

Document:-
A/CN.4/3284

Summary record of the 3284th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2015, vol. I

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(<http://legal.un.org/ilc/>)*

national legal systems". As far as he knew, murder was defined as a crime in all countries, thus the current wording might seem a little condescending.

67. Ms. ESCOBAR HERNÁNDEZ said that although replacing the expression "Such measures" with "Certain measures" would go some way to meeting her concern, she remained sceptical about the final part of the sentence which seemed to contradict point (1) of the paragraph, according to which the obligation would usually oblige the State at least to adopt national laws and policies as necessary. She would prefer simpler wording to be used, such as "It is possible that some such measures are already in place in most States", and for the final part of the sentence to be deleted so as to avoid any ambiguity.

68. Mr. NOLTE proposed that the adoption of the paragraph be deferred until the next meeting and that the Commission continue its consideration of the rest of the text.

That proposal was adopted.

Paragraph (18)

Paragraph (18) was adopted.

Paragraph (19)

69. Mr. PARK, supported by Ms. ESCOBAR HERNÁNDEZ, stressed that it was important to distinguish between intergovernmental and non-governmental organizations, and proposed that, in the first sentence, the adjective "intergovernmental" be added after the word "organizations", and that the words "International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies" be transposed to paragraph (20), which dealt with NGOs.

70. Ms. JACOBSSON recalled that ICRC was not an NGO and that the Commission had already discussed the question of its status and had been careful not to label it as such in its previous work. States had an obligation to cooperate with ICRC under international humanitarian law. The situation was different with regard to the International Federation of Red Cross and Red Crescent Societies, which was a different entity.

71. The CHAIRPERSON suggested the following wording: "such as the United Nations and other entities like the International Committee of the Red Cross".

72. Mr. MURPHY (Special Rapporteur) said that he thought he had avoided reopening the debate on the status of ICRC by using the general term "organizations" and by referring later, in paragraph (20), to the three levels of existing cooperation: cooperation with other States, cooperation with intergovernmental organizations and cooperation with NGOs.

73. Mr. CAFLISCH said that he shared Ms. Jacobson's view and saw no reason to change the wording of the paragraph.

The meeting rose at 6.05 p.m.

3284th MEETING

Tuesday, 4 August 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kitchaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*concluded*)* (A/CN.4/678, Part II, sect. D, A/CN.4/686, A/CN.4/L.865)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles on immunity of State officials from foreign criminal jurisdiction, as adopted by the Drafting Committee, and as contained in document A/CN.4/L.865, which read:

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Draft article 2. Definitions

For the purposes of the present draft articles:

...

(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Draft article 6. Scope of immunity ratione materiae

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

2. The Drafting Committee had devoted three meetings to its consideration of the draft articles on the topic of immunity of State officials from foreign criminal jurisdiction. It had examined the two draft articles initially proposed by the Special Rapporteur in her fourth report (A/CN.4/686), together with a number of suggested reformulations presented to the Drafting Committee by the Special Rapporteur in response to suggestions made or concerns raised during the debate in plenary session.

* Resumed from the 3278th meeting.

At the current session, the Drafting Committee had provisionally adopted draft article 2 (f), which defined the expression “act performed in an official capacity”, and draft article 6, which delimited the scope of immunity *ratione materiae*.

3. Since the Drafting Committee had worked in English, French and Spanish, the official text of the draft articles referred to the Drafting Committee had been provisionally adopted in those languages.

4. Draft article 2 (e) contained a definition of the term “State official” that the Commission had adopted at its sixty-sixth session.³²⁶ In view of the adoption of that definition and of draft article 5,³²⁷ which provided that State officials acting as such enjoyed immunity *ratione materiae*, doubts had been expressed during the debate in plenary about whether it was in fact necessary to define the expression “act performed in an official capacity”. The Drafting Committee had decided that it would be useful to do so, given the centrality of the concept in the regime of immunity *ratione materiae*, and had set out the definition of “act performed in an official capacity” in draft article 2 (f).

5. The Drafting Committee had preferred the word “act” to the word “conduct”, since it was regarded as not being overly restrictive and as being consistent with the Commission’s previous work on the topic. Paragraph (5) of the commentary to draft article 4, provisionally adopted by the Commission at its sixty-fifth session,³²⁸ provided a detailed explanation of the Commission’s decision to use the term “act” in the context of the present topic. The Drafting Committee had considered it appropriate to refer to acts “performed by a State official”, which limited to State officials the range of persons who enjoyed functional immunity and which created a logical continuity with the definition of “State official” contained in draft article 2 (e).

6. As originally proposed by the Special Rapporteur, draft article 2 (f) enunciated three characteristics of an act performed in an official capacity, namely, the attribution of the act to the State, the exercise of elements of the governmental authority by the State official and the link between the act and the criminal conduct at issue. An extensive debate had taken place in the Drafting Committee with regard to the second characteristic. In her fourth report, the Special Rapporteur had originally proposed that reference should be made to a State official “exercising elements of the governmental authority”. That language had been modelled on that used in chapter II of the draft articles on the responsibility of States for internationally wrongful acts;³²⁹ however, some Commission members had noted in the plenary debate that it was not necessarily the most appropriate language in the context of the current topic. After examining other proposals, including the terms “governmental authority” and “sovereign authority”,

which were ultimately considered to be too narrow, the Drafting Committee had decided to use the expression “State authority”. It was not overly restrictive and was to be understood as covering any individual “who represents the State or who exercises State functions”, as enunciated in draft article 2 (e). The term “authority” had been chosen instead of “function” in order to avoid a debate on whether the commission of a crime could be considered a State function. The choice of “State authority” had not been unanimous, and according to one view expressed in the Drafting Committee, it would have been preferable to refer to “State functions”, which would have emphasized the concept of functions from the outset, thereby underscoring the notion of functional immunities and more closely mirroring the text of draft article 2 (e). The Drafting Committee had decided to proceed with the adoption of draft article 2 (f) on the understanding that this view would be reflected in the commentary.

7. The Drafting Committee had further decided to delete from the definition of “act performed in an official capacity” the reference to its criminal nature. Despite the importance of that aspect in the context of the topic, it was regarded as unnecessary to the definition and as potentially confusing, since it could be construed erroneously to mean that any official act was, by its nature, a criminal act. The reference had been deleted on the understanding that it would be explained in the commentary with an indication to the effect that the criminal nature of an act did not, in principle, disqualify it as an official act.

8. As had been proposed by the Special Rapporteur, the expression “in the exercise of” had been retained. It was considered to be a crucial part of the definition of “act performed in an official capacity”, inasmuch as it emphasized that to be qualified as such, an act not only had to be committed by a State official, but also had to be performed in the exercise of State authority.

9. Draft article 6 was entitled “Scope of immunity *ratione materiae*”, as had originally been proposed by the Special Rapporteur. Its purpose was to set out the material and temporal elements of immunity *ratione materiae*. The Drafting Committee had reworked its structure by reversing the order of paragraphs 1 and 2, so as to emphasize the functional nature of immunity *ratione materiae* and the fact that it depended on the nature of the act performed before addressing its temporal scope. Paragraph 3 dealt with the situation of individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, but it dealt with that situation in the specific context of immunity *ratione materiae*.

10. Paragraph 1, as provisionally adopted by the Drafting Committee, made a clear and direct statement about the material scope of immunity *ratione materiae*, which was applicable only with respect to acts performed in an official capacity. It allowed for a distinction to be drawn between the types of acts covered by functional immunity and those not covered by it, and complemented draft article 5, which identified the category of persons who could enjoy such immunity. Its clarity was further enhanced by the definition of “act performed in an official capacity” which was contained in draft article 2 (f). The wording agreed by the Drafting Committee had circumvented the use of the

³²⁶ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 143.

³²⁷ *Ibid.*, p. 146.

³²⁸ *Yearbook ... 2013*, vol. II (Part Two), p. 49.

³²⁹ The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

originally proposed phrase “term of office”, which was not applicable to all State officials and was therefore misleading. The current formulation obviated the need to refer to the nature of the functions or office of the State officials concerned. It had been provisionally adopted on the understanding that, at a later stage, it might prove necessary to more closely align draft article 5, which referred to State officials “acting as such”, and draft article 6, paragraph 1, which did not use that expression but referred to acts performed in an official capacity.

11. An important feature captured by paragraph 2 was that, unlike immunity *ratione personae*, immunity *ratione materiae* was not characterized by a strict temporal scope. Its wording had been modelled on the text of relevant international instruments, in particular article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations and article IV, section 12, of the 1946 Convention on the Privileges and Immunities of the United Nations. The term “continues to subsist” sought to describe the functioning of immunity *ratione materiae* over time. State officials could enjoy such immunity as from a certain date during the period in which they exercised their functions and after the end of those functions, because immunity *ratione materiae* related to the act, rather than to the person, in contrast to immunity *ratione personae*. The words “have ceased to be State officials” were also modelled on the same international instruments. Lastly, the Drafting Committee had decided to use the word “individuals” in order to reflect the definition of “State officials” contained in draft article 2 (e).

12. Paragraph 3 referred to the specific situation of immunity that was applicable to individuals who had enjoyed immunity *ratione personae*, as defined in draft article 4, after the end of their term of office. Since paragraph 3 appeared to apply the two previous provisions to that specific situation and draft article 4, paragraph 3, already referred to the relationship between immunity *ratione personae* and immunity *ratione materiae*, although only in the form of a “without prejudice” clause, the question had arisen whether the substance of paragraph 3 should be included in the text of the draft article or explained in the corresponding commentary. Noting that the situation it dealt with was not entirely similar to those covered in paragraphs 1 and 2, and in view of its practical significance, the Drafting Committee had decided that it would be preferable to retain the provision in the draft article itself.

13. The text of paragraph 3, as originally proposed by the Special Rapporteur, had also given rise to a discussion within the Drafting Committee regarding the relationship between immunity *ratione personae* and immunity *ratione materiae*. Some members had pointed out that persons enjoying immunity *ratione personae* could also enjoy immunity *ratione materiae* during their term of office, and that, in some national legal systems, they could have an interest in invoking immunity *ratione materiae* rather than immunity *ratione personae*. The Special Rapporteur and other members had pointed out that the commentaries already adopted by the Commission on the topic expressed the view that immunity *ratione materiae*, *stricto sensu*, applied only after the end of the term of office of persons enjoying immunity *ratione personae*. Putting

aside that interesting theoretical question, there had been general agreement within the Drafting Committee that the purpose of paragraph 3 was to clarify, in operational terms, the regime applicable to individuals who enjoyed immunity *ratione personae* after the end of their term of office. Again, the wording used in the Vienna Convention on Diplomatic Relations and the Convention on the Privileges and Immunities of the United Nations was considered particularly useful for describing that regime. Like the relevant provisions of those conventions, the text of paragraph 3 did not qualify the immunity enjoyed after an official’s term of office. As indicated by the Commission in its commentary to draft article 4, immunity *ratione personae* applied equally to official acts and private acts, while immunity *ratione materiae* covered only acts performed in an official capacity. The continuance of immunity after the term of office, which was the object of draft article 6, paragraph 3, was, by definition, relevant only for acts performed in an official capacity.

Provisional application of treaties (concluded)*
(A/CN.4/678, Part II, sect. G, A/CN.4/676, A/CN.4/687)

[Agenda item 6]

INTERIM REPORT OF THE DRAFTING COMMITTEE

14. Mr. FORTEAU (Chairperson of the Drafting Committee) said that the Drafting Committee had held three meetings on the topic of the provisional application of treaties. However, owing to a lack of time, it had been unable to conclude its consideration of the six draft guidelines referred to it by the Commission. He would therefore provide an interim report on the progress made in the Drafting Committee thus far. The Drafting Committee would revert to its consideration of the draft guidelines at the Commission’s sixty-eighth session.

15. In addition to the draft guidelines proposed by the Special Rapporteur in his third report (A/CN.4/687), the Drafting Committee had been presented with a new set of revised draft guidelines, into which the Special Rapporteur had incorporated the various views expressed and drafting suggestions made during the plenary debate. It had also been presented with a proposal by the Special Rapporteur for some additional draft guidelines, which, following suggestions made in the plenary debate, could usefully supplement those he had proposed in his third report. The Drafting Committee had carried out its work on the basis of those new proposals and, in the time allocated to it, had been able to adopt provisionally three draft guidelines. For information purposes only, he presented the text and titles of the three draft guidelines, which read:

Draft guideline 1. Scope

The present draft guidelines concern the provisional application of treaties.

Draft guideline 2. Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

* Resumed from the 3279th meeting.

Draft guideline 3. General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.

16. The Drafting Committee had first considered and adopted draft guideline 3, which was based on initial draft guideline 1, as proposed by the Special Rapporteur in his third report. The Committee had considered that, in view of the introductory character of that draft guideline, it would be useful to supplement it with two draft guidelines, entitled “Scope” and “Purpose”, respectively, in keeping with the Commission’s usual practice. The latter had been formulated on the basis of suggestions made during the plenary debate and as a necessary corollary to the Special Rapporteur’s proposal for a provision that laid down the general rule on the provisional application of treaties. The Drafting Committee had subsequently rearranged the order of the draft guidelines, so that they dealt sequentially with the scope, purpose and general rule applicable to the project, thus providing an appropriate orientation to the project and mirroring the Special Rapporteur’s original draft guideline 1.

17. A proposal had been made during the plenary debate that the Commission adopt draft conclusions rather than draft guidelines, in keeping with an approach taken in relation to other topics under consideration by the Commission. After consideration, the Drafting Committee had decided, on a provisional basis, to continue to develop draft guidelines. It was felt that the purpose of the exercise, in particular as described in the syllabus annexed to the Commission’s report on the work of its sixty-third session,³³⁰ was to provide guidance for States seeking to apply treaties provisionally, and that the development of a text in the form of draft guidelines was more conducive to that purpose.

18. Two issues had been discussed in relation to draft guideline 1, which was entitled “Scope”. First, there was the question of what was the most appropriate verb to use in the draft guideline. After rejecting the verbs “address” and “applies to”, the Drafting Committee had ultimately settled on the verb “concern”, which it regarded as more suitable for draft guidelines that purported merely to provide guidance to States.

19. The second issue had to do with whether to add the qualifying phrase “by States and international organizations” to the end of the sentence. It had given rise to a lengthy debate on the advisability of including international organizations within the scope of the project at the current stage. In his summing up of the debate, the Special Rapporteur had indicated his intention to deal with provisional application by States first, in line with some wishes expressed in the Commission, and to return to provisional application by international organizations at a later stage. The Drafting Committee had decided that the proposed qualifying phrase was not necessary at the current stage, in particular for a provision on scope, which was meant to cover the entire set of draft guidelines. Instead, that issue would best be dealt with in the commentary, with the specification that, notwithstanding the intention of

the Special Rapporteur to focus on States first, treaties, such as the United Nations Convention on the Law of the Sea, that included international organizations among their participants, would not, as a result, automatically be excluded from the scope of application of the draft guidelines. The same applied to the practice of international organizations, such as the European Union, in relation to the provisional application of treaties, as mentioned in the annex to the Special Rapporteur’s third report.

20. With regard to draft guideline 2, the Drafting Committee had discussed the substance of the text on the basis of a previous proposal by the Special Rapporteur for a second paragraph in the provision on scope. While consideration had been given to including that provision in draft guideline 3, it was deemed preferable to present it as a separate draft guideline entitled “Purpose”, in line with the Commission’s usual practice.

21. The initial version of draft guideline 2 had been modelled on article 25 of the 1969 Vienna Convention, which established the general rule on the provisional application of treaties. Although there had been no disagreement on the importance of that article, various criticisms had been made concerning the initially proposed text. They related to its lack of precision with regard to the provisional application of treaties to which international organizations were parties and the fact that rules of international law, such as those of customary international law, might be applicable. In addition, it was pointed out that article 25 did not necessarily reflect all aspects of current practice on the provisional application of treaties.

22. Draft guideline 2 had been reformulated along the lines of the “purpose” provisions that the Commission included in many of its texts, and a reference made in an earlier version to “orientation” had been replaced with the word “guidance”. Likewise, the words “legal regime of” had been replaced with “the law and practice on”. The last clause had also been amended to read “and other rules of international law”, which specifically envisaged the applicability of the rules of customary international law. Draft guideline 2 stated that the purpose of the draft guidelines was to provide guidance “on the basis of” article 25 of the 1969 Vienna Convention and other rules of international law, in order to emphasize that article 25 was the point of departure for the Commission’s work on the topic.

23. Draft guideline 3 (General rule) stated the general rule on the provisional application of treaties. The Drafting Committee had worked on the basis of the revised proposal of the Special Rapporteur, which took into account suggestions made in the plenary debate. In preparing the draft guideline, the Committee had sought to track the language of article 25 of the 1969 Vienna Convention as closely as possible. It had considered that the reference in that article to “pending its entry into force” was to be understood in accordance with article 24 of the Convention, which covered both the entry into force of a treaty itself and the entry into force of that treaty for each State that had consented to be bound thereby. After exploring various drafting options, the Committee had decided provisionally to retain the general formulation “entry into force” and to consider other solutions in the context of a possible future guideline on the matter.

³³⁰ See *Yearbook ... 2011*, vol. II (Part Two), annex III, pp. 198 *et seq.*

24. The opening and final clauses of the draft guideline had been the subject of significant debate. The issue had been how best to take account of both those States that could apply a treaty provisionally and those States whose agreement was required in order for provisional application to take place. The opening clause, which asserted that a treaty or a part of the treaty might be provisionally applied, tracked the formulation of the *chapeau* of paragraph 1 of article 25, but did not specify which States could apply the treaty provisionally. The initial revised proposal of the Special Rapporteur had referred to a State provisionally applying a treaty or a part thereof, without specifying the relationship of the State to the treaty. The Drafting Committee had held an extensive debate as to whether such a reference needed to be qualified by a reference to a more specific group of States, such as the negotiating States, or whether, reflecting contemporary practice, the draft guideline should recognize the possibility of provisional application by States that were not negotiating States.

25. A similar issue had arisen with respect to the final clause, which in the revised proposal of the Special Rapporteur made reference to the agreement of States. The question again had been whether to track the position taken in article 25, which limited the agreement to that of negotiating States, or whether to take into account contemporary practice, for example cases of provisional application being agreed to either by only some negotiating States or by States that had not been negotiating States, but had subsequently acceded to the treaty. The Drafting Committee had been concerned that a broad formulation could allow for an interpretation that a third State without any connection with the treaty could apply it provisionally.

26. The solution found by the Drafting Committee was to adopt a formulation, for both the opening and concluding clauses, that did not seek to specify the possible constellation of States that might be involved. The provision had been drafted in the passive voice and simply restated the basic rule, in the case of the first clause, that a treaty or a part thereof might be provisionally applied and, in the final clause, that, in addition to a situation where a treaty itself expressly provided for provisional application, such provisional application might also take place if it had been so agreed in some other manner. The wording had been adopted on the understanding that the commentary would discuss the fact that contemporary practice had revealed the provisional application of treaties by a variety of groups of States, perhaps in a manner not entirely envisaged by the drafters of article 25, which made it impossible to take a definitive position in the text of the draft guideline itself.

27. The Drafting Committee had considered a proposal for a second paragraph for the draft guideline, which made reference to internal law by emphasizing its potential relevance in cases where the treaty clause specifically referred to, or conditioned the scope or content of provisional application upon, the requirements of internal law. The Committee had taken the view that the matter would be better dealt with in one of the subsequent draft guidelines proposed by the Special Rapporteur, possibly as a stand-alone draft guideline.

28. The English and French versions of the statement of the Chairperson of the Drafting Committee would be placed on the Commission's website in due course.³³¹

29. Mr. CANDIOTI said that the relevant chapter of the Commission's annual report should indicate the placement on the website of the statement.

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

CHAPTER VII. Crimes against humanity (concluded) (A/CN.4/L.860 and Add.1)

30. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VII contained in document A/CN.4/L.860/Add.1.

C. Text of the draft articles on crimes against humanity provisionally adopted by the Commission at its sixty-seventh session (concluded)

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO, AS PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SEVENTH SESSION (concluded)

Commentary to draft article 4 (Obligation of prevention) (concluded)

Paragraph (17) (concluded)

31. Mr. MURPHY (Special Rapporteur), recalling the concerns that had been raised the previous day about the third sentence, said that, after consultations with other members, he proposed that it be replaced with the following two sentences: "Some measures, such as training programmes, may already exist in the State to help prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obligated to supplement those measures, as necessary, specifically to prevent crimes against humanity." He further recalled that Mr. Forteau had proposed that, at the end of the paragraph, the phrase "to minimize the likelihood of the proscribed act being committed" be replaced with the words "in order to prevent as far as possible crimes against humanity". Lastly, he proposed that the word "Party" be deleted in the final sentence.

Paragraph (17) was adopted with those amendments.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Paragraph (21)

32. Ms. ESCOBAR HERNÁNDEZ said that, in the Spanish text, the final sentence should be recast to read: *Se ha empleado la expresión "tales como" para destacar que los ejemplos citados no pretenden ser exhaustivos.*

Paragraph (21) was adopted with that amendment to the Spanish text.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were adopted.

³³¹ See the Commission's website, *Analytical Guide*, at: <https://legal.un.org/ilc/guide/gfra.shtml>.

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

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

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

CHAPTER VIII. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.861 and Add.1)

33. The CHAIRPERSON invited the Commission to consider chapter VIII of its draft report, beginning with the portion of the chapter contained in document A/CN.4/L.861.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 6

34. Mr. NOLTE (Special Rapporteur) proposed that the following phrase be added at the end of the first sentence: “and which proposed one draft conclusion (draft conclusion 11) on the issue”. He further proposed that, in the final sentence, after the words “under article 31, paragraph 3 (a)”, the words “and (b), as well as article 32,” be inserted.

Paragraph 6 was adopted with those amendments.

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted, subject to their completion by the Secretariat.

Section B, as amended, was adopted.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT CONCLUSIONS

Paragraph 11

35. Mr. McRAE said that, in the title of subsection 1 and in the first sentence of paragraph 11, the two instances of the word “articles” should be replaced with “conclusions”.

The title of subsection 1 and paragraph 11, as amended, were adopted.

36. The CHAIRPERSON invited the Commission to consider the portion of chapter VIII contained in document A/CN.4/L.861/Add.1.

2. TEXT OF THE DRAFT CONCLUSION AND COMMENTARY THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SEVENTH SESSION

Commentary to draft conclusion 11 (Constituent instruments of international organizations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

37. Mr. McRAE said that he was concerned about the view expressed as to whether the substantive articles of a treaty that created an organization were also to be interpreted as part of the constituent instrument of that organization, which did not fully reflect the position of the Commission as expressed in the plenary debate. He would appreciate clarification on the particular relevance in that regard of the twelfth report on reservations to treaties,³³² cited in the first footnote to the paragraph, since he had been unable to locate paragraphs 255 to 257. The penultimate sentence of paragraph (3) suggested, without sufficient substantiation, that the substantive rules of a treaty that contained a constituent instrument ought to be interpreted in exactly the same way as the rules that were part of the constituent instrument that created the institution in question. Moreover, it did not follow from the sentence that preceded it. Accordingly, the sentence should be either deleted or amended to read: “A constituent instrument of an international organization may encompass both institutional and substantive rules.” That formulation was descriptively accurate and avoided the suggestion that Article 2, paragraph 4, of the Charter of the United Nations should be interpreted as if it were part of a constituent instrument and hence interpreted differently from other rules of international law.

38. Mr. NOLTE (Special Rapporteur) explained that the first footnote to the paragraph referred to the preliminary version of the twelfth report on reservations to treaties (A/CN.4/584 and Corr.1) to be found on the Official Document System website.³³³ In the corrected version available from the Commission’s website, the relevant paragraph numbers were 75 to 77. In that report, the Special Rapporteur on reservations to treaties had indeed dealt with the issue raised by Mr. McRae, and the views he had expressed in the first two sentences of paragraph 75 and the first two sentences of paragraph 77 seemed to support the proposition contained in draft conclusion 11. During the debate in the Drafting Committee, he had been asked to substantiate the content of the commentary and that was the purpose of that footnote, which he undertook to correct. He had tried to take account of the possibility that some constituent instruments, such as the Marrakesh Agreement Establishing the World Trade Organization, did not encompass the whole range of substantive obligations of the organization concerned.

39. Mr. FORTEAU said that he shared Mr. McRae’s concerns. The reference to article II of the Marrakesh Agreement Establishing the World Trade Organization was confusing because that article did not mention interpretation. Generally speaking, the reasoning of paragraph (3) was hard to follow, especially as draft conclusion 11 drew no inferences with regard to the difference between a

³³² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584.

³³³ <https://documents.un.org/>.

substantive and an institutional rule. For that reason, only the first sentence of paragraph (3) should be retained.

40. Mr. MURPHY said that it was unclear from the Special Rapporteur's explanation whether the position expressed by the Special Rapporteur on reservations to treaties in the paragraphs which had been cited had been fully endorsed by the Commission. He, too, had been puzzled by the penultimate sentence of paragraph (3), because it seemed to be merely repeating what had already been said in the second sentence; if that were the case, it could be deleted. If, on the other hand, the purpose of the sentence was to indicate that some organizations were competent to act with regard to both institutional and substantive rules, that should be stated more clearly, although it was debatable whether that opinion was factually correct. If that sentence were altered or deleted, the final sentence would have to be amended as well.

41. Sir Michael WOOD said he agreed with the previous speakers that it would be wise to end paragraph (3) after the first sentence. Article 20, paragraph 3, of the 1969 Vienna Convention dealt with the different context of reservations. If the first footnote to the paragraph were to be retained, it should refer to the relevant draft guideline and commentary thereto. The fourth sentence was rather broad, general and obscure and should therefore be deleted. The quotation of article II, paragraph 1, of the Marrakesh Agreement Establishing the World Trade Organization did not seem to be particularly relevant, as it did not refer to interpretation. The example of Article 2, paragraph 4, of the Charter of the United Nations which Mr. McRae had mentioned was particularly telling. All in all, he was in favour of Mr. Forteau's suggestion.

42. Mr. NOLTE (Special Rapporteur) said that the paragraph did not concern interpretation as such; it explained what was meant by "constituent instrument". The Commission had dealt with that issue in the context of article 20, paragraph 3, of the 1969 Vienna Convention. Although the context had been different, the concept was the same. He saw no reason why the term "constituent instrument" should have different meanings in articles 5 and 20, paragraph 3, of the 1969 Vienna Convention. Much depended on that meaning. The second footnote to the paragraph contained a reference to guideline 2.8.8 of the Guide to Practice on Reservations to Treaties,³³⁴ which was consistent with the views expressed in the Special Rapporteur's twelfth report on reservations to treaties. While he did not wish to delete the essence of paragraph (3), he was amenable to amending the sixth sentence to read: "A constituent instrument of an international organization may encompass both institutional and substantive rules which form part of it." He was, however, unconvinced by radical proposals not to define the basic term which formed the subject of the draft conclusion.

43. The CHAIRPERSON suggested that paragraph (3) be left in abeyance pending consultations between the Special Rapporteur and the members who had proposed amendments.

³³⁴ General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq.*

Paragraph (4)

44. Sir Michael WOOD suggested that the word "also" be deleted, that the phrase "without prejudice to any relevant rules of the organization" be inserted after "international organizations" and that the word "affirms" be altered to "follows".

45. Mr. NOLTE (Special Rapporteur) pointed out that draft conclusion 11, paragraph 4, did contain the phrase "without prejudice to any relevant rules of the organization". He hoped that Sir Michael would not insist on its inclusion in every paragraph of the commentary which referred to constituent instruments of international organizations. He was not, however, opposed to its inclusion in paragraph (4).

Paragraph (4), as amended, was adopted.

Paragraph (5)

46. Mr. FORTEAU drew attention to a mistake in the date cited in the last footnote to the paragraph with reference to the Statute of the International Court of Justice. In addition, it would be wise to use the exact wording of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

47. Mr. NOLTE (Special Rapporteur) agreed with Mr. Forteau's proposal to reword the footnote in question.

With that amendment to the last footnote to the paragraph, paragraph (5) was adopted.

Paragraph (6)

48. Ms. ESCOBAR HERNÁNDEZ drew attention to a factual error; the first sentence of that paragraph should refer to articles 31 and 32 of the 1969 Vienna Convention.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (11)

Paragraphs (7) to (11) were adopted.

Paragraphs (12) and (13)

49. Ms. ESCOBAR HERNÁNDEZ said that the phrase in brackets in the sixth sentence of paragraph (12), after the words "European Council", should be deleted. It added nothing and might even be misleading, since the composition of the European Council had been different in 1995. She asked the Special Rapporteur to clarify the term "plenary organ of the European Union" in the last sentence. Did he mean the Council of the European Union or the European Council? It would be advisable to end paragraph (12) after the sixth sentence, in order to avoid confusion. If the Special Rapporteur wished to advert to that particular framework for decision-taking, the example of the European Union, duly amended, would be better placed in paragraph (13).

50. Mr. TLADI, referring to the example of the European Union, asked whether any courts had regarded the decision in question as a subsequent agreement. If that were not the case, in the last sentence, the phrase "in the literature" should be inserted after the words "has been regarded".

51. Mr. NOLTE (Special Rapporteur) said that, as Governments were represented in both the Council of the European Union and the European Council, albeit on different levels, it might be helpful to non-European readers to spell out the membership of the European Council. As it was clear from the context that the Governments of the 15 member States had taken the decision concerned, he would delete the phrase in brackets. He was also prepared to delete the phrase “the plenary organ” and to replace it with “an organ”, without specifying whether the organ in question was the Council of the European Union or the European Council. He had no objection to Mr. Tladi’s proposal.

52. Ms. ESCOBAR HERNÁNDEZ agreed with the Special Rapporteur that it was necessary to distinguish between the Council of the European Union and the European Council. It was true that on some occasions the European Council had adopted decisions containing a subsequent agreement. In most cases, however, such decisions had been adopted not by the European Council but by the Council of the European Union. That was true of the decisions which had been reviewed by the Court of Justice of the European Union in the cases cited in the second and third footnotes to paragraph (13).

53. Ms. JACOBSSON agreed with the Special Rapporteur that it was necessary to clarify the composition of the European Council.

54. Sir Michael WOOD said that he doubted whether it was wise to include paragraphs about acts of the European Union, as it did not behave like an ordinary international organization, particularly with regard to interpretation. The phrase in brackets should be deleted in the sixth sentence of paragraph (12), because it was confusing in that it did not reflect the composition of the European Council in 1995. In the final sentence of paragraph (12), it would be wise to delete the first part preceding the comma, since other decisions of the European Council were not generally regarded as subsequent agreements. If that section of the paragraph were retained it should simply read: “This decision has been regarded in the literature as a subsequent agreement under article 31, paragraph 3 (a).” Paragraph (13) was too theoretical for the purposes of the commentary to draft conclusion 11 and should therefore be deleted.

55. Mr. ŠTURMA agreed with the Special Rapporteur that the practice of the European Union should be mentioned. It might be useful to explain what the European Council was and to distinguish it from the Council of the European Union. For that reason, paragraph (12) should be retained, with some minor amendments. The reference to the case law of the Court of Justice of the European Union should not be removed from paragraph (13), since it seemed to support the Special Rapporteur’s argument that, in certain situations, members of the Council of the European Union acted in the capacity of representatives of member States and adopted acts which constituted subsequent agreements. The reference to those leading cases of the Court of Justice of the European Union should therefore be maintained in the footnotes.

56. Mr. PETRIČ urged the Commission to be less Eurocentric.

57. Mr. NOLTE (Special Rapporteur) said that, while it was not the task of the Commission to discuss the intricacies of the European Union, it was useful to clarify the distinction between an act within the organization and an act of Governments acting as such. That was the purpose of paragraph (12). Its aim was not to turn a special feature of the European Union into an element of general international law.

*The meeting was suspended at 12 p.m.
and resumed at 12.25 p.m.*

Paragraphs (12) and (13) (*concluded*)

58. Mr. NOLTE (Special Rapporteur) said that in the light of informal consultations held with Ms. Escobar Hernández and Mr. Forteau, it was proposed that the first five sentences of paragraph (12) be retained. The remainder of the paragraph should be amended to read:

“In 1995,

“[t]he Governments of the 15 Member States [of the European Union] have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant [provisions of the Treaty on European Union],”

“that is to say that:

“the name given to the European currency shall be Euro. ... The specific name Euro will be used instead of the generic term “ecu” used by the Treaty to refer to the European currency unit’.

“This decision of the Member States meeting within the European Council has been regarded as a subsequent agreement under article 31 (3) (a).”

59. In addition, and also in the light of the informal consultations held, the word “plenary” should be deleted before the word “organ” in the first sentence of paragraph (13).

60. Sir Michael WOOD proposed that, in the second sentence of paragraph (13), the expression “proceeded in the first place” be replaced with the words “initially proceeded” and that the word “Ultimately” beginning the third sentence be replaced with the word “Later”.

Paragraphs (12) and (13), as amended, were adopted.

Paragraph (14)

61. Sir Michael WOOD questioned the appropriateness of the expression “taken together” in the last sentence with reference to bilateral treaties and said that the sentence as a whole could be simplified. He proposed that it read: “They may, however, imply assertions concerning the proper interpretation of the constituent instrument itself, and may serve as supplementary means of interpretation under article 32.”

62. Mr. FORTEAU proposed the deletion of the adjective “proper” pertaining to interpretation.

Paragraph (14), as amended, was adopted.

Paragraph (15)

63. Mr. MURPHY said that since the paragraph dealt with the alternative ways in which subsequent agreements and subsequent practice might arise or be expressed, in the last sentence, the verb “reflects” should be replaced with “may reflect” to convey the idea that either one of those scenarios was possible. In addition, the word “themselves” in that sentence was superfluous and should be deleted.

64. Mr. TLADI said that it would be helpful to clarify the meaning of the terms “arise from” and “expressed in”. To that end, he proposed that a new sentence be inserted before the last sentence, based on the text of the report of the Drafting Committee. It would read: “‘Arise from’ is intended to encompass the generation and development of subsequent agreements and subsequent practice, while ‘expressed in’ is used in the sense of reflecting or articulating such agreements and practice.” In the last sentence, it was important to make it clear that the subsequent agreements or subsequent practice of the States parties related to the constituent instrument of the organization. He therefore proposed that the sentence read: “Either variant of the practice in an international organization may reflect subsequent agreements or subsequent practice by the States parties to the constituent instrument of the organization (see draft conclusion 4).”

65. Mr. FORTEAU said that, in line with a decision taken by the Drafting Committee, the words “by the States parties” should read “by States parties” in the last sentence.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Paragraph (19)

66. Mr. McRAE expressed concern about the footnote to the paragraph, since it raised the issue that had been discussed earlier in connection with paragraph (3), namely of the Commission taking a position on whether the substantive as well as the institutional provisions of an agreement were subject to special interpretation. Moreover, as currently worded, the footnote implied that the WTO Appellate Body had interpreted its constituent instrument, whereas the citation of the Appellate Body given in paragraph (18) referred to an interpretation or application of WTO law. He therefore proposed that the bulk of the footnote be deleted.

67. Mr. NOLTE (Special Rapporteur) proposed that paragraph (19) should be held in abeyance and discussed together with paragraph (3).

It was so decided.

Paragraph (20)

68. Mr. TLADI said that, since all the circumstances described in the first sentence and supported in the second footnote to the paragraph concerned decisions and acts adopted by consensus, an additional explanatory sentence should be inserted after the first sentence, which should

read: “These circumstances are generally limited to when such acts are done by consensus, as is discussed below.”

69. Sir Michael WOOD said that many of the writings listed in that footnote were quite controversial, and citing passages from them implied their endorsement by the Commission. He therefore proposed that the footnote, or at least the citations contained therein, be deleted.

70. Mr. KOLODKIN endorsed Sir Michael Wood’s comments.

71. Mr. NOLTE (Special Rapporteur) said that what the writers cited were saying was not very different from the conclusion of the International Court of Justice cited in the same paragraph. While he had no objection to Mr. Tladi’s proposal, he considered that it would fit better in the footnote itself, which he was reluctant to delete. Perhaps a qualifier could be added in the first sentence of the paragraph to the effect that not all writers held those views.

72. Mr. FORTEAU proposed that the first sentence should begin with the words “Some authors have considered” [*Certains auteurs ont estimé*], thereby avoiding the term “confirm”, which implied that the Commission endorsed the citations in question, and conveying the idea that only some writers were concerned.

73. Mr. PARK said that it might be helpful to draw on the wording used in the second sentence of paragraph 67 of the Special Rapporteur’s third report (A/CN.4/683), which read: “While authors have made this point explicitly, both for the United Nations General Assembly and for other plenary organs of international organizations, the International Court of Justice has taken resolutions of the General Assembly into account when interpreting provisions of the Charter of the United Nations.”

74. Mr. SABOIA, referring to the comments regarding the controversial nature of the writings in question, said that he had taken a closer look at some of their contents and they seemed perfectly reasonable. He therefore saw no need to delete the references thereto.

75. Mr. MURPHY said that, in terms of a hierarchy of sources, it seemed unusual to start the paragraph by referring first to writers and subsequently to the International Court of Justice and WTO. He therefore proposed that the paragraph begin with the phrase “International courts and tribunals, as well as some writers, have concluded”. He further proposed that the citations be deleted from the footnote, but that the references to the writers be retained and placed in the last footnote to the paragraph, with an appropriate transition phrase.

76. Mr. NOLTE (Special Rapporteur) said that while he was open to the idea of rearranging the elements in the paragraph in the order proposed by Mr. Murphy, he would prefer not to delete the citations from the footnote since they were quite explicit and, in his view, from the writings of mainstream writers. In the light of the number of different proposals made, it would seem more appropriate to discuss them in informal consultations. He therefore proposed that the paragraph be held in abeyance.

It was so decided.

Paragraph (21)

77. Mr. FORTEAU proposed that the expression “in order to be representative” be deleted since it could give rise to confusion.

78. Mr. MURPHY said that the basic idea that should be conveyed in the paragraph was that draft conclusion 11, paragraph 2, referred to the importance of the practice of an international organization as a whole for the purpose of subsequent agreements and subsequent practice. Yet, as currently worded, paragraph 2 focused more on the possibility of the practice of two or more organs being representative of the international organization. It was important to capture the idea that practice could arise from a plenary organ but that it could also be generated by two or more organs. He therefore proposed that the paragraph be split into two sentences; the first should end after “the practice of an organ of an international organization” and the second sentence should read: “The practice of an international organization”—and the phrase “in order to be representative” might be deleted as Mr. Forteau proposed—“can arise from the conduct of a plenary organ, but can also be generated by the joint conduct of two or more organs.”

79. Sir Michael WOOD said that, as he understood it, paragraph (21) was not about the practice of an international organization as a whole, but about the practice of more than one organ. The paragraph could be simplified along the lines proposed by Mr. Forteau and Mr. Murphy, but he did not consider it appropriate to refer to “joint conduct”. His preference would be to refer to the conduct of more than one organ; that conduct need not be joint but perhaps should be based on the same interpretation.

80. Mr. NOLTE (Special Rapporteur) said that the paragraph was based on the wording of the statement by the Chairperson of the Drafting Committee on the topic.³³⁵ Moreover, the practice of an international organization for the purpose of subsequent agreements and subsequent practice could arise from the practice of one or more organs, and the one organ in question need not necessarily be a plenary organ. A case in point was the 1989 advisory opinion of the International Court of Justice in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, which referred to the practice of the Secretary-General of the United Nations. The amendments proposed by Sir Michael and Mr. Murphy would alter the substance of the paragraph and be tantamount to saying that the practice of an international organization could only be the practice of a plenary organ or of two or more organs, which was considerably different from what was said in the report of the Chairperson of the Drafting Committee and relevant case law.

81. Mr. FORTEAU said that the paragraph reproduced almost verbatim the text of the statement by the Chairperson of the Drafting Committee on the topic, except for the expression “in order to be representative”.

82. Mr. NOLTE (Special Rapporteur) said that he supported the proposal to delete that expression.

83. Mr. MURPHY said that he failed to understand how the practice of the Secretary-General related to draft conclusion 11, paragraph 2, which referred to the practice of States parties in relation to the constituent instrument of an organization and not to the practice of the organization itself. In his view, the purpose of paragraph (21) was to explain that in draft conclusion 11, paragraph 2, reference was being made to the practice of an international organization rather than to an organ of that organization, because the State parties’ practice could arise from one or more organs. His intent was not to alter the substance of the text as originally drafted, but to make it clear that such practice could arise from a plenary organ as well as from one or more organs acting together.

84. Mr. NOLTE (Special Rapporteur) said he had not been suggesting that the practice of the Secretary-General in the case he had cited came under the scope of draft conclusion 11, paragraph 2, but that it could give rise to the practice of an organization. In that case, the Secretary-General had initiated a practice that had come to be accepted by the Member States without the involvement of the General Assembly or the Security Council. The basic thrust of paragraph (21) was that draft conclusion 11, paragraph 2, referred to the practice of an organization, or of one or more of its organs that might or might not reflect the practice of the States parties. He was willing to change the wording of paragraph (21), but not its basic thrust.

85. The CHAIRPERSON said that the Commission would continue its consideration of the paragraph at the next plenary meeting.

The meeting rose at 1 p.m.

3285th MEETING

Tuesday, 4 August 2015, at 3.05 p.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER VIII. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued)* (A/CN.4/L.861 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of document A/CN.4/L.861/Add.1, paragraph by paragraph, beginning with paragraphs

³³⁵ Mimeographed; available from the Commission’s website, *Analytical Guide*, at: <https://legal.un.org/ilc/guide/gfra.shtml>.