

Provisional

For participants only

22 September 2015

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International Law Commission

Sixty-seventh session (second part)

Provisional summary record of the 3290th meeting

Held at the Palais des Nations, Geneva, on Friday, 7 August 2015, at 10 a.m.

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Present:

Chairman: Mr. Singh
Members: Mr. Al-Marri
Mr. Caflisch
Mr. Candioti
Mr. Comissário Afonso
Mr. El-Murtadi
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

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

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

Mr. Llewellyn (Secretary to the Commission), announcing the results of consultations on the use of footnotes to refer to draft texts in the Commission's report, said that the Special Rapporteur on the identification of customary international law preferred that the draft conclusions as provisionally adopted by the Drafting Committee not be set out in a footnote; rather, the report would indicate that the relevant statement by the Chairman of the Drafting Committee and the documents containing the conclusions were to be found on the Commission's website. A link to the website would be provided in a footnote. The footnote would further indicate that it was anticipated that commentaries to the draft conclusions, together with the draft conclusions themselves, would be considered at the next session. Only the draft conclusions as originally submitted by the Special Rapporteur would be set out in a footnote in the report. The same practice would be followed in relation to the topic of provisional application of treaties. The Special Rapporteurs on the topics of protection of the environment in relation to armed conflicts and immunity of State officials from foreign criminal jurisdiction also wished the draft texts as originally submitted in their respective reports to be set out in footnotes. The corresponding texts as provisionally adopted by the Drafting Committee would be set out in footnotes; it would be made clear therein that those texts, together with the commentaries, would be considered by the Commission at its next session. The Planning Group would consider the entire question of footnotes and how to refer to draft texts in the Commission's report at the next session.

Chapter IX. Immunity of State officials from foreign criminal jurisdiction
(continued) (A/CN.4/L.863 and Add.1)

The Chairman invited the Commission to resume its consideration of the portion of chapter IX of its draft report contained in document A/CN.4/L.863.

Paragraph 23 (continued)

The Chairman recalled that the adoption of paragraph 23 had been deferred pending its redrafting. He invited the Special Rapporteur to read out the proposed new text.

Ms. Escobar Hernández (Special Rapporteur) said that, following consultations with Sir Michael Wood, she proposed amending paragraph 23 to read: "It was, for instance, suggested that in determining the scope of immunity *ratione materiae*, there were certain acts that could potentially be beyond the benefit of immunity *ratione materiae*. This was the case for acts involving allegations of serious international crimes, *ultra vires* acts, *acta jure gestionis*, or acts performed in an official capacity but exclusively for personal benefit, as well as acts performed on the territory of the forum State without its consent". [*Se sugirió por ejemplo que en la determinación del alcance de la inmunidad ratione materiae, había ciertos actos que potencialmente podrían quedar fuera del beneficio de la inmunidad ratione materiae. Era el caso de los actos que comportaban alegaciones de graves crímenes internacionales, actos ultra vires, acta jure gestionis o actos realizados a título oficial pero exclusivamente en beneficio personal, así como actos realizados en el territorio del Estado del foro sin su consentimiento*].

Mr. Kamto drew attention to the risk that the final phrase, "acts performed on the territory of the forum State without its consent", might be understood to refer not only to the category of acts that the Commission had in mind, such as espionage, but also to other types of acts.

Ms. Escobar Hernández (Special Rapporteur) said that, while she shared Mr. Kamto's concern, it should be borne in mind that the proposed text reflected the Commission's discussion, not its position. The question he had raised would in all likelihood be debated when the Commission came to consider the commentaries to the draft articles.

Paragraph 23, as amended, was adopted.

The portion of chapter IX contained in document A/CN.4/L.863, as amended, was adopted.

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

Chapter X. Provisional application of treaties (A/CN.4/L.864)

The Chairman invited the Commission to consider chapter X of its draft report, as contained in document A/CN.4/L.864.

A. Introduction

Paragraph 1

Mr. Park said that, in the interests of consistency, the 1969 Vienna Convention on the Law of Treaties should be referred to in a uniform manner throughout the document.

Paragraph 1 was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraph 8

Paragraph 8 was adopted, subject to its completion by the Secretariat.

1. Introduction by the Special Rapporteur of the third report

Paragraphs 9 to 13

Paragraphs 9 to 13 were adopted.

2. Summary of the debate

(a) General remarks

Paragraph 14

Mr. Nolte, noting the inconsistent use of the adjectives "internal", "national" and "domestic" to qualify the word "law" throughout the document, proposed that "internal law" should be used systematically, since that was the term employed in the 1969 Vienna Convention on the Law of Treaties. He further proposed that, for the sake of clarity, the phrase "the method for State adherence to treaties" in the first sentence of paragraph 14 should be replaced with "the way in which States enter into treaties".

Paragraph 14, as amended, was adopted.

Paragraph 15

Mr. Murphy said that, in the interests of clarity, in the final sentence, the words “that allowed for provisional application” should be inserted after the words “a given treaty”. He would submit a number of minor editorial amendments to the Secretariat.

Mr. Kolodkin said that, as a number of issues that had been raised by Commission members were not reflected in the summary of the debate, he wished to propose the insertion of a new paragraph, to read:

“Some members of the Commission noted that while article 25 of the 1969 Vienna Convention was the basis of the legal regime of provisional application of treaties, it did not answer all the questions related to the provisional application of treaties. It was suggested that the Commission should provide guidance to States on such questions as: which States may agree on provisional application of treaties (only negotiating States or other States as well); whether an agreement on provisional application must be legally binding; and whether such an agreement can be tacit or implied. It was also noted that the Commission should provide guidance to States as to which other rules of the law of treaties and other rules of international law, for example on responsibility and succession, apply to provisionally applied treaties.”

Mr. Petrič, welcoming Mr. Kolodkin’s proposal, said that it made the summary of the debate reflect the discussion more accurately.

Mr. Kittichaisaree endorsed those remarks.

Paragraph 15, as amended, was adopted.

Paragraph 16

Mr. Nolte said that, for the sake of accuracy, the phrase “the same as those of entry into force” in the second sentence should be amended to read “the same as those after the entry into force of a treaty”. Similarly, the phrase “practically the same as those of entry into force” in the penultimate sentence should be reworded to read “the same as those after the treaty had entered into force”.

Sir Michael Wood said that, as the meaning of the sixth sentence was not clear, the second clause should be deleted and the first clause recast to read: “Another possibility was to refer to the provisions on the invalidity of a treaty”.

Mr. Forteau said that the second clause, whose meaning was perfectly clear in the French version, recalled the language of article 69, paragraph 2 (b), of the 1969 Vienna Convention on the Law of Treaties.

Sir Michael Wood said that, in that case, the English text should be reformulated to track more closely the language of that provision. It would also be helpful if a reference to article 69 were inserted in parentheses.

On that understanding, paragraph 16, as amended, was adopted.

Paragraph 17

Mr. Nolte proposed that, in the first sentence, the word “legal” should be inserted before the word “effects” and that the text at the end of the sentence that read “including as far as regards the effects of the treaty in the future” should be deleted, as it was superfluous. In the second sentence, the phrase “that treaty” should be replaced with “the obligation to provisionally apply the treaty”, since that would reflect the debate within the Commission on the source of the obligation to provisionally apply a treaty — whether it emanated from the treaty itself or from a separate agreement.

Mr. Kolodkin said that he supported Mr. Nolte's proposals. At the end of the paragraph, he proposed an addition to take into account an aspect of the plenary debate that had not been reflected. It would read: "Some members noted that article 27 of the 1969 Vienna Convention was also applicable to provisionally applied treaties".

Paragraph 17, as amended, was adopted.

Paragraph 18

Mr. Murphy proposed that, at the start of the first sentence, the word "unilateral" should be deleted and that the words "the unilateral declaration" at the end of the sentence should be replaced with "Syria's unilateral declaration". In the second sentence, the word "agreement" should be corrected to read "agreed".

Mr. Forteau said that, pursuant to Mr. Murphy's proposal, in the first sentence, the words "by Syria" [*par la Syrie*] should be replaced with the phrase "as a result of a unilateral declaration made by Syria" [*à la suite d'une déclaration unilatérale de la Syrie*].

Mr. Kolodkin, referring to the final sentence, said that the words "the decision by Syria" should be replaced with "the declaration of Syria".

With those amendments, paragraph 18 was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

Mr. Nolte, supported by **Mr. Kolodkin** and **Sir Michael Wood**, said that, to his recollection, no Commission member had expressed the view that an analysis of limitation clauses used to modulate obligations undertaken in order to comply with internal law, or conditioning provisional application on respect for internal law, was beyond the scope of the topic, as was stated in the final sentence. He therefore proposed that the clause "although it was generally felt that this was beyond the scope of the topic" should be deleted.

Paragraph 20, as amended, was adopted.

Paragraph 21

Mr. Kittichaisaree proposed that, in the first sentence, the word "Several" should be replaced with "Some", and that in the second sentence, the words "by other members" should be inserted after the word "cautioned".

Paragraph 21, as amended, was adopted.

(b) Relationship with other provisions of the 1969 Vienna Convention

Paragraph 22

Mr. Murphy proposed that, in the second sentence, the words "other provisions" should be replaced with "additional provisions". In the third sentence, the words "was relevant," should be inserted after "article 60". In the final sentence, the words "limit the legal confusion" should be replaced with "explain the situation".

Mr. Nolte said that, in the second sentence, the word "Nonetheless" suggested an opposition between the first and second sentences that did not exist. He therefore proposed to delete it.

With those amendments, paragraph 22 was adopted.

Paragraph 23

Paragraph 23 was adopted.

(c) Provisional application with regard to international organizations

Mr. Kolodkin proposed that the subheading “Provisional application with regard to international organizations” should be replaced with “Provisional application of a treaty with the participation of international organizations”, as that had been the subject of the plenary debate in question.

That amendment to the subheading was adopted.

Paragraph 24

Mr. Park, referring to the words “European Union” in the second sentence, said that it was important to clarify which mechanism or body of the European Union was meant. Otherwise, the sentence should be deleted.

Sir Michael Wood said that, although the second sentence might reflect what some speakers had said, there was nothing in the text to substantiate the view, allegedly held by the European Union, that the provisions of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations did not reflect customary law. It was a very strong statement, whose implication was that none of the provisions of the 1986 Vienna Convention reflected customary international law. He supported Mr. Park’s proposal to delete the sentence.

The proposal was adopted.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

Mr. Nolte proposed that, in the first sentence, the words “the participation of” should be inserted between “with” and “international organizations”. In the final sentence, the words “incorporate it in their legal regimes” should be replaced with “make use of it”, since one did not incorporate provisional application itself, but rather made provision for it.

Mr. Nolte’s first proposal was adopted.

Ms. Escobar Hernández said that she disagreed with Mr. Nolte’s second proposal, because the final part of the paragraph referred to comments she had made concerning the provisions of the Treaty on the Functioning of the European Union which stipulated that it was the Council of the European Union that adopted the decision to authorize the signing of agreements and, if necessary, their provisional application, before their entry into force. In the final sentence, she proposed to replace the words “in their legal regimes” with “into their constituent rules” [*en sus normas constitutivas*].

After a discussion in which **Mr. Nolte, Ms. Escobar Hernández, Sir Michael Wood, Mr. Murphy, Mr. Kittichaisaree** and **Mr. Forteau** participated, **the Chairman** said that he took it that the Commission wished to delete the word “most”

in the second sentence and in the third sentence, to delete the words “modality or” and replace the words “in their legal regimes” with “into their constituent rules”.

Paragraph 26 was adopted with those amendments.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 27 bis

Mr. Kolodkin said that, to draw attention to the views expressed by a number of members of the Commission on how to cover the issue of the provisional application of treaties to which international organizations were party, proposed the insertion of a new paragraph, *27 bis*, which would read, “Some members noted that it would be appropriate to undertake first the examination of questions related to the provisional application of treaties concluded by States and only afterwards to proceed to the consideration of provisional application of treaties with the participation of international organizations”.

Paragraph 27 bis was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

Mr. Nolte proposed that the phrase “obligation in a treaty being provisionally applied” should be amended to read “obligation to provisionally apply a treaty”.

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 33

Paragraphs 30 to 33 were adopted.

Paragraph 34

Mr. Park, referring to the second sentence, proposed that the words “the law of treaties” should be inserted before the phrase “was wrongful under”.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 38

Paragraphs 35 to 38 were adopted.

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

Chapter III. Specific issues on which comments would be of particular interest to the Commission (continued) (A/CN.4/L.857)

Paragraphs 1 and 2

The Chairman drew attention to the new paragraphs 1 and 2 of chapter III, inserted at the previous meeting.

Mr. Murphy, supported by **Mr. Nolte**, said that the original text had contained dates in order to remind Governments of the deadline for supplying information: 31 January 2016 was the latest point at which Special Rapporteurs could still incorporate

information in the reports which they, in turn, needed to submit in February or March 2016. The dates that had been deleted should be reintroduced, perhaps accompanied by the phrase “if possible by” in order to soften the tone.

Mr. Forteau explained that it was the Secretariat’s practice to send each State an individual letter containing the list of the Commission’s questions and indicating that it would be useful to have a reply by a given date. However, he had no objection to reintroducing dates in chapter III.

Mr. McRae, supported by **Mr. Candiotti**, suggested that a statement could be added to the effect that, for information to be taken into account in the reports of Special Rapporteurs, it was required by a certain date; that would not preclude the possibility of supplying information at a later date, however.

The Chairman said that he took it that the Commission wished to include in paragraph 2 a request that information should be submitted by 31 January 2016.

It was so decided.

A. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Paragraph 3

Paragraph 3 was adopted.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

C. Immunity of State officials from foreign criminal jurisdiction

Paragraph 6

Paragraph 6 was adopted.

D. Provisional application of treaties

Paragraph 7

Paragraph 7 was adopted.

(E.) Jus cogens

Paragraph 8

Paragraph 8 was adopted.

Chapter III of the report, as a whole, as amended, was adopted.

Chapter XIII. Other decisions and conclusions of the Commission (A/CN.4/L.867 and Add.1)

The Chairman invited the Commission to consider the portion of chapter XIII of the draft report contained in document A/CN.4/L.867

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 to 24

Paragraphs 1 to 24 were adopted.

B. Date and place of the sixty-eighth session of the Commission

Paragraph 25

Paragraph 25 was adopted.

The portion of chapter XIII of the draft report contained in document A/CN.4/L.867 was adopted.

The Chairman invited the Commission to consider the portion of chapter XIII of the draft report contained in document A/CN.4/L.867/Add.1.

A. Programme, procedures and working methods of the Commission and its documentation

1. Inclusion of a new topic in the programme of work of the Commission

Paragraph 1

Paragraph 1 was adopted.

C. Tribute to the Secretary of the Commission

Paragraph 2

Paragraph 2 was adopted.

D. Cooperation with other bodies

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Paragraph 7

Mr. Forteau said that the visit of the members of the African Union Commission on International Law had taken place on 23 July 2015, not 23 May 2015: the date should be corrected.

Paragraph 7, as amended, was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

E. Representation at the seventieth session of the General Assembly

Paragraph 10

Paragraph 10 was adopted.

F. International Law Seminar

Paragraphs 11 to 15

Paragraphs 11 to 15 were adopted.

Paragraph 16

Paragraph 16 was adopted with a minor editorial amendment to the French text.

Paragraphs 17 to 22

Paragraphs 17 to 22 were adopted.

The portion of chapter XIII of the draft report contained in document A/CN.4/L.867/Add.1 was adopted.

Chapter XIII of the report as a whole, as amended, was adopted.

The report of the International Law Commission as a whole, as amended, was adopted.

Chairman's concluding remarks

The Chairman said that the sixty-seventh session had been a productive one. He was grateful to the members of the Bureau and to the former chairmen of the Commission for their advice and guidance. He thanked the Secretariat, the Codification Division and the Legal Liaison Office in Geneva for their efficient assistance and continuous support. He also thanked the précis-writers, interpreters, conference officers, translators and other members of conference services who performed services for the Commission on a daily basis.

Closure of the session

After the customary exchange of courtesies, **the Chairman** declared the sixty-seventh session of the International Law Commission closed.

The meeting rose at 11.35 a.m.