

Document:-
A/CN.4/3157

Summary record of the 3157th meeting

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

Extract from the Yearbook of the International Law Commission:-
2012, vol. I

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3157th MEETING

Thursday, 2 August 2012, at 3.05 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Kitichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

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

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/L.804 and Add.1)

1. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of the portion of chapter VI contained in document A/CN.4/L.804/Add.1.

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

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR (A/CN.4/L.804/Add.1)

Paragraph 1

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to amend the last sentence to read as follows: “She restated her will to take into consideration the work undertaken by the former Special Rapporteur³⁷⁴ and by the Secretariat in its memorandum,³⁷⁵ as well as the previous work of the Commission on related topics, while providing a new approach that would facilitate consensus in the Commission on the controversial aspects of the topic.”

Paragraph 1, as amended, was adopted.

Paragraph 2

3. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to amend the paragraph to read as follows:

“The Special Rapporteur also welcomed the general receptiveness, in the comments made, and the broad support given, to the methodology and approaches that she intended to pursue, including, in particular, the distinction between immunity *ratione personae* and *ratione materiae*, which was sought in the development of the topic, the proposed systematic approach and the treatment of the various blocks of questions in a successive fashion. In this connection, she stated that no methodological approach can be absolutely neutral

³⁷⁴ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

³⁷⁵ A/CN.4/596 and Corr.1 (document available from the Commission’s website).

in the work of the Commission. She confirmed that she planned to proceed on the basis of a thorough review of the State practice, doctrine and jurisprudence, both national and international. She also stated that taking into account values and principles was necessary, the need being to focus on those that were widely held and reflected international consensus. The overall objective would be to take a balanced approach in addressing immunity that would not contradict efforts undertaken by the international community to combat impunity regarding the most serious international crimes. She also noted that the question of possible exceptions to immunity was going to be extremely important in the discussion of the Commission. It was noted that although notions like ‘absolute’ or ‘relative’ immunity had limitations analytically, they could, however, be useful in explaining and offering a clear distinction when the regime of possible exceptions was taken up by the Commission. In her view, only those crimes that are of concern to the international community as a whole, are egregious and are widely accepted as such on the basis of a broad consensus, including genocide, crimes against humanity and war crimes, could merit consideration in any discussion of possible exceptions. In that context as well, it would be crucial to examine State practice and the prior work of the Commission.”

Paragraph 2, as amended, was adopted.

Paragraph 3

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to amend the paragraph to read as follows:

“The Special Rapporteur concluded that, in the light of the debate, she was of the view that the workplan contained in paragraph 72 of her preliminary report continued to be entirely valid. She therefore expressed her intention to take up, in a systematic and structured manner, the consideration and analysis of the four blocks of questions identified in the proposed workplan, namely, general issues of a methodological and conceptual nature, immunity *ratione personae*, immunity *ratione materiae* and procedural aspects of immunity, in a concrete and practical way, by including in each of her substantive reports the corresponding draft articles. She indicated that, tentatively, her intention for next year was to address the general questions that are mentioned in section 1 of her workplan as well as the various aspects concerning immunity *ratione personae*. She also expressed the hope that it would be possible to conclude the first reading of the draft articles during the present quinquennium.”

Paragraph 3, as amended, was adopted.

5. The CHAIRPERSON suggested to return to paragraph 41 of chapter VI, which was contained in document A/CN.4/L.804.

2. SUMMARY OF THE DEBATE (*concluded*)

(c) *Substantive considerations (concluded)*

(4) *Immunity ratione materiae (concluded)*

Paragraph 41 (*concluded*)

6. Mr. MURPHY proposed to amend the third sentence to read as follows: “This approach, however, was perceived as untenable by some members since by definition immunity assumed that the person may enjoy immunity for such acts.”

Paragraph 41, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report of the Commission, as amended, was adopted.

Chapter IX. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.807)

7. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.807.

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 and 5

Paragraphs 4 and 5 were adopted.

DISCUSSIONS OF THE WORKING GROUP

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

(a) Major issues facing the topic

Paragraph 8

8. Mr. MURPHY proposed the deletion of the phrase “so as to help frame an appropriate response by the Commission” at the end of the first sentence.

(a) Harmonization

9. Mr. KITTICHAISAREE proposed to replace the phrase “Secretariat’s memorandum on the relevant multilateral conventions”³⁷⁶ with “Secretariat’s survey of multilateral conventions which may be of relevance for the topic” so as to match the wording in paragraph 13.

(b) Interpretation, application and implementation

10. Sir Michael WOOD said that the word “chronic” in the last sentence should be replaced with “serious”, which was more appropriate.

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

(b) Relationship with universal jurisdiction

Paragraph 10

Paragraph 10 was adopted.

(c) Feasibility of the topic

Paragraph 11

11. Mr. FORTEAU suggested to replace, in the French version, the heading “Faisabilité du sujet” with “Caractère réalisable du sujet”.

Paragraph 11, as amended in the French version, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Section B, as amended, was adopted.

Chapter IX of the draft report of the Commission, as amended, was adopted.

Chapter XI. The most-favoured-nation clause (A/CN.4/L.809)

12. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.809.

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

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted on condition that they were completed by the Secretariat.

1. WORK OF THE STUDY GROUP

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

13. Mr. FORTEAU said that it would be useful to specify for what purpose the arbitrators and counsel in investment cases involving most-favoured-nation clauses had been identified.

14. Mr. McRAE (Chairperson of the Study Group) said that he would submit a text to that effect to the Secretariat.

Paragraph 8 was adopted, subject to the amendment to be submitted by the Chairperson of the Study Group.

Paragraphs 9 to 18

Paragraphs 9 to 18 were adopted.

³⁷⁶ Yearbook ... 2010, vol. II (Part One), document A/CN.4/630.

Paragraph 19

15. Mr. FORTEAU said that at the end of the French version of paragraph 19, the words “*exceptions de politique publique*” should be replaced with “*exceptions d’ordre public*”, and the quotation marks should be deleted.

Paragraph 19, as amended in the French version, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Paragraph 22

16. Mr. NOLTE said that the word “case” at the end of the first sentence should be replaced with “treaty”.

Paragraph 22, as amended, was adopted.

Paragraph 23

17. Mr. NOLTE said that in the fourth line, the reference should be to articles 31, 32 and 33 of the 1969 Vienna Convention, since article 33 also contained an important principle of treaty interpretation.

18. Mr. FORTEAU said that, as in paragraph 19, the words “*exceptions de politique publique*” in the penultimate line of the French version should be replaced with “*exceptions d’ordre public*”, and the quotation marks should be deleted.

Paragraph 23, as amended, was adopted.

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

Section B, as amended, was adopted.

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

Chapter VII. Provisional application of treaties (A/CN.4/L.805)

19. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.805.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

Paragraph 4 was adopted subject to drafting changes.

REPORT OF THE SPECIAL RAPPORTEUR OF THE INFORMAL CONSULTATIONS HELD ON THE TOPIC

Paragraph 5

20. The CHAIRPERSON said that, in the French version, the word “*informelles*” should be replaced with “*officieuses*” in the title and in the body of the paragraph.

Paragraph 5, as amended in the French version, was adopted.

Paragraphs 6 to 9

Paragraphs 6 to 9 were adopted.

Paragraph 10

21. Sir Michael WOOD said that in actual fact, paragraph 10 dealt with two separate matters, because the first sentence was a statement about the internal practice of States, namely their constitutional and legal provisions concerning provisional application of treaties, whereas the second sentence suggested that it would be useful to compile State practice in the sense of examples of provisional application clauses in treaties. He therefore proposed to insert, in the first sentence, the word “internal” before “position of States” and to make a new paragraph with the second sentence, which would read as follows: “It was also suggested that having examples of provisional application clauses in treaties would be useful for the work of the Commission.”

22. Mr. NOLTE suggested the deletion of the word “simply”.

Paragraph 10, as amended, was adopted, on the understanding that it would be followed by a paragraph 10 bis, as agreed.

Paragraphs 11 to 15

Paragraphs 11 to 15 were adopted.

Section B, as amended, was adopted.

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

Chapter XII. Other decisions and conclusions of the Commission (A/CN.4/L.811)

23. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.811.

J. International Law Seminar (A/CN.4/L.811)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

Paragraph 11 was adopted with a minor drafting change.

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

Section J, as amended, was adopted.

The meeting rose at 4.15 p.m.

3158th MEETING

Friday, 3 August 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

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

Draft report of the International Law Commission on the work of its sixty-fourth session (concluded)

Chapter VIII. Formation and evidence of customary international law (A/CN.4/L.806)

1. The Chairperson invited the Commission to consider chapter VIII of its draft report as contained in document A/CN.4/L.806.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPporteur OF HIS NOTE

Paragraphs 5 to 13

Paragraphs 5 to 13 were adopted.

2. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 14 to 17

Paragraphs 14 to 17 were adopted.

(b) *Scope of the topic and use of terms*

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

2. Mr. NOLTE proposed to delete the word “essential” from the last sentence, as the sentence was more coherent without it.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

(c) *Methodology*

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

3. The CHAIRPERSON said that the word “the” should be inserted before “need” in the first sentence.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

(d) *Points to be covered*

Paragraphs 29 to 33

Paragraphs 29 to 33 were adopted.

Paragraph 34

4. Mr. FORTEAU proposed to delete the phrase “in which custom was purportedly formed” at the end of the last sentence, given that it added nothing and was potentially confusing.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

(e) *Final outcome of the Commission’s work on the topic*

Paragraph 36

Paragraph 36 was adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPporteur

Paragraphs 37 to 40

Paragraphs 37 to 40 were adopted.

Paragraph 41

5. Mr. NOLTE said that the second sentence seemed to suggest that the Special Rapporteur was drawing a distinction between formation and evidence, whereas it should be made clear that that was not the case. He found the expression “information that could be used as the raw material for that purpose” to be somewhat obscure and proposed that it should be replaced with “information that could explain the formation of customary international law”.