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Summary record of the 2784th meeting

Topic:
Adoption of the report

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Recommendations 4 to 7, although they did accurately reflect the views of the Working Group. The commentaries on the scope of the topic had been set out in the annex to the report for similar reasons. It would be useful for the Commission to endorse the recommendations, which should be followed by the Special Rapporteur and Commission as a whole in the future, thereby bringing an end to the unhealthy habit of continually plaguing the Special Rapporteur with the subject of working methods. Admittedly, it was a compromise solution and was not entirely satisfactory, but it was one which had been the subject of consensus within the Working Group. The Special Rapporteur had indicated to him that he lent his full support to the recommendations, for which he was largely responsible.

68. Mr. KOSKENNIEMI said that he fully understood the need to find a direction for the topic and hence the compromise solution proposed. However, before being definitively adopted such a method of work should be tried out to see what results it brought.

69. Mr. PELLET (Chair of the Working Group on Unilateral Acts) said the Special Rapporteur would need to be left in peace to work on the compromise solution until the Commission could see what results it would yield. The method of work would need to be properly defined at the next session. The Working Group had by no means completed its work, but he hoped it would be reconvened at the next session with a new chair.

70. The CHAIR said that, if he heard no objection, he would take it the Commission wished to adopt the recommendations contained in the report of the Working Group on Unilateral Acts of States.

It was so decided.

The meeting rose at 1.05 p.m.

2784th MEETING

Monday, 4 August 2003, at 10.15 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño.

Draft report of the Commission on the work of its fifty-fifth session

1. The CHAIR invited the members of the Commission to consider chapter IV, sections A and B, of the draft report of the Commission on the work of its fifty-fifth session, on the responsibility of international organizations.

CHAPTER IV. *The responsibility of international organizations* (A/CN.4/L.636 and Add.1)

A. Introduction (A/CN.4/L.636)

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 to 11

Paragraphs 3 to 11 were adopted.

2. Mr. GAJA (Special Rapporteur) proposed that the following new paragraph should be added:

“Bearing in mind the close relationship between this topic and the work of international organizations, the Commission, at its 2784th meeting, on 4 August 2003, requested the secretariat to annually circulate the relevant chapter of the report of the Commission to the General Assembly on the work of its session to the United Nations specialized agencies and some other international organizations for their comments.”

3. The CHAIR said he took it that the Commission agreed to that proposal.

It was so decided.

The new paragraph 12 was adopted.

Section B, as amended, was adopted.

4. The CHAIR invited the members of the Commission to consider chapter IV, section C, of the draft report.

C. Draft articles on the responsibility of international organizations provisionally adopted so far by the Commission

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.636 Add.1)

Commentary to article 1 (Scope of the present draft articles)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

5. Mr. ECONOMIDES said that the last sentence was complicated and could be simplified to read: “In yet another case, an international organization may be held responsible for a wrongful act committed by another international organization of which it is a member.”

6. Mr. GAJA (Special Rapporteur) said that he had no objection to that amendment and suggested the following wording: “Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.”

Paragraph (4), as amended, was adopted.

Paragraph (5)

7. Mr. ECONOMIDES said that the third sentence referred to “an obligation under international law”, whereas the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session¹ used the standard term “an international obligation”. He asked whether that change was deliberate and was intended to introduce a shade of meaning. He also found that the last sentence in French was very difficult to understand and that it should be improved.

8. Mr. GAJA (Special Rapporteur), referring to the first comment by Mr. Economides, said that that wording did not reflect any intention to change the meaning of the term habitually used, but specified what was meant by an “international obligation”, namely, an obligation under international law.

Paragraph (5) was adopted, subject to the amendment Mr. Economides would propose for the French text.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

9. Mr. BROWNLIE said that a definite article should be added before the word “organ” in the fourth sentence, which would then read: “However, article 4 does not consider the status of the organ under internal law as a necessary requirement.”

10. Mr. GAJA (Special Rapporteur) said that the inclusion of a definite article might change the meaning of the sentence. The English text could certainly be improved, without, however, using the definite article. The question was what an organ of the State was, and the definition contained in article 4, paragraph 2, on the responsibility of States indicated that in principle it was the internal law of the State which decided.

11. Mr. AL-BAHARNA proposed that the definite article should be replaced by an indefinite article and that reference should thus be made to the status of “an organ” under internal law.

12. Mr. BROWNLIE proposed the wording “the status of such organs in internal law”, it being understood that the decision should be taken by the Special Rapporteur.

13. Mr. GAJA (Special Rapporteur) said that he opted for Mr. Brownlie’s proposal. The sentence would thus read: “However, article 4 does not consider the status of such organs under internal law as a necessary requirement.”

Paragraph (8), as amended, was adopted.

Paragraph (9)

14. Mr. PELLET said that the commentary to article 1 should indicate what the Commission intended to do about responsibility arising out of a breach of the internal law of an organization. Paragraph (10) of the commentary to article 3 dealt with the internal law of an international organization, but it did not answer the question whether the draft articles related to the organization’s responsibility in the event of a breach of its internal law. In his opinion, it would be reasonable to exclude that question, but that must be stated from the beginning, in the commentary to article 1, so that it would be clear whether a breach of internal law was covered or not.

15. Mr. GAJA (Special Rapporteur) said that that proposal gave rise to a problem because the Commission had not yet discussed what was meant by the internal law of an international organization. For some members, all the internal law of international organizations was part of international law, while for others that was true for certain elements only, such as the constituent instrument. That question should therefore be set aside for the time being, and the Commission could come back to it when discussing the objective element.

16. Mr. PELLET said it would be much wiser to say that the Commission had decided not to deal with breaches of the internal law of an organization, but if it did not want to go that far, it should add a footnote stating: “The Commission reserves the possibility of deciding later whether the draft articles should cover the responsibility of an organization for breaches of certain internal rules or its own internal law. On this point, see paragraph (10) of the commentary to article 3 below.”

17. Mr. BROWNLIE said that he was not opposed to Mr. Pellet’s proposal, but that it would be useful to indicate that, in the case of States, the distinction between, so to speak, the “treaty envelope” and internal law was well understood and well established, whereas it was more difficult to distinguish between the “shell” of international organizations and their internal law. If a footnote was to be added, it should explain that, in the view of some members of the Commission, the problem was how the distinction should be drawn, and that the question should be set aside for the time being.

18. Mr. PELLET said that Mr. Brownlie’s comment was entirely justified, but that was explained in paragraph (10) of the commentary to article 3, which should be referred to in a footnote.

¹ See 2751st meeting, footnote 3.

19. Mr. GAJA (Special Rapporteur) said that such a footnote would be complicated to draft and might, as things now stood, give rise to more problems than not saying anything at all. However, he would not object if Mr. Pellet drafted the footnote in such a way as to help the reader.

20. The CHAIR suggested that the Commission should come back to paragraph (9) later.

It was so decided.

Commentary to article 2 (Use of terms)

Paragraph (1)

21. Mr. ECONOMIDES said he did not think it should be stated at the beginning of the first sentence that the definition of “international organization” given in article 2 was not intended as a general definition. That definition had in fact been drafted for a general purpose in order to cover all international organizations, but, scientifically, it could not be complete because it did not contain all the possible elements of an international organization; it was thus a definition which was appropriate for the purposes of the draft articles. It was contrary to the Commission’s main intention to say that it was not a general definition.

22. Mr. PELLET said he agreed with Mr. Economides that a good definition of international organizations in general had been given in article 2. He proposed that the words “is not intended as a general definition, but rather as” should be replaced by the word “constitutes”, which would allow the Commission not to take a stand one way or the other on whether the definition was a general one.

23. Mr. GALICKI, supported by Mr. GAJA (Special Rapporteur) and Mr. BROWNLIE, said that he was in favour of keeping the wording as it stood. He pointed out, in particular, that that “modest” wording was in keeping with the approach adopted in the 1986 Vienna Convention, in which the term “international organization” was defined exclusively for the purposes of that Convention, and that it was therefore logical to abide by that approach.

24. Mr. MOMTAZ proposed that the first sentence should be amended to read: “The definition of ‘international organization’ given in article 2 is a definition which is appropriate for the purposes of the draft articles and is not intended as a general definition.”

25. Mr. MANSFIELD, referring to the proposal by Mr. Momtaz, suggested the following wording: “The definition of ‘international organization’ given in article 2 is considered appropriate for the purposes of the draft articles and is not intended as a definition for all purposes.”

26. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted paragraph (1), as amended by Mr. Momtaz and Mr. Mansfield.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

27. Mr. PELLET said that the sixth sentence was meaningless because “intergovernmental organization” usually did not mean either the constituent instrument of the organization or the members composing it, but the entity which resulted from the constituent instrument and was composed of members. The sentence should be either deleted or amended.

28. Mr. GAJA (Special Rapporteur) said that the words “refers to” should be translated into French by the word *visé*. The term “intergovernmental organization” did in fact give rise to a problem to which he had referred in his report and which had been raised during the plenary discussion. That was one of the reasons why the Commission had abandoned the traditional definition of the term “international organization”.

29. Mr. BROWNLIE said that the word “anyway” should be replaced by the words “in any case”.

30. Mr. ECONOMIDES said that, as a result of the amendment of paragraph (1), the words “and not as a general definition” in the second sentence should be replaced by the words “and not for all purposes”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

31. Mr. GAJA (Special Rapporteur), replying to a request for clarifications by Mr. Brownlie, proposed that the fourth sentence should be amended to read: “In other cases, although an implicit agreement may be held to exist, member States insisted that no treaty has been concluded to that effect, as, for example, in respect of OSCE.” The purpose of the amendment was to make it clear that States did not question the existence of the international organization, but only that of an implicit agreement.

32. Mr. RODRÍGUEZ CEDEÑO said that, contrary to what was stated in the sixth sentence, General Assembly resolutions could be binding. In addition, UNCTAD, referred to in the seventh sentence, was not an international organization but an organ of the United Nations, and should therefore not be given as an example of an international organization.

33. Mr. GAJA (Special Rapporteur) said it could not be inferred from the English text that all General Assembly resolutions were not binding. He was prepared to delete the reference to UNCTAD, if the Commission so wished.

34. Mr. BROWNLIE said that many authors regarded UNCTAD as an international organization. It was not so much the binding nature of a resolution as the general attitude of States, a kind of informal consent to establish an international organization, that was decisive.

35. Mr. ECONOMIDES, supporting Mr. Rodríguez Cedeño, proposed that the words “non-binding” should be replaced by the words “soft law”. It was from the point

of view of the internal system that the question must be approached. Not all resolutions establishing international organizations were binding, but the rules of procedure of those organizations were binding.

36. Mr. MOMTAZ said that what were important were the will and the intention of States to establish an international organization by means of such non-binding instruments. That intention should be referred to.

37. Mr. RODRÍGUEZ CEDEÑO proposed the wording “international instruments other than treaties by which States seek to establish an international organization”. In his view, regarding UNCTAD as an international organization might create problems involving the attribution of responsibilities because it could not be held responsible for an internationally wrongful act.

38. Mr. GAJA (Special Rapporteur) said that the fifth sentence met Mr. Rodríguez Cedeño’s concerns.

39. Mr. MATHESON proposed the wording “a non-binding instrument adopted by the General Assembly”.

40. Mr. MOMTAZ said that the criterion to be adopted in paragraph (4) was whether international legal personality existed or not. In that case, the deletion of the reference to UNCTAD would be justified.

41. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to the amendment of the fourth sentence proposed by the Special Rapporteur and the deletion of the words “non-binding” in the sixth sentence and the reference to UNCTAD in the seventh sentence.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

42. Mr. BROWNLIE proposed that, in the last sentence, the words “any way” should be deleted because they were not necessary.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

43. Mr. PELLET questioned the logic of the third sentence, which referred to the more recent dicta of ICJ on the legal personality of international organizations without explaining what the earlier ones had been.

44. Following a discussion on the relationship between the recent dicta and the advisory opinion on the *Reparation for Injuries* case, in which Mr. PELLET, Mr. GAJA (Special Rapporteur), Mr. MANSFIELD, Mr. BROWNLIE and Mr. GALICKI took part, the Special Rapporteur suggested that the words “more recent” should be deleted.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

45. Mr. PELLET said that paragraph (10) did not explain why the usual wording, according to which the legal personality of an organization must be “distinct” from that of its member States”, was not used instead of the wording of article 2, according to which the legal personality of the organization should be its “own”.

46. Mr. ECONOMIDES said that the words “own legal personality” were better because they referred to the autonomous legal personality of international organizations. He found it surprising that the last sentence ruled out the possibility that a certain conduct could also be attributed to all the members of the organization and not only to one or more of them. He therefore proposed that the end of the paragraph should read: “to one or more of its members, or to all of its members”.

47. Mr. PAMBOU-TCHIVOUNDA said that the majority of the members of the Drafting Committee had considered that the words “distinct from that of its members” and the word “own” meant the same thing and had therefore opted for the latter in order to economize on wording.

48. Mr. PELLET proposed that, for the sake of clarity, the word “own” should be followed by the words “a term that the Commission considers synonymous with the phrase ‘distinct from that of its member States’”.

Paragraph (10) was adopted, subject to the two changes proposed by Mr. Economides and Mr. Pellet.

Paragraph (11)

49. Mr. PELLET said it was regrettable that the Commission did not refer in paragraph (11) to the question of organizations of international organizations, of which the Joint Vienna Institute was the best example, even if only to indicate that it was not adopting a position in that regard.

50. Mr. BROWNLIE said that he shared Mr. Pellet’s view.

51. Mr. GAJA (Special Rapporteur) said that, in principle, that type of organization was covered by the general clause in the commentary to article 1 stating that the fact that an entity did not correspond to the definition of an international organization did not mean that the principles embodied in the draft articles could not be applied to it. It was better, moreover, not to refer specifically to organizations established by international organizations in order not to introduce concepts that were not clear, such as the indirect role of States, particularly as that phenomenon was, for the time being, limited.

52. Mr. ECONOMIDES said that organizations of international organizations were not covered by the definition adopted by the Commission. He would nevertheless agree

that the commentary should explain that the Commission did not intend to take a position on those entities.

53. Mr. GAJA (Special Rapporteur) proposed that a note on the Joint Vienna Institute should be added to paragraph (11) later in order to explain that, without taking a position on such entities, the Commission considered that they were included in the above-mentioned general clause.

Paragraph (11) was adopted, subject to the addition of the note the Special Rapporteur would prepare on the basis of his proposal.

Paragraph (12)

54. Ms. ESCARAMEIA said that the words “rather than States” in the last sentence could lead to the conclusion either that the paragraph contradicted article 2 or that the Commission was using the word “State” to mean two different things.

55. Mr. GAJA (Special Rapporteur) suggested that the words “rather than States” should be deleted.

Article (12), as amended, was adopted.

Paragraph (13)

56. Mr. RODRÍGUEZ CEDEÑO said that, in the first sentence, the words “associate or affiliate” should be added between the word “additional” and the word “members” because, in many cases, entities other than States did not have full membership status within international organizations that admitted them.

57. Ms. ESCARAMEIA said that some regional trade organizations in Asia had accepted territories such as Macao, Hong Kong and Taiwan as full members.

58. Mr. GAJA (Special Rapporteur) said that it was difficult to generalize one way or another, but, for accuracy’s sake and in order to reply to Mr. Rodríguez Cedeño’s comment, he would check the Convention of the World Meteorological Organization and, if necessary, amend the footnote.

Paragraph (13) was adopted, subject to that reservation.

Paragraph (14)

59. Mr. MOMTAZ said that, for accuracy’s sake, the word “international” should be added before the word “responsibility” in the first sentence.

60. Mr. GAJA (Special Rapporteur) said that the same amendment should be made in the second sentence.

Paragraph (14), as amended, was adopted.

The commentary to article 2, as amended, was adopted.

Commentary to article 3 (General principles)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

61. Mr. PELLET said that the second sentence was hard to understand and very clumsy. He proposed that the beginning should be amended to read: “A judicial statement of this principle appears in the advisory opinion of ICJ...”.

62. Mr. PAMBOU-TCHIVOUNDA said that the word “judicial” was not necessary because reference was being made to ICJ.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

63. Mr. BROWNLIE said that the beginning of the last sentence was incorrect and should be amended to read: “Thus, in appropriate circumstances...”.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

64. Mr. PELLET said that, probably because of the way it had been translated from English into French, the fifth sentence of the French text was meaningless. He would prepare a revised translation himself and submit it to the secretariat.

65. Mr. GAJA (Special Rapporteur), supporting the proposal by Mr. Pellet, said that, at the beginning of that sentence, the words *à la charge* should be replaced by the words *à l’égard*.

66. Mr. ECONOMIDES said that, since the internal law of international organizations as a whole belonged to international law, it was incorrect to say, as the Commission had done in the fourth sentence, that “some further parts of the internal law of the organization” belonged to international law. He therefore proposed that the end of the sentence should be amended to read: “and the other parts of its internal law, which belonged to international law”.

67. Mr. PELLET said that the question raised by Mr. Economides was actually much more complex and controversial than he had suggested and that the Commission could not take such a definite position by way of the commentary to a draft article.

68. Mr. ECONOMIDES proposed that, in order to take account of Mr. Pellet’s comment, the end of the sentence

should be amended to read: “and other parts of its internal law which belong to international law”.

Paragraph (10), as amended, was adopted, on the understanding that Mr. Pellet would submit a revised translation of the fifth sentence to the secretariat.

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

Commentary to article 1 (Scope of the present draft articles) (concluded)

Paragraph (9) (concluded)

69. The CHAIR invited the Commission to consider the footnote which would be indicated by an asterisk at the end of paragraph (9) of the commentary to article 1, the text of which had been distributed to the members of the Commission and which read:

“The Commission has not yet adopted a position on whether the draft articles will apply to violations of what is sometimes called the ‘internal law of international organizations’ and intends to take a decision on this question later. For a discussion of the problems to which the concept of the ‘internal law of international organizations’ gives rise, see paragraph (10) of the commentary to article 3.”

70. Mr. GAJA (Special Rapporteur) suggested that the word “whether” should be replaced by the words “the extent to which” to give the Commission some room for manoeuvre.

71. Mr. PELLET proposed that both terms should be retained.

72. The CHAIR said that, if he heard no objection, he would take it that the Commission adopted that proposal.

It was so decided.

The commentary to article 1, as amended, was adopted.

Section C, as amended, was adopted.

Chapter IV of the report, as amended, was adopted.

CHAPTER V. Diplomatic protection (A/CN.4/L.637 and Add.1–4)

73. The CHAIR invited the members of the Commission to consider, with a view to its adoption, chapter V of the draft report of the Commission on diplomatic protection.

A. Introduction (A/CN.4/L.637)

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.637 and Add.1 and 4)

Paragraphs 12 to 14 (A/CN.4/L.637)

Paragraphs 12 to 14 were adopted.

Paragraph 15

74. Mr. GAJA (Special Rapporteur) said that a sentence reflecting the Commission’s consideration of draft articles 21 and 22 should be added to paragraph 15 or to a new paragraph 16.

75. The CHAIR said that that would be done by the Rapporteur in consultation with the Special Rapporteur. He invited the members of the Commission to consider document A/CN.4/L.637/Add.1, which related to the consideration of articles 17 to 20.

Paragraph 15 was adopted, subject to the amendment proposed.

Paragraph 16 (A/CN.4/L.637/Add.1)

Paragraph 16 was adopted.

Paragraph 17

76. Mr. GAJA said that the words “State of nationality of the”, which had been left out by mistake, should be added before the word “corporation”.

77. Mr. PELLET said that the phrase “and might even be corporations” should be added after the phrase “nationals of many countries”.

78. Mr. DUGARD (Special Rapporteur) said that he supported the proposal by Mr. Pellet.

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

79. Mr. BROWNIE, referring to the *ELSI* case, said that there seemed to be a contradiction between paragraph 19 and paragraph 51. He proposed that the Special Rapporteur should take another look at those two paragraphs.

80. The CHAIR said he took it that the Commission agreed to that proposal.

It was so decided.

The meeting rose at 1 p.m.