articles adopted by the Drafting Committee at the current session. As the Planning Group had not yet presented its report to the Commission, he was inclined to approve the adoption of paragraph 8 on the understanding that the footnote would be inserted in due course.

*Paragraph 8 was adopted subject to the amendment proposed by the Special Rapporteur.*

Paragraphs 9 and 10

*Paragraphs 9 and 10 were adopted.*

**1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE THIRD REPORT**

Paragraphs 11 to 19

*Paragraphs 11 to 19 were adopted.*

**2. SUMMARY OF THE DEBATE**

**(a) Draft article 6 (Humanitarian principles in disaster response)**

Paragraphs 20 to 23

*Paragraphs 20 to 23 were adopted.*

Paragraph 24

23. Mr. GAJA proposed that this paragraph should be placed before paragraph 28, in the part concerning draft article 8, for the matters with which it dealt (the principles of sovereignty and non-intervention in the domestic affairs of a State) were directly connected with the issue of the primary responsibility of the affected State.

*Paragraph 24 was adopted subject to the repositioning proposed by Mr. Gaja.*

Paragraph 25

*Paragraph 25 was adopted.*

**(b) Draft article 7 (Human dignity)**

Paragraphs 26 and 27

*Paragraphs 26 and 27 were adopted.*

**(c) Draft article 8 (Primary responsibility of the affected State)**

Paragraphs 28 and 29

*Paragraphs 28 and 29 were adopted.*

Paragraph 30

24. Mr. GAJA proposed that the last three sentences of that paragraph, which concerned a “secondary” responsibility for the protection of victims of disasters, be placed at the end of paragraph 29.

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 to 35

*Paragraphs 31 to 35 were adopted.*

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 36 to 40

*Paragraphs 36 to 40 were adopted.*

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

25. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, document A/CN.4/L.767/Add.1, which contained the remainder of chapter VII.

**C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted so far by the Commission (A/CN.4/L.767/Add.1)**

1. TEXT OF THE DRAFT ARTICLES

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION

Article 1 (*Scope*) *Commentary*

Paragraphs (1) to (4)

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

Paragraph (5)

26. Mr. GAJA proposed the deletion of the last two sentences of that paragraph, because they were unconnected with the text of draft article 1.

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

*The commentary to draft article 1 as a whole, as amended, was adopted.*

Article 2 (*Purpose*)

*Commentary*

Paragraphs (1) to (4)

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

Paragraph (5)

27. Mr. NOLTE proposed that the word “broadly” in the first sentence should be replaced with the phrase “where relevant”.

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

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

28. Mr. NOLTE said that paragraph (7), which referred only to needs related to survival, was too narrow and proposed that the phrase “or similarly essential needs” should be inserted after the word “survival”.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

29. Mr. McRAE said that he feared that the phrase “an implied margin of appreciation” in the penultimate sentence, which was widely used in Europe but less so in other regions of the world, might be seen as being associated with the case law of the European Court of Human Rights and proposed that it should be replaced with the phrase “an implied degree of latitude”.

30. Mr. GAJA said that he approved of Mr. McRae’s proposal. The words “such conditionality” in the last sentence seemed somewhat incongruous and should be replaced with the words “such latitude”. In the fifth sentence, he proposed that the word “including” should be replaced with “adding”. In the first sentence, which lacked clarity, he proposed, after consulting with the Special Rapporteur, that it should be replaced with the following sentence: “As regards the reference to rights, it was understood that some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively.”

*Paragraph (9), as amended by Messrs. Gaja and McRae and in consultation with Mr. Valencia-Ospina, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

*The commentary to draft article 2 as a whole, as amended, was adopted.*

Article 3 (*Definition of disaster*)

*Commentary*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

Paragraph (6)

31. Mr. NOLTE proposed that, in order to avoid any suggestion that widespread loss of human life was a criterion for defining a disaster, the words “not only” and “but also” should be deleted from the first sentence which should simply read, “many major disasters are accompanied by widespread loss of life or by great human suffering and distress”.

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

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

32. Mr. NOLTE said that the adjective “extreme” in the first sentence was superfluous. He therefore proposed that it should be deleted and that the end of the sentence should read, “such as serious political or economic crises”.

33. Mr. McRAE said that it was not the requirement of severe disruption that excluded serious political and economic crises from the draft articles' scope of application, but rather the criterion of a widespread loss of life and great human suffering. He therefore proposed that the last section of the first sentence after the words "a high threshold" should be deleted. He was not sure why the second sentence began with the word "likewise", because it was unconnected with the first. In the fourth sentence, he proposed that the phrase "a margin of appreciation" should be replaced with the words "some discretion".

34. Mr. GAJA said that, while the ideas formulated in the last two sentences were quite correct, they were out of place at that point in the commentary and he proposed that they be deleted.

35. Mr. VALENCIA-OSPINA (Special Rapporteur) acknowledged that the reference to international cooperation in the penultimate sentence was premature at that point and belonged more to the commentary to draft article 5 (Duty to cooperate). The last sentence of the paragraph, which harkened back to the debate on various possible ways of defining the term "disaster", was also misplaced. The last two sentences could therefore be deleted. In response to one of Mr. McRae's comments, he conceded that the word "likewise" at the beginning of the second sentence was inappropriate and he proposed that the whole sentence should be deleted. He was also prepared to accept the deletion of the adjective "extreme" from the first sentence.

36. Mr. PETRIČ said that since the last two sentences contained important ideas, they must not be deleted.

37. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the last two sentences should not be deleted altogether, but moved to the commentary of another article.

*Paragraph (8), as amended, was adopted.*

*The commentary to draft article 3, as amended, was adopted.*

Article 4 (*Relationship with international humanitarian law*)

Commentary

Paragraph (1)

38. Mr. NOLTE proposed that the word "predominance" should be replaced with "precedence", a more technical legal term that more closely reflected the Commission's intention. On second reading, it would also be necessary to examine in greater detail the relationship between the text of the article and that of the commentary, since the first gave the impression that the draft articles did not apply at all in areas covered by international humanitarian law, whereas the commentary clarified the relationship between them and corrected that impression.

39. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed with Mr. Nolte's comments and said that he would subsequently propose a reworked version of article 4 that would take account of them.

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

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

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

Article 5 (*Duty to cooperate*)

Commentary

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

40. Sir Michael WOOD said that he doubted that the first part of paragraph (4) was necessary, or even appropriate, as commentary to draft article 5. If the Special Rapporteur wished to retain it, the text would have to be recast. If he did not, the first three sentences could be deleted and the paragraph could begin with the fourth sentence without the adverb "furthermore".

41. Mr. VALENCIA-OSPINA (Special Rapporteur) drew attention to the fact that draft article 5 had triggered a lively debate and said that some issues, especially that of the affected State's consent, had not been considered owing to a lack of time. He wondered if the Commission might wish to deal with it in the commentary to one of the articles adopted by the Drafting Committee at the current session. He was therefore open to any proposals which would improve the text of the commentary.

42. Sir Michael WOOD said that this reply merely strengthened his conviction and that he failed to see the relationship between the duty to cooperate and the issues dealt with in the first part of paragraph (4).

43. Mr. VASCIANNIE (Rapporteur) said that the question of what would happen if a State refused to cooperate was essential and that the first part of the commentary, which he would like to retain, specifically concerned that eventuality.

44. Mr. NOLTE proposed that only the second and third sentences be deleted.

45. Mr. PERERA, Mr. PETRIČ and Sir Michael WOOD supported that proposal.

46. The CHAIRPERSON, speaking as a member of the Commission, said that he would also prefer to retain the second sentence, but to delete the adverbial phrase "on the contrary".

47. Sir Michael WOOD said that the meaning of that sentence was unclear and he did not see how the duty to cooperate underlined respect for non-intervention. He would therefore prefer it if the text were simplified and those important matters were dealt with in the commentary to an article.

48. Mr. GAJA proposed that the second sentence should be replaced with wording such as "This point will be addressed in the commentary to article 8" and that the third sentence should be deleted.

49. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in the sentence suggested by Mr. Gaja, the words “article 8” should be replaced with “a subsequent article”, because article 8 had not yet been adopted.

50. The CHAIRPERSON said that he took it that the Commission wished to adopt a paragraph (4) worded:

“Cooperation should, however, not be interpreted as diminishing the prerogatives of a sovereign State within the limits of international law; this point will be addressed in a subsequent article. Furthermore, the principle of cooperation is to be understood also as being complementary to the primary duty of the authorities of the affected State to take care of the victims of natural disasters and similar emergencies occurring in its territory. The provision has to be read in light of the other provisions in the draft articles, particularly those on the primary duty of the affected State.”

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

51. Mr. McRAE proposed that in the penultimate line of paragraph (6), the phrase “a margin of appreciation” should be replaced with “a degree of latitude”.

52. Mr. GAJA said that it was unnecessary to define what was meant by the “exact nature” of the obligation to cooperate and therefore proposed that the phrase “(whether ‘shall’ or ‘should’)” should be deleted from the sixth sentence of that paragraph.

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

Paragraph (7)

*Paragraph (7) was adopted.*

*The commentary to draft article 5, as amended, was adopted.*

*Section C, contained in document A/CN.4/L.767/Add.1, as amended, was adopted.*

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

**CHAPTER IX. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.769)**

Paragraph 1

*Paragraph 1 was adopted.*

Paragraphs 2 and 3

53. Mr. CANDIOTI proposed that, at the end of the paragraph, “2009” should be added in brackets after “sixty-first session”, in order to give a better idea of progress with consideration of the topic over the years.

54. Mr. DUGARD said that this last sentence of the paragraph suggested that the Special Rapporteur had submitted a report, but that the Commission had not examined it. He therefore proposed that “did not” should be replaced by “was unable to”.

55. Mr. NOLTE said that the Commission had been unable to consider the topic because the Special Rapporteur’s report had been unavailable. If paragraph 2 and paragraph 3 were read together, they gave the impression that there had been a report, but that the Commission had not considered it.

56. After a discussion in which Mr. CAFLISCH, Mr. HMOUD, Mr. VALENCIA-OSPINA and Mr. NOLTE took part, Mr. McRAE proposed that the last sentence of paragraph 2 and paragraph 3 be amended to read as follows:

“In the absence of a further report, the Commission was unable to consider the topic at its sixty-first session (2009).”

“3. At the present session, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.”

*Paragraphs 2 and 3, as amended, were adopted.*

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

**CHAPTER XII. Shared natural resources (A/CN.4/L.772)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

57. Mr. GAJA said that the phrase in square brackets could be deleted.

*It was so decided.*

*Paragraph 4, as amended, was adopted.*

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

*Paragraph 6 was adopted subject to a minor editorial amendment to the English version.*

Paragraph 7

*Paragraph 7 was adopted.*

Paragraph 8

58. Mr. McRAE proposed that, in the last sentence of paragraph 8, the term “boundary delimitation” should be replaced with “maritime delimitation”, the expression used in the rest of the document.

*Paragraph 8, as amended, was adopted.*

Paragraph 9

59. Mr. GAJA said that, having consulted the Special Rapporteur on the subject, he thought that, in the third sentence, it would be wise not to give the impression that the Commission was passing judgment over bilateral agreements which might or might not have been concluded. He therefore proposed that the words “had been adequately addressed” with “may have been adequately addressed”.

60. Mr. CANDIOTI proposed that, in the same sentence, the words “and confusion” should be deleted.

*Paragraph 9, as amended, was adopted.*

Paragraph 10

*Paragraph 10 was adopted.*

Paragraph 11

61. Mr. NOLTE said that, in the last sentence of the paragraph, it would be advisable to indicate why the Working Group had taken the decision in question, if only by referring back to the previous paragraphs. He therefore proposed that the words “On the whole” should be replaced with “In light of the foregoing”.

*Paragraph 11, as amended, was adopted.*

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

*The meeting rose at 6.10 p.m.*

## 3073rd MEETING

*Tuesday, 3 August 2010, at 10 a.m.*

*Chairperson:* Mr. Nugroho WISNUMURTI

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

### **Draft report of the Commission on the work of its sixty-second session (*continued*)**

#### **CHAPTER IV. *Reservations to treaties* (A/CN.4/L.764 and Add.1–10)**

1. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report beginning with the portion of the chapter contained in document A/CN.4/L.764.

#### **A. Introduction (A/CN.4/L.764)**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Section A was adopted.*

#### **B. Consideration of the topic at the present session (A/CN.4/L.764 and Add.1)**

Paragraphs 5 to 12

*Paragraphs 5 to 12 were adopted.*

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE SECOND ADDENDUM TO HIS FOURTEENTH REPORT AND HIS FIFTEENTH REPORT

Paragraphs 13 to 30

*Paragraphs 13 to 30 were adopted.*

2. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SIXTEENTH REPORT

Paragraphs 31 to 55

*Paragraphs 31 to 55 were adopted.*

3. CONTENT OF THE FINAL REPORT ON THE TOPIC

Paragraph 56

*Paragraph 56 was adopted.*

#### **C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.764/Add.2–10)**

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SECOND SESSION (A/CN.4/L.764/Add.3–10)

2. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter IV contained in document A/CN.4/L.764/Add.3.

*Commentary to guideline 2.6.3 (Freedom to formulate objections)*

Paragraph (1)

3. Mr. NOLTE questioned the wording of the second sentence of paragraph (1) which read: “Nevertheless, although that freedom is quite extensive, it is not unlimited, and it therefore seems preferable to speak of a ‘freedom’ rather than a ‘right’.” As he recalled, the Drafting Committee and the Commission had been prompted to use the term “freedom” and not “right”, because it had been held that the word “freedom” would allow States greater latitude, whereas rights might tend to be limited. He therefore proposed that the sentence be recast to read: “As this entitlement flows from the general freedom of States to conclude treaties, it seems preferable to speak of a freedom rather than a right.” He clearly remembered that the discussion had turned on terminology drawn from English or American legal theory. The philosopher Wesley Newcomb Hohfeld had been mentioned as someone who had distinguished between rights and freedoms and who had contended that freedoms were less specific than rights and that they flowed from general entitlements.<sup>375</sup> That was why the term “freedom” had been chosen rather than “right”. The debate had reached the conclusion that the possibility of formulating an objection should not be limited but enhanced.

4. Mr. PELLET (Special Rapporteur) said, in response to Mr. Nolte, that he was unsure whether the philosophy

<sup>375</sup> W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, W. Cook (ed.), New Haven, Yale University Press, 1919.