

Document:-
A/CN.4/2862

Summary record of the 2862nd meeting

Topic:
Draft report of the Commission on the work of its fifty-seventh session

Extract from the Yearbook of the International Law Commission:-
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Paragraph 57

89. Mr. PELLET said that the word “*préserver*” in the second sentence of the French text should be replaced with the word “*présumer*”.

Paragraph 57 was adopted with a minor drafting change to the French version.

Paragraphs 58 to 73

Paragraphs 58 to 73 were adopted.

Paragraph 74

90. Mr. PELLET said that the word “*article*” in the last sentence of the French text should be in the plural.

Paragraph 74 was adopted with a minor drafting change to the French version.

Paragraph 75

91. Mr. ECONOMIDES said that since articles 7, 8 and 9 of Resolution II/1985 of the Institute of International Law were cited in the paragraph, the text of those articles should be provided in a footnote, in order to facilitate comparison.

92. In addition, he wondered what was meant by the adjective “different” in the second sentence of the paragraph. He proposed that a new sentence should be added at the end of the paragraph, to read: “It was noted that only treaties incompatible with the exercise of the right to self-defence should be suspended or abrogated.”

93. The CHAIRPERSON suggested that the word “different” should be replaced by the word “conflicting”.

94. Mr. BROWNLIE said that he did not recall that that position had been expressed during the debate.

95. Mr. ECONOMIDES said that he himself had upheld that position, and he insisted that the sentence he had proposed should be included in the text.

96. The CHAIRPERSON, speaking in his personal capacity, recalled that one of the articles of the Institute of International Law dealt with that very aspect of the question. He suggested that the Commission should adopt paragraph 75 as amended by Mr. Economides.

Paragraph 75, as amended, was adopted.

Paragraphs 76 and 77

Paragraphs 76 and 77 were adopted.

97. The CHAIRPERSON announced that the Commission would conclude its consideration of document A/CN.4/L.668 at its next meeting.

The meeting rose at 1.10 p.m.

2862nd MEETING

Tuesday, 2 August 2005, at 3.10 p.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Mr. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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

CHAPTER V. *Effects of armed conflicts on treaties (continued) (A/CN.4/L.668)*

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

Paragraph 78

1. Mr. PELLET sought clarification regarding the last sentence, which read: “At the same time, he pointed out that such proviso would not solve the problems of legal causation, i.e. it was not clear to what extent the States concerned could rely on it as a basis for suspending treaties unless there existed some causal connection necessitating suspension or termination.”

2. Mr. BROWNLIE (Special Rapporteur) said that the last sentence concerned the problem of *ipso facto* termination, which was supposed to have been clarified by his ill-fated version of draft article 10. As he had repeatedly explained, apparently to no avail, the intent of the draft article was to raise an intellectual problem, not to prove that he did not accept the post-1945 version of the use of force. The issue at stake was *ipso facto* suspension or termination and the principle stated in article 3 based on one of the more important parts of the Institute of International Law’s resolution II/1985, according to which there was no *ipso facto* effect. The *ipso facto* effect problem was two-pronged. First there was causation: there had to be some factual basis for suggesting that armed conflict affected the treaty. Second, there was a need to distinguish between a proviso making it clear that the contents of the Commission’s draft would not have any effect on the provisions of the Charter of the United Nations relating to the use or threat of force, and the situation in which the principles relating to the use of force—the substantive principles—were brought into play to deal with the question of the legal validity of the use of force concerned. That did not come under the topic under consideration, which explained his reaction during the previous meeting when the Chairperson had accepted a statement that represented the view of only one member of the Commission. Some members of the Sixth Committee would be justifiably concerned if the Commission embarked en passant on a codification of the legal principles relating to the use of force by States.

3. The CHAIRPERSON asked the Special Rapporteur whether he could propose alternative wording to meet Mr. Pellet's concern.

4. Mr. BROWNLIE (Special Rapporteur) said that the current wording was perfectly clear to him: it simply meant that there had to be a legal basis on the facts for asserting the suspension or termination of the treaty concerned. He would need some time to reflect on a formulation that would be as clear to others.

5. The CHAIRPERSON suggested that consideration of paragraph 78 should be deferred.

It was so agreed.

6. Mr. BROWNLIE (Special Rapporteur) said that in the light of amendments made during the previous meeting and the resulting shift in emphasis in the original summary of the debate produced by the Secretariat, the Special Rapporteur's concluding remarks set out in paragraph 78 needed to be expanded on somewhat. He suggested the addition of a sentence that would not in any way prejudice the views of the Commission as a whole, to read: "The Special Rapporteur stated that it was not his intention to examine the question of the validity or voidability of treaties in terms of the Charter provisions relating to the use or threat of force."

7. The CHAIRPERSON suggested that the additional sentence should form a new paragraph 78 bis.

It was so agreed.

Paragraph 78 bis was adopted.

Paragraph 79

Paragraph 79 was adopted.

Paragraph 80

8. Mr. ECONOMIDES questioned the appropriateness of the assertion that general support existed in the Commission for draft articles 11 to 14, given that some members had not had the opportunity to express their views on them.

9. Mr. GAJA recalled that the problem had arisen because the Commission had not discussed the draft article by article. He suggested the deletion of the words "in the Commission" to meet Mr. Economides' concern.

Paragraph 80, as amended, was adopted.

Paragraphs 81 and 82

Paragraphs 81 and 82 were adopted.

10. Following a procedural discussion on the reference to a questionnaire in paragraphs 5, 15 and 19, the CHAIRPERSON suggested that the Commission should revert to those paragraphs in the context of its consideration of chapter III of the draft report.

It was so agreed.

CHAPTER VI. *Responsibility of international organizations (A/CN.4/L.669 and Add.1)*

A. *Introduction (A/CN.4/L.669 and Add.1)*

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

11. Mr. GAJA (Special Rapporteur) drew attention to the fact that articles 1 to 7 had been adopted after consideration of the first and second reports and that a further nine articles had been adopted since then. He therefore proposed that the last sentence of the paragraph should read "The Commission provisionally adopted articles 1 to 7."

Paragraph 3, as amended, was adopted.

Section A, as amended, was adopted.

B. *Consideration of the topic at the present session*

12. Mr. PELLET, raising a general problem, said that the text of paragraphs 4 to 9 had been drafted in the customary manner, so as to reflect only the views of the Special Rapporteur, and not those of other members of the Commission. It was not therefore an accurate account of the debate on the topic. That situation was most unsatisfactory; the views of the Special Rapporteur were already well known, since they were contained in his report. For that reason, thought should be given to providing a more balanced report in the future. To that end, it would be necessary to decide whether to record merely that the Commission had adopted the draft articles in question and to reflect members' views in the commentary without giving any particular emphasis to the position of the Special Rapporteur, or whether to make a summary of all the views expressed. He himself was in favour of the latter solution, although he was aware that it would place an extra burden on the Secretariat.

13. Mr. GAJA (Special Rapporteur) said that he would be very much in favour of the report containing some trace of the views expressed by other members of the Commission. The draft report had merely followed previous practice. When draft articles were adopted on the basis of a report presented the same year, it was standard practice not to give any indication of members' opinions, which would be reflected to some extent in the commentaries to the articles. It would probably be better to change that practice in the future. In order for the Sixth Committee to have more information, it would also be useful to include in the report the wording of the articles originally presented to the Commission, because the latter's documents were not widely circulated. As they stood, only paragraphs 8 and 9 contained a very brief summary of his views, and they did not give undue emphasis to his position.

14. The CHAIRPERSON asked whether the problem could be resolved by deleting paragraphs 8 and 9.

15. Mr. PELLET said that paragraphs 8 and 9 were superfluous and not counterbalanced by a conspectus of other members' views. In the future, there would be

nothing to prevent the text of each draft article as proposed by the Special Rapporteur from being placed in a footnote, to enable the reader to compare the original text and the final version adopted by the Commission.

16. Mr. KOSKENNIEMI said that deletion of paragraphs 8 and 9 would diminish the clarity of the whole chapter, since the paragraphs in question set out the Special Rapporteur's views in a summarized version that was useful to the reader. Although he had some sympathy for Mr. Pellet's position, he believed that, in the case in point, deletion of those two paragraphs would lead to a loss of intelligibility.

17. Mr. Sreenivasa RAO said he had never understood why, when draft articles were adopted, the report contained only the commentary and not members' views. A very complicated set of draft articles had been proposed, a highly complex discussion had ensued, but the General Assembly would see only the commentary to the draft articles as they had been adopted. It would have no idea of the permutations and combinations of the arguments which had been debated and which had resulted in the set of articles as they now stood.

18. Mr. GAJA (Special Rapporteur) said that the solution lay in adding material to the report rather than removing it. In the future, consideration should therefore be given to providing a fuller report. He did not insist on the retention of paragraphs 8 and 9. However, if the Commission considered that they were useful in that they helped to explain the draft articles, then they should be retained.

19. The CHAIRPERSON said he took it that the Commission wished to retain paragraphs 8 and 9.

It was so agreed.

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

20. Mr. GAJA (Special Rapporteur) suggested that the penultimate sentence should be amended to read: "They involved compliance with acts of international organizations by their members. Such acts may be binding decisions or non-binding recommendations or authorizations."

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 13

Paragraphs 10 to 13 were adopted.

Section B, as amended, was adopted.

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (A/CN.4/L.669/Add.1)

1. TEXT OF THE DRAFT ARTICLES

Paragraph 11

Paragraph 11 was adopted.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

Paragraph 12

Paragraph 12 was adopted.

Commentary to chapter III (Breach of an international obligation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The general commentary to chapter III was adopted.

Commentary to article 8 (Existence of a breach of an international obligation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

21. Mr. PELLET said that a major problem arose in respect of paragraph (5) of the commentary to article 8 and footnote 26, because the last sentence of the paragraph created the impression that there were only three views regarding the legal nature of the rules of international organizations whereas, in fact, there were four strands of opinion. The first, most radical, stance was that the internal law of an organization did not form part of international law. A number of authors, including Cahier, Barberis and Bernhardt, took that view. Conversely, footnote 26 put forward the thesis that the rules of international organizations were part of international law, a theory supported by Decleva, Balladore Pallieri and others. He failed to see why that opinion, which was quite tenable, was mentioned only in a footnote rather than being included among the theoretical positions enumerated in the body of the commentary. Moreover, the "exception" referred to was an exception only according to the second view, which was not cited. He therefore proposed inserting a new sentence after the marker to footnote 26, encapsulating the idea that other authors contended that the internal law of international organizations was part of international law. A new footnote 26 *bis* would consist of the second part of original footnote 26 starting with the words "The theory that the 'rules of the organization' ...". The body of the commentary would then continue more or less as in the original, with a few consequential amendments, but justice would have been done to all the positions adopted by legal writers and the commentary would contain a logical sentence concerning international organizations that had achieved a high degree of integration—an allusion to the European Union.

22. Mr. GAJA (Special Rapporteur) said he had no objection to Mr. Pellet's proposal. Nevertheless, the structure of the text did not justify giving equal emphasis to all four positions. The assumption underlying paragraph (4) of the commentary was that the rules of international organizations formed part of international law, whereas paragraph (5) stated that some authors had raised objections to that position in the case of certain organizations or of particular rules of certain organizations. It would perhaps be preferable to state the majority view of Commission members and refer to the fact that some authors had held that all the rules of international organizations were

part of international law. The second part of footnote 26 could then be added and the remainder of the text could be retained as it stood.

23. After a discussion in which Mr. Pellet, Mr. Gaja (Special Rapporteur) and Mr. Economides participated, Mr. MANSFIELD suggested that, after the second sentence, a new sentence should be added, to read: “Many consider that the rules of treaty-based organizations are governed by international law.” The text would continue: “Some authors have held that ...” and the remainder of paragraph (5) could be retained without further amendment.

24. After further contributions from Mr. PELLET and Mr. ECONOMIDES, Mr. GAJA (Special Rapporteur) proposed the following amendments to paragraph (5) of the commentary to article 8: in the second sentence, the words “to some extent” would be deleted. A new sentence would be added after the second sentence, to read: “Many consider that the rules of treaty-based organizations are part of international law.” A footnote would be added, comprising the portion of footnote 26 from the phrase “The theory that” to the end of that footnote. In the sentence beginning with the words “Another view”, the words “an exception should be made with regard to” should be deleted and the words “are a special case” appended at the end of the sentence.

25. Mr. PELLET said that, in the French version of the final sentence, the words “*une troisième opinion*” should be replaced by “*une autre opinion encore*”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

26. Mr. MATHESON said he had doubts about the final sentence. It was not true that “most, if not all” obligations arising from the rules of an organization fell within the category of obligations under international law. At best, one could say that “some” obligations fell within that category. Moreover, the entire paragraph deliberately avoided making a judgement as to how much of that category of internal rules fell within international law. He proposed that the sentence be deleted.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

27. Mr. PELLET said he disliked the paragraph and wished it to be deleted. If, however, the Special Rapporteur felt strongly that it should be retained, he should at least include a reference to draft article 16, which he personally regarded as highly exceptionable. The idea expressed in paragraph (10) was premature, it impinged too strongly on the domain of responsibility of States, and in any event, such a remark could apply to nearly every provision in the draft.

28. Mr. GAJA (Special Rapporteur) said it was true that the remark could apply to many other provisions. Indeed,

if a reference was to be inserted, it should be not solely to article 16. The point being established related to the attribution of responsibility to international organizations, not to member States or to States in general, as that was governed by the rules established in the draft articles on responsibility of States for internationally wrongful acts. At its next session, the Commission would take up the question of the subsidiary responsibility that member States or other States might incur in the event of the responsibility of an international organization arising; that, however, was an entirely different matter.

29. He remained convinced that somewhere in the draft the idea must be conveyed that the references to responsibility of international organizations were without prejudice to the entirely separate question whether member States or other States also incurred responsibility. He was willing to locate the content of paragraph (10) elsewhere, perhaps at the end of the general commentary to chapter III: it would then become a new paragraph (4) of that section of chapter III.

30. Mr. ECONOMIDES said that the question covered in paragraph (10) was of such importance that it should be the subject of a separate article in the draft itself, not simply relegated to the commentary. A “without prejudice” clause should be inserted, indicating that when an international organization incurred responsibility, that was without prejudice to the responsibility of member States under the articles on responsibility of States. Such a provision would apply to the entire draft on responsibility of international organizations.

31. Mr. GAJA (Special Rapporteur) drew attention to the “without prejudice” clause in article 16. Although it referred to the responsibility of a State or international organization which committed an act, it could perhaps be redrafted in more general terms. He feared, however, that that might create the false impression that the Commission had settled the problems of State responsibility while dealing with responsibility of international organizations. On reflection, he felt that it would not be a good idea to relocate paragraph (10) at the end of the general commentary to chapter III, and that perhaps it would be best to delete it after all.

32. Mr. KOLODKIN said he would prefer to retain the paragraph but to transpose it to the commentary to article 16.

33. Mr. PELLET said that he, too, had been thinking along those lines, but that attention would have to be paid to how the paragraph fitted in with the commentary to article 16: one could not simply do a “cut and paste” job.

34. Mr. GAJA (Special Rapporteur) explained that article 16 was a “without prejudice” clause relating solely to chapter IV, in other words, to cases when an international organization incurred responsibility in connection with the act of a State or of another international organization. Paragraph (10) of the commentary to chapter III, article 8, stated something quite different: that where there was wrongful conduct on the part of an international organization, it might incur responsibility, but that did not mean that there was no parallel responsibility on the part of

member States. That was not a new idea, but one that had been discussed for several years.

35. Mr. MANSFIELD reverted to the Special Rapporteur's earlier idea of relocating paragraph (10), with the addition of a suitable introductory phrase, so as to form paragraph (4) of the general commentary to chapter III. That would mean that the idea would be present in one's mind throughout a reading of chapter III.

36. Mr. Sreenivasa RAO said that a statement like that in paragraph (10) must be included somewhere in the commentary. An international organization was an entity governed by the rules of its constituent instrument. Member States played roles in the decision-making process, some more actively than others, but all the decisions adopted by the organization entailed common responsibility. Some, like himself, had tried to argue that the draft articles should go beyond that façade so that members that had effectively participated in the adoption of a wrongful decision were not absolved simply because they were members of the organization. That view must be represented somewhere, and it would be represented if the final phrase of paragraph (10), following the words "incur responsibility", was deleted.

37. Mr. PELLET said that he was very opposed to the Special Rapporteur's proposal because if it was endorsed, it would not be possible to understand how paragraph (10) related to article 16. There was absolutely no reason to separate the idea in paragraph (10) from that in article 16, even if it was explained that it was different, in which case the entire paragraph would have to be recast to say that it was also true for article 16. Although he did not like the idea, the advantage of Mr. Kolodkin's proposal was that at least the two were linked. The Special Rapporteur would then need to decide whether to say "*en outre*" (moreover) or "*en particulier*" (in particular) so as to show how it tied in with article 16.

38. The CHAIRPERSON suggested that further discussion of where to locate the idea contained in paragraph (10) of the commentary to article 8 should be postponed until the Commission came to consider the commentary to article 16.

It was so agreed.

Commentary to article 9 (International obligation in force for an international organization)

Commentary to article 10 (Extension in time of the breach of an international obligation)

Commentary to article 11 (Breach consisting of a composite act)

The commentaries to articles 9, 10 and 11 were adopted with a minor editing amendment.

Commentary to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

39. Mr. GAJA (Special Rapporteur) said that the reference to the *Bosphorus* case should be corrected, because the issue was no longer before the European Court of Human Rights; thus, the sentence should state that the issue "was also before the European Court of Human Rights ...".

40. Mr. PELLET said that paragraph (5) was too long and should be subdivided into five paragraphs numbered (5) to (9).

41. He was very hostile to the assertion in the last paragraph, which began with the words "For the purposes of the present Chapter, it seems preferable at the current stage ...". The justification given in that same paragraph that such a rule would run counter to the general rule on attribution of conduct to States expressed in article 4 of the draft articles on the responsibility of States for internationally wrongful acts was not convincing.¹ All the draft articles on the responsibility of States were without prejudice to what happened when an international organization was concerned. Article 57 of the draft articles on State responsibility was extremely broad, because it provided that "[t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".² He had been very opposed to the Special Rapporteur's position on that matter in his report. It would mean taking a position which was the contrary of what was set out in the draft articles on State responsibility on the grounds that it ran counter to what was expressed in article 4, but it was not intellectually acceptable to say that when an international organization was concerned, no position would be taken. That was simply passing the buck, since it was asserted that a position had already been taken on the question in the draft articles on State responsibility, whereas attempts made to address such questions during the work on the draft articles on State responsibility had been countered with the argument that international organizations were not to be covered. He was very concerned by the justification given in the last sentence, and before making any proposal, he wanted to hear the Special Rapporteur's opinion on it. The matter augured ill for the future, because if, whenever a position was taken which was not identical with the one in the draft articles on State responsibility, the Commission were to say that it ran counter to the draft articles on State responsibility, the draft articles on responsibility of international organizations would be completely "smothered" by the draft articles on State responsibility, something which should not be allowed to happen.

42. Mr. GAJA (Special Rapporteur) said that that debate had come up a number of times in the past. The position of the Commission of the European Union was that when a member State acted in implementing a decision or other binding act of the European Communities, that act was

¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 40.

² *Ibid.*, p. 141.

to be attributed to the international organization. In his view, that ran counter to article 4 of the draft articles on State responsibility which was based on the assumption that the act of a State organ would be attributed to that State unless that State organ was put at the disposal of an international organization. Article 57 on State responsibility did not go so far as to say that there could be an exception to the rules of attribution in the sense that what was considered to be an act of a State under those articles suddenly became an act of an international organization. The judgement in the *Bosphorus* case bore out his point of view: although a number of member States had argued that they had been acting on behalf of the European Community and that the act concerned had been committed not by Ireland, but by the organization, the judges of the Grand Chamber of the European Court of Human Rights had unanimously ruled that the conduct must be attributed to the member State, even if that member State had used no discretion in implementing a given regulation. When he had drafted the text, a judgement on the merits in the *Bosphorus* case had still been pending and, not wanting to anticipate that ruling, he had left room for possible exceptions. Thus, the sentence beginning with the words “For the purpose of the present chapter ...” was probably too cautious, since the judgement in the *Bosphorus* case had clearly shown that an act of a State was involved, and not an act of the European Community, even though in acting the State had implemented a regulation of the European Community.

43. Various judgements of the European Court of Human Rights supported his view that an act of an organ of a State was an act of a State, not an act of an international organization. His suggestion, therefore, would be to delete the last sentence of the last paragraph, although the penultimate sentence could perhaps also be altered to make it more assertive.

44. With regard to the numbering of paragraph (5), he proposed that only two new paragraphs should be created: a new paragraph (6) would begin with the words “A different view ...”, and a new paragraph (7) with “The issue ...”.

45. The CHAIRPERSON said he took it that the Commission wished to endorse Mr. Gaja’s proposal to delete the last sentence of paragraph (5) and to instruct the Secretariat to adjust the numbering of the paragraphs.

It was so decided.

Paragraph (5), as amended and renumbered, was adopted.

The general commentary to chapter IV, as amended, was adopted.

46. Mr. PELLET said that the Special Rapporteur had been too quick to claim victory by citing the *Bosphorus* case. The decisions of the European Court of Human Rights were not always entirely convincing. Moreover, the WTO panel had arrived at the opposite conclusion. Thus, he did not concede defeat; Mr. Gaja’s interpretation remained debatable.

Commentary to article 12 (Aid or assistance in the commission of an internationally wrongful act)

The commentary to article 12 was adopted with a minor editing amendment suggested by the Chairperson.

Commentary to article 13 (Direction and control exercised over the commission of an internationally wrongful act)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

47. Ms. ESCARAMEIA said she gathered that paragraph (2) had been included in response to one of her earlier remarks. She had proposed that the title should read, not “Direction and control ...”, but “Direction and/or control ...”. She was aware that the current wording was in keeping with the formulation in the draft articles on State responsibility, but it had not been explained why “and” was appropriate whereas “or” was not. Paragraph (2) itself cited the example of one body (NATO) which was responsible only for the direction of the international peacekeeping force in Kosovo (KFOR) and of another (the United Nations) responsible only for its control. It had been her understanding that some of her concerns would be reflected in the commentary, and she had therefore expected a statement to the effect that “direction and control” meant the same thing as “direction or control”, which she would not find entirely logical but could accept, since it would have clarified the situation and would have practical implications. The point of paragraph (2) seemed to be that although “direction” and “control” were separated, a joint exercise was probably envisaged. The commentary should specify that “direction and control” meant “direction or control”, particularly because the fourth line before the end of paragraph (3) also referred to “direction or control”. She asked the Special Rapporteur to clarify the matter.

48. Mr. GAJA (Special Rapporteur) said that the wording “direction and control” was found in the draft articles on State responsibility, and the approach adopted with regard to international organizations should be no different. There had been extensive discussions on the question when the draft articles on State responsibility had been produced, and he did not see any justification for saying that direction and control were the same thing or that one of the two was sufficient. The somewhat odd example was due to the dearth of practice. Although he had made every effort to reflect the views of the entire Commission in the commentary, it could not be all-inclusive. It had been his understanding that most members of the Commission had been in favour of retaining the wording used in the draft articles on State responsibility.

49. The CHAIRPERSON said he took it that the Commission wished to adopt paragraph (2) as it stood.

Paragraph (2) was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to article 13 was adopted.

Commentary to article 14 (Coercion of a State or another international organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 14 was adopted.

Commentary to article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations)

Paragraph (1)

50. Mr. MATHESON said that the language in the last part of the first sentence was not entirely clear with respect to the relationship between the two elements described in the sentence. It could be clarified by replacing the words “thereby circumventing” with “and that would circumvent”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

51. Mr. PELLET wondered whether, as paragraph (6) was very abstract, it could not be illustrated with a reference to the *Matthews v. United Kingdom* case, in which, as he interpreted it, the Court had found against the United Kingdom, not for implementing the Act concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, but for doing so in a way which did not necessarily result from the position of the European Community. The inclusion of such an example would enrich the commentary.

52. Mr. GAJA (Special Rapporteur) said he was not persuaded by the proposal to refer to the *Matthews* case. Although the United Kingdom had in fact implemented an act in a particular way, that act had been an international agreement, not an act of the European Community. It was an act which had modified the treaty by opening up the possibility of elections by universal suffrage. A better example might be the *Cantoni v. France* case, although there had been no breach, and from that point of view the *Matthews* case would have been more convincing. He would review the various cases to see whether he could find a better example in time for the following day's meeting.

53. The CHAIRPERSON suggested that, in view of the Special Rapporteur's remarks, further discussion of paragraph (6) should be postponed until the next plenary meeting.

It was so agreed.

The meeting rose at 5.55 p.m.

2863rd MEETING

Wednesday, 3 August 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Shared natural resources (concluded) (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Corr.1 and Add.1, A/CN.4/555 and Add.1)

[Agenda item 4]

REPORT OF THE WORKING GROUP

1. The CHAIRPERSON invited the Chairperson of the Working Group on Shared natural resources to introduce the report of the Working Group.
2. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources), introducing the report of the Working Group (A/CN.4/L.681 and Corr.1), said that during the 11 meetings which the Working Group held from 19 May to 28 July 2005 the Working Group considered the draft articles submitted by the Special Rapporteur in the annex to his third report (A/CN.4/551 and Corr.1 and Add.1) with a view to the possible submission of a revised text that would take into account the debate on the topic in the Commission. The Working Group had had the benefit of the advice and briefings of experts on groundwaters from UNESCO and the International Association of Hydrogeologists, and had had a briefing by the Franco-Swiss Genevese Aquifer Authority on 12 July 2005. All that had facilitated the work of the Working Group.
3. Eight draft articles, which the Working Group had reviewed in the course of its work, were contained in the annex to the report.
4. With regard to form, the Working Group had essentially agreed with the approach proposed by the Special Rapporteur that the focus should be on the substance without prejudice as to the final form. Thus reference was made to “draft articles” wherever “Convention” appeared in the text presented by the Special Rapporteur. The question of the final form was, of course, an important matter, and some members had expressed a wish for the Working Group to address it at some particular point. It was to be hoped that such an opportunity would be afforded if the Commission decided to reconvene the Working Group in 2006. The Working Group had not completed its work, and proposed, in paragraph 6 of its report, that the Commission consider reconvening it during the first part of its fifty-eighth session. The Working Group was mindful