Summary record of the 2906th meeting

Topic:
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Paragraph (8)

Paragraph (8) was adopted with an editing amendment to the English version.

The commentary to draft article 15 was adopted.

The meeting rose at 6:05 p.m.

2906th MEETING

Friday, 4 August 2006, at 10.15 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Commissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Katuka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Montaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

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

CHAPTER VI. Shared natural resources (concluded) (A/CN.4/L.694 and Add.1 and Corr.1)

1. The CHAIRPERSON invited the members of the Commission to resume consideration of chapter VI, section C, of the draft report on shared natural resources. The text of the provisions had already been adopted; the Commission had only to concern itself with the commentaries thereto.

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading (concluded) (A/CN.4/L.694/Add.1 and Corr.1)

2. Text of the draft articles with commentaries thereto (concluded)

Commentary to article 16 (Emergency situations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

2. Mr. PELLET drew attention to an error in the last sentence: the correct reference was to subparagraphs (a) and (b) of article 16, paragraph 2, not paragraph 3.

3. The CHAIRPERSON requested the Secretariat to correct that error.

Paragraph (3) was adopted subject to that correction.

Paragraphs (4) to (8)

Paragraphs (4) to (8) were adopted.

4. Mr. PELLET said that he found the fifth sentence, which read “In the case of watercourses, the States could meet such requirement without derogation from the obligations as the recharge of the water to the watercourses would be likely to be sufficient”, to be unclear. Was the recharge truly sufficient to meet requirements or in order for the aquifer to be self-sustaining?

5. Mr. YAMADA (Special Rapporteur) said that the sentence referred to satisfying the “need of their population for drinking water” mentioned in the previous sentence.

Paragraph (9) was adopted.

Commentary to article 17 (Protection in time of armed conflict)

Paragraph (1)

Paragraph (1) was adopted.

Paragraphs (2) and (3)

6. Mr. PELLET said that the last sentence of paragraph (2) gave the impression that, if an important matter was not involved, the law of armed conflict would not apply. It also showed that the provision, to which he had always been opposed, was superfluous. It would be better to delete most of the sentence, leaving only: “The article’s function is, in any event, merely to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers.”

7. Mr. MOMTAZ said that the sentence conveyed the idea that the provisions of international humanitarian law relating to the protection of property in time of armed conflict were treaty-based. Such had been the conclusion of the ICJ in its 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. Among other things, the Court had found that article 54 of Protocol I additional to the Geneva Conventions of 1949, as referred to in paragraph (3) of the commentary, had a basis in treaty and not in custom. The Commission thus had to decide whether it wanted to follow the Court’s line of reasoning. He thought it would be better to retain only the end of the problematic sentence, as Mr. Pellet had suggested. The “Martens clause”, set out in the preamble of the Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land and mentioned in paragraph (3), related only to civilians and combatants, whereas draft article 17 referred to aquifers as military objectives. The last sentence of paragraph (3) also said that “The same general principle”, namely, the “Martens clause”, was expressed in paragraph 2 of draft article 5; that was not true, since the paragraph referred to the necessity of taking account of vital human needs. The best approach would be to delete all references to the “Martens clause” and draft article 5.

8. Mr. YAMADA (Special Rapporteur) said that draft article 17 was identical to article 29 of the 1997 Watercourses Convention. It had therefore seemed logical for its commentary to be identical to the commentary to article 29,367 which contained the problematic wording

flagged by Mr. Pellet and Mr. Momtaz. He had considered that to amend the commentary would be to create inconsistency and admit that the Commission had made a mistake in the past. It was for the Commission, however, to decide whether the advisory opinion adopted by the ICJ in 1996 required it to revise its position or not.

9. Ms. ESCARAMEIA said that, unlike Mr. Momtaz, she did not see draft article 17 as applying solely to aquifers. It provided that aquifers must not be used in violation of the principles and rules of protection, but such protection extended to the populations that depended on the aquifer, particularly in emergency situations, and thus to civilians and combatants. The reference in paragraph (3) of the commentary to the “Martens clause”, and the last sentence of the paragraph, should therefore be retained.

10. Mr. MOMTAZ said that the “Martens clause” came into play in cases covered by no rule of international humanitarian law, but that was not the case in the present instance, since the commentary listed all the applicable rules. Moreover, the clause applied only to civilians and combatants. The reference in the last sentence of paragraph (3) of the commentary to draft article 5, paragraph 2, was certainly incorrect, since paragraph 2 had nothing to do with the “Martens clause”.

11. The CHAIRPERSON, speaking as a member of the Commission, pointed out that the Special Rapporteur had proposed the inclusion at the end of the third sentence of paragraph (3) of the following text: “including various provisions of conventions on international humanitarian law to the extent that the States in question are bound by them” (see A/CN.4/L.694/Add.1/Corr.1). Perhaps that set of references to relevant instruments could replace the reference to the “Martens clause”.

12. Ms. ESCARAMEIA said it was true that the words “The same general principle” in the last sentence of paragraph (3) of the commentary wrongly suggested that the “Martens clause” was reflected in draft article 5, paragraph 2. She would, however, like a reference to paragraph 2 to be retained, since the requirement it mentioned—taking account of vital human needs—was particularly crucial in the event of armed conflict. A reference to the “Martens clause” could do no harm and would cover unforeseen situations, which was precisely the purpose of that clause.

13. Mr. BROWNLIE said that, as he saw it, draft article 17 was a “without prejudice” clause, even though it was not drafted as such. Its purpose was to recall that the draft articles were subject to the application of international humanitarian law and other related provisions. It would be inappropriate, and even dangerous, for the Commission to present, in only a few paragraphs, a version of international humanitarian law and the law of war applicable to aquifers.

14. Mr. PELLET said that he fully agreed with Mr. Brownlie’s comments, but thought they also showed that draft article 17 itself was problematic, precisely because of the dangers it involved. Nevertheless, he was not indifferent to the explanation given by the Special Rapporteur and, since the Commission had made a mistake once, it might as well go the whole way and fully reproduce the commentary to article 29 of the 1997 Watercourses Convention, however absurd that might be.

15. Mr. CHEE asked whether there had ever been instances when groundwaters had actually been used by civilians or combatants. If not, then draft article 17 did not cover any realistic situation.

16. Mr. MANSFIELD said that, given the explanations by the Special Rapporteur, it would be best to leave the text as it was, since, on second reading, the Commission would have to reconsider whether or not to retain the provision. It would be difficult to rewrite the commentary at the present stage.

17. Mr. GAJA said he agreed that the text should generally be left as it stood, but a few changes were in order, since draft article 5, paragraph 2, was not in fact about the “Martens clause”. Deleting one portion while the entire text was based on the 1997 Watercourses Convention would give the impression that the Commission had changed its mind.

18. At the request of Mr. Candido, the CHAIRPERSON read out the changes agreed on for paragraphs (2) and (3) of the commentary to draft article 17. The second sentence of paragraph (2) was to be replaced by: “The article’s function is, in any event, merely to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers.” The third sentence of paragraph (3) should be amended to read: “In such cases, draft article 17 makes it clear that the rules and principles governing armed conflict apply, including various provisions of conventions on international humanitarian law, to the extent that the States in question are bound by them.” The last sentence would read: “Paragraph 2 of draft article 5 of the present draft articles provides that, in reconciling a conflict between utilizations of transboundary aquifers, special attention is to be paid to the requirement of vital human needs.”

Paragraphs (2) and (3), as amended, were adopted.

Commentary to article 18 (Data and information concerning national defence or security)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2), as amended, was adopted.


Commentary to article 19 (Bilateral and regional agreements and arrangements)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2), as amended, was adopted.

Section C as a whole, as amended, was adopted.
20. Mr. YAMADA recalled that consideration had been given to adding two sentences at the end of paragraph 1, to read: “A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.” He also proposed that, in the footnote to the first paragraph in document A/CN.4/L.694, the sentence that began “A Working Group” should be deleted.

21. Mr. KATEKA said that, in the first sentence proposed for addition to paragraph 1, the word “also” should be deleted.

Paragraph 1, as amended, was adopted.

Paragraph 2 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session (concluded)

Paragraphs 3 to 6 were adopted.

Paragraph 8 to 10 were adopted.

Paragraph 11 was adopted.

Paragraph 12 was adopted.

Section B was adopted.

C. Recommendation of the Commission

D. Tribute to the Special Rapporteur

Paragraphs 13 and 14 were adopted.

E. Text of the draft articles on diplomatic protection

Paragraphs 15 and 16 were adopted.

Document A/CN.4/L.692 was provisionally adopted.

Paragraph (1) and (2) were adopted.

Paragraph (3) was adopted.

Mr. PELLET proposed that, in the third sentence, the words “premised largely” should be replaced by the words “traditionally premised” in order to make the statement in the sentence less categorical.

Mr. GAJA, noting that diplomatic protection could also be exercised by a State, proposed that, in the first sentence, the words “a State or” should be added before “an international organization” and, in the fourth sentence, that the words “or of a State” should be added after “of an international organization”.

The CHAIRPERSON, speaking as a member of the Commission, said that the term “agent” (“agent”) used throughout the paragraph was somewhat restrictive, since,
in the context of diplomatic protection, a State could assist any of its nationals, regardless of whether they were salaried workers, civil servants, high-level officials or ordinary citizens.

29. Mr. GAJA said that the problem was perhaps that the French term “agent” was not a good translation for the English word “agent”, which was perfectly acceptable in the context.

30. Mr. PELLET said that he would prefer Mr. Gaja’s idea to be expressed not by the inclusion of references to the State in the body of the commentary, but by the insertion of a footnote, to read: “The fact that the words ‘functional protection’ generally refer to the protection of one of its agents by an international organization does not prevent a State from protecting its agents in the exercise of their functions.”

31. Mr. ECONOMIDES said that he agreed with Mr. Pellet, but thought that the proposed footnote would create as much confusion as would the proposal by Mr. Gaja. He would prefer the text to be left as it stood.

32. Mr. CANDIOTI said that he was in favour of retaining the text proposed by the Special Rapporteur for paragraph (3) of the general commentary. Dealing with “functional protection” in that commentary would create confusion.

33. Mr. GAJA said that he would withdraw his proposal, since it did not seem to be acceptable to other members, but he still thought that paragraph (3) as currently worded created confusion. The articles under consideration did not cover, for example, the case where a consular official of a State did not have the nationality of that State, which would then be entitled to exercise functional protection.

Paragraph (3) was adopted.

The general commentary was adopted.

Commentary to article 1 (Definition and scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

34. Mr. DUGARD (Special Rapporteur) said that Mr. Matheson had proposed that the words “is sometimes” in the first sentence should be replaced by “has traditionally”.

35. Mr. Sreenivasa RAO said he had difficulty understanding what was meant by the phrase “it was not always so” in the last sentence of the paragraph.

36. Mr. DUGARD (Special Rapporteur) said the phrase was intended to show that, in the past, international law had not conferred primary rights on the individual, whereas, today, rights were conferred on the individual by many instruments and by customary international law.

37. Mr. ECONOMIDES said that the last sentence in paragraph (3) was superfluous and should be deleted.

Paragraph (3) of the commentary, as amended by Mr. Matheson and Mr. Economides, was adopted.

Paragraph (4)

38. Mr. PELLET said that he had many problems with the paragraph. First of all, the reference to “the prohibition of slavery” in the second sentence seemed a bit too categorical. Secondly, he could not go along with the idea expressed in the sixth sentence that the individual was not yet a full subject of international law. Lastly, in the penultimate sentence, the words “may have” were especially problematic for him. He would therefore like the paragraph to be deleted. Failing that, he suggested that a working group should be formed to redraft it.

39. Mr. GAJA proposed that the phrase “Although not yet a full subject of international law” in the sixth sentence and the entire tenth sentence, namely, “This does not mean that the fiction provided by Mavrommatis can be dispensed with”, should be deleted. The penultimate sentence could be amended to read: “However, the individual has rights under international law, but few remedies.”

40. Mr. Sreenivas RAO proposed that, in the same sentence, the words “few remedies” should be replaced by “few opportunities for exercising them in the event of difficulties”, which he thought would better express the idea that the Special Rapporteur wanted to convey, namely, that, while the individual had rights under international law, it was difficult for him to defend them when they were challenged.

41. The CHAIRPERSON informed the members that the Special Rapporteur had to leave the meeting and that the Commission would have to come back to the paragraph and resume its consideration of chapter IV at a later meeting.


[Agenda item 6]

REPORT OF THE WORKING GROUP

42. Mr. PELLET (Chairperson of the Working Group on unilateral acts of States), introducing the report of the Working Group on unilateral acts of States, said it consisted of draft conclusions divided into two sections. The first took the form of an introductory note describing the background of the topic and defining the concept of the unilateral act of States; the second set out the guiding principles applicable to unilateral declarations of States capable of creating legal obligations. The Working Group had given priority to unilateral acts taking the form of an express manifestation of a will to be bound on the part of the author State, while bearing in mind that a State could be bound by behaviours other than formal declarations. The draft principles, which the Commission was invited to adopt in the form of conclusions on the topic of unilateral acts of States, consisted of a preamble on unilateral acts in a very broad sense followed by principles which related only to unilateral acts stricto sensu and were accompanied by brief commentaries that could more accurately be described as explanatory notes. The notes had been

* Resumed from the 2888th meeting.
prepared by the Special Rapporteur and the Chairperson of the Working Group, with the Working Group’s consent, but without its having been called on to endorse them. For the sake of brevity and for lack of time, the explanatory notes referred exclusively to the jurisprudence of the ICJ and case studies prepared in 2004 by several members of the Working Group and summarized by the Special Rapporteur in his eighth report.369

43. The preamble to the guiding principles incorporated a number of general considerations. It recalled first that States could find themselves bound by their unilateral behaviour on the international plane and that behaviours capable of legally binding States could take the form of formal declarations or mere informal conduct, including silence, on which other States could reasonably rely. It then referred to the role of circumstances in determining whether a unilateral behaviour by a State bound it. It noted that, in practice, it was often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State were the consequence of the intent that it had expressed or depended on the expectations to which its conduct had given rise among other subjects of international law. Lastly, it explained that the guiding principles related only to unilateral acts stricto sensu, in other words, to those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law.

44. Turning to each of the 10 guiding principles contained in the report (A/CN.4/L.703), he said that guiding principle 1 was directly inspired by the dictum of the ICJ in its 1974 judgments in the Nuclear Tests case. Guiding principle 2 stated that any State possessed capacity to undertake legal obligations through unilateral declarations. Guiding principle 3 related to the determination of the legal effects of unilateral declarations. Guiding principle 4 concerned the powers of the official authorities that made the declaration and was inspired by the consistent jurisprudence of the ICJ, including its most recent decisions. Guiding principle 5 stated the manner in which unilateral declarations could be formulated, namely, orally or in writing. Guiding principle 6 concerned the addressees of unilateral declarations. Guiding principle 7 dealt with how obligations were created for the State formulating a unilateral declaration; it, too, was inspired by the jurisprudence of the ICJ and laid down certain guidelines for interpreting the content of such obligations. Guiding principle 8 stated that a unilateral declaration that was in conflict with a peremptory norm of international law was void; it was inspired by article 53 of the 1969 Vienna Convention. Guiding principle 9 dealt with obligations for other States that were created by a unilateral declaration of a State. It merely stated a principle well established in international law whereby, absent any authorizing provision, obligations could not be imposed on a State without its consent. Guiding principle 10, on revoking a unilateral declaration, indicated that this could not be done arbitrarily and was also inspired by the jurisprudence of the ICJ. A fundamental change in circumstances was understood to be governed by the rules embodied in article 62 of the 1969 Vienna Convention.

45. In conclusion, he said that the Working Group recommended that the Commission should adopt the 10 guiding principles together with their commentaries. He thanked not only the Special Rapporteur for his excellent spirit of cooperation and constructive suggestions, but also all the members of the Working Group for their contributions and their spirit of compromise.

46. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) emphasized that the guiding principles submitted by the Chairperson of the Working Group on unilateral acts of States were the culmination of 10 years of hard work and, together with their commentaries, should be of great use to States in their international relations for determining the scope and effects of their unilateral declarations.

47. Mr. KATEKA welcomed the fact that the Working Group had made the effort to accompany the guiding principles by commentaries that would clarify their meaning and scope. The reference to silence in the second preambular paragraph of the guiding principles was not really necessary, however.

48. Mr. GAJA said that the English text of the guiding principles needed to be amended: in guiding principle 1, the words “interested States” should be replaced by “States concerned” and, in guiding principle 4, the words “have the capacity” should be replaced by “are competent”; lastly, at the end of the first sentence of guiding principle 7, the words “clear and specific terms” should be aligned with the French version.

49. Mr. BAENA SOARES said that he endorsed the guiding principles, the Spanish version of which posed no problems, and looked forward with interest to receiving the text of the commentaries.

50. Mr. MELESCANU, referring to the second sentence of guiding principle 9, said that, once a unilateral declaration had been clearly accepted, it was no longer a unilateral declaration, but rather an international agreement concluded in simplified form, for example, orally. With that reservation, he thought that the principles, accompanied by their commentaries, constituted a major contribution by the Commission to the codification of international law.

51. Mr. ECONOMIDES said that three preliminary observations were called for by the guiding principles put forward by the Working Group. First, regarding the title, it should be made clear that the legal obligations in question were created “on the international plane”. Secondly, the preamble to the guiding principle seemed too ambitious: only the first and final paragraphs were really necessary and the remaining three, particularly the second of those, could be deleted without any harm. Lastly, guiding principles 1, 3 and 9 called for comments that would be made at an appropriate moment.

52. Mr. Sreenivasa RAO said he welcomed the fact that the Working Group had been able to complete its work in such a satisfactory manner and expressed the hope that the commentaries to be submitted would be as clear as the guiding principles themselves and would make a

contribution to the literature. The Commission should take note of the results of the work on the topic, namely, the guiding principles and the commentaries thereto, as it had for the topic of fragmentation of international law.

53. Mr. KABATSI said that he shared Mr. Kateka’s reservations about the reference to silence in the second preambular paragraph and Mr. Melescanu’s reservations about the second sentence of guiding principle 9, even though he could see that, in some situations, the States concerned might incur obligations without having strictly speaking entered into treaty relations.

54. Mr. MANSFIELD said that the report of the Working Group, including the guiding principles contained therein, was a text that had been the subject of arduous negotiations and must be taken as a package. The preamble to the principles in its entirety and each of the principles themselves had had to be retained, for without each and every one of them there would have been no consensus. He hoped that, like the Working Group, the Commission could adopt them as a whole by consensus.

55. Mr. PELLET (Chairperson of the Working Group on unilateral acts of States) appealed to the Commission to heed Mr. Mansfield. Reaching a consensus within the Working Group had been extremely difficult and, if the Commission began trying to make changes, it might become embroiled in an interminable debate. It could very well adopt the guiding principles with the reservations of certain members. Moreover, the comments of members could be reflected in the commentaries, to be submitted to the Commission the following week.

56. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group on unilateral acts of States (A/CN.4/L.703) by consensus.

It was so decided.

The meeting rose at 1.10 p.m.

2907th MEETING

Monday, 7 August 2006, 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Moptaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

Draft report of the International Law Commission on the work of its fifty-eighth session (continued)

Chapter IV. Diplomatic protection (continued) (A/CN.4/L.692 and Add.1)

E. Text of the draft articles on diplomatic protection (continued) (A/CN.4/L.692/Add.1)

1. The CHAIRPERSON recalled that at the previous meeting, some members of the Commission, initially in the minority, had proposed deleting the paragraph, but that the ensuing discussion had revealed the need to indicate that while an individual was not a full-fledged subject of international law, as was a State, he or she was accorded a panoply of rights by international law. Even though they were not exercised, implemented and upheld in the same way as those inherent to State sovereignty, paragraph (4) should be amended to reflect that state of affairs.

2. Mr. DUGARD (Special Rapporteur) said the paragraph should be retained because it explained why, despite important developments in the field of human rights, diplomatic protection was still necessary. Although many primary rules were now available to protect the individual, remedies were few. Mr. Gaja had proposed to delete the phrase “Although not yet a full subject of international law” at the start of the sixth sentence. Since it raised a controversial issue and added nothing of value, he could agree to its deletion. Another useful proposal by Mr. Gaja was to replace the words “may have”, in the penultimate sentence, by “has”, a more correct wording to which he could likewise agree. He suggested that, with those two amendments, the paragraph should be retained.

3. Mr. PELLET said the new text represented some improvement over the original but was still not entirely satisfactory. The reference in the second sentence to the prohibition of slavery was ambiguous and imprecise. Slavery had been prohibited fairly recently, not in the “early years of international law” mentioned in the preceding paragraph. In fact, the prohibition of the slave trade, and, for that matter, of piracy, had preceded the prohibition of slavery, and he did not see why the latter should be singled out. Accordingly, he proposed that the second sentence should be deleted. If, however, it was retained, the phrase “except perhaps those arising from the prohibition on slavery” should be deleted and the word “virtually” inserted between “There were” and “no primary rules”.

4. A more serious problem concerned the antepenultimate sentence. It again raked up the Mavrommatis fiction, which draft article 1 had succeeded in adroitly circumventing. The sentence added nothing and could and should be deleted.

5. Mr. ECONOMIDES proposed replacing the second phrase of the second sentence with the phrase “except for a few very rare exceptions”.

6. Mr. CHEE said that having the right to a remedy was one thing, but exercising it was quite another. Normally when an individual was involved in a case of an international character, it was better that the State should seek remedies. In view of that possibility, he would prefer to see the reference to the Mavrommatis fiction retained. However, if a majority of members favoured its deletion, he would not oppose such a decision.