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Summary record of the 2884th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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“If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.”

14. The Drafting Committee recommended to the Commission the adoption of the five draft guidelines before it and of the revisions to the two draft guidelines already adopted by the Commission.

15. The CHAIRPERSON invited the Commission to adopt the draft guidelines contained in document A/CN.4/L.685 and Corr.1.

Draft guideline 3.1

Draft guideline 3.1 was adopted.

Draft guideline 3.1.1

16. Mr. MOMTAZ proposed that the subparagraphs should be lettered (a), (b) and (c), to bring them into line with the format of draft guideline 3.1.

17. Mr. MANSFIELD endorsed the proposal.

Draft guideline 3.1.1, as amended, was adopted.

Draft guidelines 3.1.2, 3.1.3 and 3.1.4

Draft guidelines 3.1.2, 3.1.3 and 3.1.4 were adopted.

Draft guidelines 1.6 and 2.1.8 [2.1.7 bis]

Draft guidelines 1.6 and 2.1.8 [2.1.7 bis], as revised, were adopted.

The meeting rose at 10.35 a.m.

2884th MEETING

Thursday, 8 June 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued)* (A/CN.4/560, sect. C, A/CN.4/564 and Add.1-2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

* Resumed from the 2879th meeting.

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON, in the absence of Mr. Kolodkin, Chairperson of the Drafting Committee, invited Mr. Mansfield to present the Drafting Committee's report (A/CN.4/L.687 and Add.1 and Corr.1).

2. Mr. MANSFIELD reported that the Drafting Committee had spent three meetings considering draft articles 17 to 24 on circumstances precluding wrongfulness, which the Commission at its 2879th meeting had referred to the Drafting Committee. He wished to thank the Special Rapporteur, Mr. Gaja, for guiding the work of the Drafting Committee with his explanations and suggestions and the members of the Drafting Committee for their cooperation and valuable contributions.

3. Chapter V, entitled “Circumstances precluding wrongfulness”, of the draft articles on the responsibility of international organizations comprised draft articles 17 to 24, which had not raised serious concerns when considered in plenary session. Although some members had been of the view that certain provisions in the chapter should be deleted, since there was no corresponding practice on the part of international organizations to rely on and the exercise resembled legislation rather than codification, the Commission had agreed to retain the articles and the Drafting Committee had followed suit.

4. With regard to draft article 17 (Consent), which corresponded to article 20 of the draft articles on the responsibility of States for internationally wrongful acts,¹⁶⁷ the text proposed in the fourth report of the Special Rapporteur had been favourably received by the plenary Commission, and the Drafting Committee had therefore retained it without change. Two issues in particular had been raised in the plenary debate. The first related to the inclusion in the draft article of language to the effect that consent to any act contrary to *jus cogens* should not be considered valid. The second point raised was the need to take into account, in the case of international organizations, situations where consent might be given to an international organization not by a State but by another entity, such as a territory or autonomous region that had not attained the status of a State. In the Drafting Committee's view, the issue of validity of consent should be addressed in general terms in the commentary, including a reference to draft article 23 on compliance with peremptory norms. However, the commentary should avoid discussing the circumstances or conditions under which consent might be given by entities other than States or international organizations, and it should not deal with the issues of what should be considered State consent and how it should be expressed, since those were matters beyond the scope of the current exercise.

5. With regard to draft article 18 (Self-defence), which corresponded to article 21 of the draft articles on the responsibility of States,¹⁶⁸ a number of issues had been raised in the plenary debate, namely, whether a distinction should be made between self-defence for

¹⁶⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

¹⁶⁸ *Ibid.*

States and self-defence for international organizations; whether the notion of an inherent right to self-defence applied only to States; whether self-defence should be limited to peacekeeping operations and administration of territories; whether a distinction should be made between self-defence and acts taken by a force in defence of the mandate of the organization; and whether to address the issue of collective self-defence when a member of the organization was attacked. Following the view of most members in the plenary debate, the Drafting Committee had recognized that those were difficult questions, some of which were equally relevant to State responsibility but were not addressed in the draft articles on the responsibility of States. The point that self-defence could be invoked only by those organizations that deployed forces or administered territories could not be easily and clearly dealt with in the body of the text and should be explained in the commentary. The Drafting Committee had also been of the view that consistency between the draft articles under consideration and the draft articles on the responsibility of States should be maintained as far as possible, to avoid any unintended implication for the interpretation of the latter. A better approach would therefore be to refer to those issues in the commentary, indicating their complexity and relevance. In plenary discussions the issue had also been raised as to whether the lawfulness of self-defence should be evaluated on its “conformity with the Charter of the United Nations”, as in the corresponding provision of the draft articles on the responsibility of States. Some members had expressed the concern that the Charter requirements applied to States and it was unusual to extend them to international organizations, although they had not questioned the notion that the principles on self-defence embodied in the Charter also applied by analogy to international organizations. The Drafting Committee had borrowed the language of article 52 of the 1969 Vienna Convention, which referred to “the principles of international law embodied in the Charter of the United Nations”. The Drafting Committee had made no further changes to the text proposed by the Special Rapporteur.

6. The Drafting Committee had proposed to leave draft article 19 (Countermeasures) blank because at the current stage a simple and general text on countermeasures could be misleading. In the draft articles on the responsibility of States,¹⁶⁹ the conditions under which countermeasures precluded wrongfulness were stated by reference to Chapter II of Part Three. For the topic under consideration, the substantive provisions on countermeasures had not yet been considered by the Commission and would be discussed only in the context of implementation of responsibility. Clearly, countermeasures taken by international organizations raised specific questions, for example, whether sanctions were countermeasures or should be the subject of a different regime. The Drafting Committee had been of the view that it might be premature to simply provide for a text on countermeasures, a subject that was controversial, without working out the details in order to provide a more informed and complete picture of the parameters of countermeasures. The Drafting Committee had also considered the option of not including any provision on countermeasures and

requesting the views of Governments, but had decided that it would be preferable to address questions to Governments at the time when the substantive provisions on countermeasures were to be discussed. It had therefore concluded that the better course of action was to reserve a place for the article, so that it was clear that a provision on countermeasures would eventually be formulated, and to include an explanatory footnote.

7. Draft article 20 (*Force majeure*), which corresponded to article 23 of the draft articles on the responsibility of States,¹⁷⁰ had been generally accepted in the plenary debate; the only issue that had raised concerns was the extent to which an international organization could invoke financial distress as *force majeure*, justifying non-compliance with its obligations. Although the Special Rapporteur had mentioned such an occurrence as a possible example of *force majeure*, the Drafting Committee had held the view that there might be various reasons for financial distress of an international organization, such as poor management, non-payment of dues by member States, unanticipated expenses and the like, most of which could not be considered cases of *force majeure*. Financial distress of an international organization could amount to *force majeure* only in exceptional circumstances. The Drafting Committee had agreed that the conditions for *force majeure* that applied to States also applied to international organizations, so that there was no reason to make a distinction between the two. It had further agreed that, while there might be circumstances in which financial distress of an international organization could constitute *force majeure*, it was not prudent to use it as a prime example of a case of *force majeure*, even in the commentary, since that might be misleading.

8. Draft article 21 (Distress), which corresponded to article 24 of the draft articles on the responsibility of States,¹⁷¹ had not raised many questions in the plenary debate. The only point that had led to some discussion had been whether the qualification for invoking distress should be limited to “saving the author’s life or the lives of other persons entrusted to the author’s care”, as stated at the end of paragraph 1. That requirement had been held to be too narrow and did not take account of situations where the lives of persons not in the author’s care would be in danger and where the author was in a position to intervene to prevent the loss of life. Some members had therefore suggested that the Commission should adopt a formulation that was less restricted. Suggestions had also been made to include the criterion of a “special relationship”, used in the commentary to article 24 of the draft articles on the responsibility of States, which would expand the scope somewhat, although not enough to cover other situations. The Drafting Committee had discussed the issue at length, bearing in mind that in some situations an international organization might intervene to save the lives of individuals with whom it had no special relationship. For example, the question had been raised about what might happen if United Nations forces were deployed in a specific geographical area to which their mandate was limited, yet incidents were occurring just outside that area that could result in loss of civilian lives

¹⁶⁹ *Ibid.*, draft article 22, p. 27.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, p. 80, para. (7).

and the United Nations forces were in a position to prevent it. Should not their intervention fall under the scope of the distress provision? The Drafting Committee had agreed that it was a difficult question and that the policy concerns behind it applied equally to the corresponding provision in the draft articles on the responsibility of States. The question involved much larger issues of the responsibility to protect and humanitarian intervention, which could not be dealt with under the current topic. Moreover, the Drafting Committee had feared that any change in approach might have unintended implications for the corresponding article on the responsibility of States. It had also been of the view that it was not always easy to distinguish between distress and necessity, covered in draft article 22, which might very well apply to specific scenarios such as the one mentioned above. The Drafting Committee had therefore agreed to maintain the text as proposed by the Special Rapporteur, since it was consistent with the corresponding article on the responsibility of States, but to address the issue in the commentary, particularly indicating the concerns that the formulation might be perceived to be too narrow.

9. Draft article 22 (Necessity) corresponded to article 25 of the draft articles on the responsibility of States.¹⁷² The Commission had debated the scope of application of the draft article, since, in practice, organizations had on occasion invoked necessity, in particular operational necessity or necessity as justifying access to confidential information. The general view had been that international organizations should be able to invoke necessity, provided the right was carefully circumscribed. Most of the questions raised had related to paragraph 1 (a). In the draft articles on the responsibility of States, the act for which necessity was invoked must be “the only way for the State to safeguard an essential interest against a grave and imminent peril”. The Special Rapporteur had modified that language to adapt it to international organizations and had limited it to “the only means for the organization to safeguard against a grave and imminent peril an essential interest that the organization has the function to protect”. That wording raised the question of what was meant by the term “essential interest” and whether it included the essential interest of a member State or a member organization. The Drafting Committee had been of the view that the term “essential interest” should be given a limited scope by setting a high threshold. To express the type of exceptional situation for which an international organization might invoke necessity, the Drafting Committee had redrafted paragraph 1 (a) of the text proposed by the Special Rapporteur to bring out two elements more clearly. First, the essential interest would be only that “of the international community as a whole”, a formulation that excluded the parochial interests of the organization itself. The Drafting Committee had considered linking the “essential interest” to the constituent instrument of the organization or to its mandate to protect but had decided against both, since neither seemed consistent with the understanding that the “essential interest”, for the purposes of the draft article, should be one of paramount interest to the international community as a whole. The constituent instrument of an international organization might include a number of

objectives, not all of which would reach the threshold set in the provision. The same reasoning would apply to a particular mandate that might be given to an international organization by its members.

10. The Drafting Committee had agreed, however, that there must be a legal framework within which an international organization could lawfully claim that it was authorized to act to protect that essential interest, in order to prevent any organization from invoking the protection of an essential interest of the international community even if it was not within its competence or function. In order to fill the gap, the Drafting Committee had introduced a reference to “international law”, so that paragraph 1 (a) would refer to an essential interest of the international community as a whole that the organization “has, in accordance with international law, the function to protect”. Some concerns had been expressed that the formulation would set the bar too high and would preclude regional organizations or organizations which did not have universal membership from invoking necessity to protect an essential interest of their members. The Drafting Committee, taking the view that a formulation that covered such situations would make the provision too broad and susceptible to abuse, had thought it preferable to keep the scope of the provision narrow and not to include the essential interest of a member State or a member organization as justification for an international organization to invoke necessity. However, the commentary would point out that member States were not precluded from protecting their essential interests acting in cooperation with the international organization.

11. Paragraph 1 (b) set a further limitation on the invocation of necessity and recognized that there might be competing essential interests that would have to be weighed against one another. The act of the international organization, even if it was intended “to safeguard against a grave and imminent peril an essential interest of the international community as a whole”, must not seriously impair an essential interest of the State or States towards which the obligation existed, or an essential interest of the international community as a whole. The question had been raised whether the reference to the “international community as a whole” should be kept in that subparagraph, since it might appear illogical to say that any act for the protection of an “essential interest of the international community as a whole” referred to in paragraph 1 (a), might impair an “essential interest of the international community as a whole” referred to in paragraph 1 (b). The Drafting Committee had concluded, however, that the international community as a whole had more than one essential interest and that it was important to make sure that the protection of one essential interest would not seriously impair another essential interest.

12. Although there had been some discussion in the Commission as to whether the provision should also make reference to the essential interest of another international organization, the Drafting Committee had decided against such an inclusion. Since the essential interest of an international organization had not been thought to be sufficient reason for invoking necessity under paragraph 1 (a), its inclusion in paragraph 1 (b) as a further limitation would be inconsistent. Paragraph 2 corresponded to article 25,

¹⁷² *Ibid.*, p. 28.

paragraph 2 of the draft articles on the responsibility of States¹⁷³ and laid down the two limitations on the invocation of necessity. The Drafting Committee had made no changes to the text proposed by the Special Rapporteur.

13. Draft article 23 (Compliance with peremptory norms), which corresponded to article 26 of the draft articles on the responsibility of States, had been generally supported in the plenary debate.¹⁷⁴ Some questions had been raised as to the applicability of peremptory norms to international organizations, but the Drafting Committee had decided to retain the draft article. Mindful that the whole subject of peremptory norms to international organizations involved difficult issues that could not be resolved in detail in the text of a provision, the Drafting Committee had judged it better to address the subject in general terms both in the text of the draft article and in the commentary.

14. Draft article 24 (Consequences of invoking a circumstance precluding wrongfulness), which corresponded to article 27 of the draft articles on the responsibility of States,¹⁷⁵ was also generally supported in the plenary debate. Some members had commented that the provision should deal with compensation more extensively. The Drafting Committee had been of the view that, for the sake of consistency with the draft articles on the responsibility of States, it was better to retain the text as proposed by the Special Rapporteur. It had also been suggested that the words “no longer exists” at the end of subparagraph (a) should be replaced with the words “does not exist”. The Drafting Committee had agreed that the latter formula was more accurate, since “no longer” had a temporal element that was unnecessarily restrictive; nevertheless, for the sake of consistency with the draft articles on responsibility of States, it had decided to retain the text as proposed and to address that particular question in the commentary.

15. The CHAIRPERSON invited the Commission to consider chapter V (Circumstances precluding wrongfulness) of the draft articles on responsibility of international organizations (A/CN.4/L.687) article by article.

Article 17 (Consent)

Draft article 17 was adopted.

Article 18 (Self-defence)

Draft article 18 was adopted.

Article 19 (Countermeasures)

Draft article 19 was adopted.

Article 20 (*Force majeure*)

Draft article 20 was adopted.

Article 21 (Distress)

Draft article 21 was adopted.

Article 22 (Necessity)

Draft article 22 was adopted.

Article 23 (Compliance with peremptory norms)

Draft article 23 was adopted.

Article 24 (Consequences of invoking a circumstance precluding wrongfulness)

Draft article 24 was adopted.

The meeting rose at 10.50 a.m.

2885th MEETING

Friday, 9 June 2006, at 10.00 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Shared natural resources (*concluded*)*
(A/CN.4/560, sect. A, A/CN.4/L.683, A/CN.4/L.688)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. MANSFIELD, introducing the report of the Drafting Committee on shared natural resources (A/CN.4/L.688) on behalf of the Committee's Chairperson, Mr. Kolodkin, said that the Drafting Committee had completed, on first reading, a set of 19 draft articles on the law of transboundary aquifers. At its 2879th meeting, held on 19 May 2006, the Commission had referred to the Drafting Committee the draft articles contained in the annex to the report of the Working Group on Shared natural resources (A/CN.4/L.683). The Drafting Committee had considered the draft articles at five meetings on 31 May and 1, 2, 3 and 7 June 2006.

2. Mr. MANSFIELD paid a tribute to the Special Rapporteur, whose mastery of the subject, perseverance and positive disposition had greatly facilitated the Drafting Committee's task. He also expressed appreciation to the Working Group on Shared natural resources, whose outstanding work had made it possible for the Drafting Committee to adopt several draft articles without any amendment. The Commission had also benefited from the valuable advice supplied by experts on groundwaters from UNESCO and the International Association of Hydrogeologists (IAH).

* Resumed from the 2879th meeting.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*