

Document:-
A/CN.4/2909

Summary record of the 2909th meeting

Topic:
Draft report of the International Law Commission on the work of its fifty-eighth session

Extract from the Yearbook of the International Law Commission:-
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Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

84. Mr. DUGARD (Special Rapporteur) said that the words “albeit not unambiguous” in the first sentence should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

85. Mr. PELLET, referring to the first sentence, said that it was preferable to speak of a case involving something akin to diplomatic protection “of the members of the crew” or even a “case involving something akin to protection of the members of the crew” without mentioning the word “diplomatic”.

86. Mr. DUGARD (Special Rapporteur) stressed that the International Tribunal for the Law of the Sea had seen the “*Saiga*” case as being related to diplomatic protection. He therefore suggested saying something along the lines of “a case involving something akin to, but different from, diplomatic protection”.

87. Mr. PELLET said it was essential to refer above all to the protection of the members of the crew. He proposed the following wording for the French version: “[*Le Tribunal*] y a également vu une affaire de protection des membres de l’équipage s’apparentant à la protection diplomatique sans se confondre avec celle-ci.”

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

88. Mr. MOMTAZ pointed out that the fourth sentence contradicted draft articles 2 and 3 by saying that neither of the two States was accorded priority, whereas, in actual fact, priority was accorded to the State of nationality of the members of the crew, which was entitled, pursuant to draft articles 2 and 3, to exercise diplomatic protection on behalf of its nationals. It would therefore be better to delete the words “without priority being accorded to either” at the end of the fourth sentence.

89. Ms. ESCARAMEIA said that she was opposed to the deletion of those words, which reflected the conclusion of a lengthy debate, at the end of which the Commission had decided that there was to be no priority. The argument which referred to the right provided for in draft articles 2 and 3 was not valid: by the same token, it could be argued that draft article 18 gave priority to the right of the flag State.

90. The CHAIRPERSON, speaking as a member of the Commission, said that, as he saw it, the main point was that both possible actions were recognized. The words “without priority being accorded to either” could thus be deleted.

91. Mr. CHEE said that he supported Ms. Escarameia’s point of view.

92. The CHAIRPERSON said that, owing to the lack of time, the Commission would continue its consideration of paragraph (8) of the commentary to draft article 18 at the next meeting.

The meeting rose at 6.09 p.m.

2909th MEETING

Tuesday, 8 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue.

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

CHAPTER IV. *Diplomatic protection (concluded)* (A/CN.4/L.692 and Add.1)

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

2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)*

Commentary to article 18 (Protection of ships’ crews) (concluded)

Paragraph (8) (*concluded*)

1. The CHAIRPERSON recalled that the previous day’s discussion of paragraph (8) have revolved around the possible deletion of the third sentence of the paragraph.

2. Mr. ECONOMIDES said that, in the third sentence, the phrase “without priority being accorded to either” was somewhat inaccurate, in that it implied that both the diplomatic protection exercised by the State of nationality and that exercised by the flag State should be recognized, yet the diplomatic protection exercised by the State of nationality was already recognized. The sentence was intended to convey the idea that diplomatic protection exercised by the flag State should be recognized alongside that traditionally exercised by the State of nationality. Since the Commission should not attempt to regulate the priority between them, it would be more apt to word the sentence: “The diplomatic protection exercised by the flag State in seeking redress for the crew should be recognized alongside the diplomatic protection of the State of nationality, which may apply in all cases and which is the traditional form.” The two States could agree which was to exercise diplomatic protection, if they so wished. Usually it was the flag State which would exercise such protection, but it was not out of the question that the State of nationality of the crew might do so.

3. The CHAIRPERSON asked Mr. Economides if it was appropriate to retain the adjective “diplomatic” at the beginning of the sentence.

4. Mr. ECONOMIDES said that, in view of the debate the previous day, when it had been decided that an endeavour should be made to avoid the adjective “diplomatic”, that term could be dropped in his proposed amendment.

5. Mr. MANSFIELD said that the English text had been very carefully worded to make it clear that there was a distinction between diplomatic protection by the State of nationality and the right of the flag State to seek redress. For that reason, he was not in favour of the formulation proposed by Mr. Economides, which suggested that the notion of diplomatic protection also applied to the exercise of redress by the flag State for the crew. That matter had been discussed at length in the Working Group and the Drafting Committee. The phrase as it stood was well crafted and reflected the actual situation. He was therefore a strong supporter of the original text.

6. Mr. DUGARD (Special Rapporteur) endorsed Mr. Mansfield’s statement. It was plain from the plenary debate and from States’ comments that a clear distinction should be drawn between diplomatic protection and the right of the flag State to seek redress for the crew. The term “diplomatic protection” should not be used to cover the latter. He had deliberately refrained from using the term “diplomatic protection”, or even “protection”, in that paragraph in order to avoid confusion. The phraseology had been very carefully chosen. It was equally vital to indicate that no priority was accorded to either form of protection and he had therefore done so in that sentence, which was the result of careful consideration.

7. Ms. ESCARAMEIA said that she likewise supported Mr. Mansfield’s statement. The wording had been discussed thoroughly in the Drafting Committee, where a substantive agreement had been reached. The Commission should not reopen the discussion. The sentence should be retained in its current wording.

8. Mr. MOMTAZ said that, in practice, if a State of nationality was prepared to exercise diplomatic protection, the flag State stood aside. The thesis of the protection of the crew by the flag State was justified in a situation where the flag State was prepared to provide such protection and the State of nationality, for one reason or another, was not in a position to exercise diplomatic protection. The deletion of the sentence in question would represent a compromise solution. There was no need for the Commission to adopt a position. In the kind of situation envisaged in draft article 18, it was the State of nationality which had priority over the flag State. The reasoning behind the draft article was that, if the State of nationality did not, for any reason, wish to exercise diplomatic protection, the flag State was entitled to do so. He was prepared to leave the sentence as it was, but it was not consonant with State practice.

9. Ms. XUE (Rapporteur) said that, for policy reasons, she sympathized with the viewpoint of Mr. Momtaz. The aim of the paragraph was to demonstrate that the two kinds of protection were complementary, not contradictory. In practice, if one or more of the crew members of the

same nationality were injured, the State of nationality would certainly have priority to exercise diplomatic protection. Case law amply supported that assertion. If, however, the whole crew suffered from an internationally wrongful act and if the members of the crew had many different nationalities, it would be hard to insist that the States of nationality had priority, as that would give rise to the presentation of multiple claims. It would then be better to follow the precedent set in the “*Saiga*” case, where one State had exercised overall protection for the whole crew. The debate was not over the substance, but on how to phrase the notion in order to bring out the idea that the aim was to provide maximum protection for crew members. She therefore suggested that the end of the sentence should read “should be recognized as complementary”. The remainder of the policy argument set out in the paragraph would then be logical.

10. Mr. ECONOMIDES said that he withdrew his proposed amendment, as the amendment proposed by Ms. Xue achieved the same purpose by removing any allusions to priority and placing the two possible forms of protection on an equal footing.

11. Mr. FOMBA proposed that the sentence should end with the word “recognized”. The clarification supplied by Mr. Momtaz with regard to practice was, however, important and should be reflected in a footnote.

12. Mr. DUGARD (Special Rapporteur) emphasized that the wording of the sentence was that which had been included in the commentary on first reading. As such, it had been seen and approved by States. For many States article 18 had been a very controversial provision, and they had ultimately supported it largely because of the careful way in which the commentary had been drafted. For that reason, he would prefer to retain the phrase “without priority being accorded to either”.

13. Mr. BROWNLIE said that, as a matter of form, it would degrade a second reading text which had the status of having been seen by Governments if it were to be altered at a late stage at the suggestion of one or two members. If it did make any such amendments, the Commission would be standing its procedure on its head.

14. Mr. KATEKA said that he was in favour of retaining the text as it stood.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (3) (concluded)

15. Mr. DUGARD (Special Rapporteur) proposed that paragraph (3) should be worded:

“The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State. This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic communications

and consular regulations of the United States. Doubts have, however, been raised, including by the United States, as to whether this practice provides evidence of a customary rule.”

Paragraph (3), as amended, was adopted.

The commentary to article 18, as amended, was adopted.

Commentary to article 17 (Special rules of international law) (concluded)

Paragraph (1)

16. Mr. DUGARD (Special Rapporteur) presented a new version of paragraph (1), which would read:

“Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of national remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the settlement of investment disputes between States and nationals of other States are the primary examples of such treaties.”

He noted that, if that paragraph were to be adopted, paragraph (2) should be deleted, as its contents would be included in paragraph (1).

Paragraph (1), as amended, was adopted.

Paragraph (2) was deleted.

The commentary to article 17, as amended, was adopted.

Commentary to article 19 (Recommended practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

17. Mr. DUGARD (Special Rapporteur) announced that Mr. Matheson had suggested that the last sentence of that paragraph should read: “If customary international law has not yet reached this stage of development, then article 19, subparagraph (a), may be seen as a recommendation that might at some future time develop as customary law.”

18. Mr. KATEKA, Mr. FOMBA and Ms. ESCARAMEIA opposed that amendment to the last sentence of paragraph (3) of the commentary since they viewed article 19, subparagraph (a), as progressive development, not merely a recommendation.

Paragraph (3) was adopted.

Paragraph (4)

19. Mr. DUGARD (Special Rapporteur) noted that Mr. Matheson had suggested deleting the second sentence, which read: “Like article 19, subparagraph (a), this provision falls into the grey area between codification and progressive development.”

20. Ms. XUE (Rapporteur) said that the Commission’s report should faithfully reflect the discussions in the Working Group and the plenary debates. Only an idea on which members had agreed in those debates could be added. The paragraph had been discussed at some length, because some members had raised the point on a number of occasions. The article referred to recommended practice. It would not be an honest reflection of the Commission’s deliberations to claim that it must be seen as an exercise in progressive development.

21. Mr. DUGARD (Special Rapporteur) said that, while article 19 constituted a recommendation, it did contain some elements of codification and progressive development. For that reason, Mr. Matheson had preferred to describe it as recommendatory rather than as a provision representing progressive development. He personally did not have any very strong views on the subject although, as the heading to the article indicated, the Commission was essentially dealing with a recommendation. The proposed amendment therefore deserved further consideration.

22. Ms. ESCARAMEIA said that she was in favour of the text as it stood. The point had been the subject of much discussion. The fact that the article was formulated as a recommendation was already a concession on the part of those members who believed that, in fact, it codified practice. It was therefore quite true to state that the provision fell into the grey area between codification and progressive development. In practice, it was hard to imagine that a State would take action without considering the views of the injured persons, save perhaps in the event of mass claims. The commentary should indicate that some of the Commission members believed that the article in question constituted codification of existing practice.

23. Mr. GAJA said that the paragraph contained two assertions about progressive development. A possible compromise might be to delete the second sentence and retain the last sentence, which was similar to the last sentence of paragraph (3) and expressed the ambiguity between codification and progressive development.

24. Ms. XUE (Rapporteur) said that article 19 was in itself a substantial compromise because it turned a right into a duty. Article 19 had been included for policy considerations, but the claim was being made that it constituted progressive development. Even if the second sentence were deleted, a reference to progressive development would still be found in the last sentence. The last sentence should therefore be deleted or toned down.

25. The CHAIRPERSON, speaking as a member of the Commission, said that the second sentence was a commentary within the commentary and did not contribute any specific elucidation of the text of the article. He therefore suggested that it should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

26. Mr. MOMTAZ said that footnote whose reference followed the phrase “customary international law” should refer to the footnote whose reference followed the phrase

“customary international law” in paragraph (4) and not to the footnote referring to the *Mavrommatis* case.

27. Mr. DUGARD (Special Rapporteur) noted that Mr. Matheson had proposed replacing the phrase “This conflicts with” at the start of the second sentence, with the words “This recommendation is designed to encourage responsible conduct by States in light of”. He had no objection to the proposal.

28. In response to a query by the Chairperson, he said that the word “responsible” was appropriate in the context: the intention was to encourage States to act responsibly, in keeping with the recommendations made in article 19.

Paragraph (5), as amended, was adopted.

Paragraph (6)

29. Mr. GAJA pointed out that in the first sentence, the phrase “judicial pronouncements” was an inaccurate description of the *dictum* of the umpire of the Mixed Claims Commission. He proposed that it should be replaced with the word “view”.

30. Mr. DUGARD (Special Rapporteur) endorsed the proposal as a broader and more judicious formulation.

Paragraph (6), as amended, was adopted.

New paragraph (6) *bis*

31. Mr. DUGARD (Special Rapporteur) read out a proposal by Mr. Matheson for the insertion of a new paragraph 6 *bis*, which would read:

“Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the costs of goods or services provided by the State to them.”

Paragraph (6) bis was adopted.

Paragraph (7)

32. Mr. MOMTAZ said that the final sentence, “While it is an exercise in progressive development it is supported by State practice”, was contradictory, since an exercise in progressive development could not, by definition, be supported by State practice. It also contradicted the clause “this probably does not constitute a settled practice” in the first sentence. He proposed that the phrase “it is supported by State practice” should be deleted.

33. Ms. ESCARAMEIA proposed instead that the final sentence should read simply: “It is supported by State practice and equity.”

34. Mr. CANDIOTI, supported by Mr. BROWNLIE, said that the point was that some practice did exist in that area. He proposed the replacement of the phrase “it is supported by State practice” with the words “it is supported by a certain amount of practice”. There would then be no contradiction

between the final sentence and the first sentence, because practice could be embryonic before becoming settled.

35. Mr. MANSFIELD said that he endorsed the proposal but would suggest a slightly different word order. The final sentence would read: “While it is an exercise in progressive development it is supported by equity and a certain amount of State practice.”

Paragraph (7), as amended, was adopted.

The commentary to article 19, as amended, was adopted.

Section E as a whole, as amended, was adopted.

C. Recommendation of the Commission (concluded)* (A/CN.4/L.692)

36. The CHAIRPERSON invited the Commission to consider the proposed text of a recommendation, to be inserted as paragraph 13 of section C of chapter IV, to read:

“At its 2909th meeting, on 8 August 2006, the Commission decided in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on diplomatic protection.”

37. Mr. CANDIOTI pointed out that the draft articles were a subset of the law on State responsibility. He requested clarification from the Secretariat as to the recommendation the Commission had made on the form the draft articles on the responsibility of States for internationally wrongful acts should take when adopting them in 2001.³⁷⁸ If the Commission had not recommended that the draft articles on the responsibility of States should be given final form in a convention, it should not make such a recommendation regarding the draft articles on diplomatic protection, because they formed a chapter of the law on State responsibility.

38. Mr. KATEKA said that, although the topic of State responsibility was a broad one, the Commission’s work on diplomatic protection was important and could stand on its own. The fate of the draft articles should not be linked to that of the draft articles on State responsibility, which were important in and of themselves and were already being cited frequently, even though not yet enshrined in a convention. He supported the proposal to recommend to the General Assembly the elaboration of a convention on diplomatic protection.

39. Mr. ECONOMIDES said that he endorsed that view. Linking the draft articles on the responsibility of States and those on diplomatic protection would only do a disservice to the first and slow down progress with the second. The best approach was to recommend the elaboration of a convention on diplomatic protection.

40. The CHAIRPERSON explained that the reasoning just expounded by Mr. Economides reflected the discussion by the Enlarged Bureau of the proposed

* Resumed from the 2906th meeting.

³⁷⁸ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 25, paras. 72–73.

recommendation. If he heard no objection, he would take it that the Commission wished to adopt it.

It was so decided.

Section C was adopted.

D. Tribute to the Special Rapporteur, Mr. Christopher John Robert Dugard (concluded) (A/CN.4/L.692)

41. The CHAIRPERSON said that now that the Commission had completed its consideration of the draft articles on diplomatic protection on second reading, he wished to express his personal gratitude to the Special Rapporteur. He invited the Commission to consider the proposed text of a tribute, to be inserted in paragraph 14 of section D of chapter IV, to read:

“The International Law Commission,

“Having adopted the draft articles on diplomatic protection,

“Expresses to the Special Rapporteur, Mr. Christopher John Robert Dugard, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of draft articles on diplomatic protection.”

“The Commission also expressed its deep appreciation to the previous Special Rapporteur, Mr. Mohammed Bennouna, for his valuable contribution to the work on the topic.”

The tribute to the Special Rapporteur was adopted by acclamation.

Section D was adopted.

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

42. Mr. DUGARD (Special Rapporteur) thanked the Chairperson and members of the Commission for their generous tribute. He had guided the Commission through its deliberations, but it had been a team effort and the end product was the Commission's. He thanked the Chairperson in particular for his role in bringing the exercise to fruition.

CHAPTER V. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/L.693 and Add.1)

43. The CHAIRPERSON invited the Commission to begin its consideration of chapter V of its draft report and drew attention to sections A to D contained in document A/CN.4/L.693.

A. Introduction (A/CN.4/L.693)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted, on the understanding that the dates in paragraph 11 would be filled in by the Secretariat.

Section B was adopted.

44. The CHAIRPERSON drew attention to section E of chapter V contained in document A/CN.4/L.693/Add.1.

E. The text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/CN.4/L.693/Add.1)

1. THE TEXT OF THE DRAFT PRINCIPLES

Paragraph 16

45. The CHAIRPERSON noted that the draft principles, set out in paragraph 16 of chapter V, had already been adopted.

2. THE TEXT OF THE DRAFT PRINCIPLES AND COMMENTARIES THERETO

Paragraph 17

46. Mr. GAJA said there was a problem with the English wording: the phrase “transboundary harm” appeared in the title, whereas “transboundary damage” was used throughout the text. It might be better to change the title to conform to the body of the draft principles.

47. Mr. Sreenivasa RAO (Special Rapporteur) said the proposal was eminently acceptable, as long as it did not present major technological difficulties. The title of the subtopic had been adopted long ago, before the distinction had been made between damage and harm.

48. Mr. MANSFIELD said that the proposal seemed sensible, but since all the consequences could not be easily foreseen, the Commission should leave its decision in abeyance until it had completed its consideration of the commentaries to the draft principles.

49. Mr. GAJA said he had no objections to deferring a decision on the matter.

General commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

50. Mr. MOMTAZ thought that it would be preferable to place the very short paragraph (4) at the end of paragraph (3).

Paragraph (4) was incorporated in paragraph (3).

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

* Resumed from the 2906th meeting.

Paragraph (7)

51. Mr. GAJA said that the words “complying with” should be changed to “infringement of”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

52. Mr. BROWNLIE said that the first sentence was difficult to understand. He did not see why it was necessary to say that State liability was an exception. It seemed to be a strange way to characterize State liability, which the Commission regarded as a project in its own right.³⁷⁹ The beginning of the second sentence, which drew a conclusion from State liability being an exception, was also a non sequitur.

53. Mr. Sreenivasa RAO (Special Rapporteur) said that he would give consideration to an alternative. The first two sentences reflected the fact that State liability had been a major point of discussion throughout the consideration of the topic.

54. Ms. ESCARAMEIA said that she agreed with Mr. Brownlie and hoped that the Special Rapporteur would review the points he had raised. She would have liked to have seen more mention in the general commentary of the core principle that those who had suffered harm or loss should not be left to bear the burden alone.

55. Mr. MANSFIELD agreed that the principle was very important, but, since it was stated in paragraph (3), very early in the general commentary, he was satisfied that it had been given sufficient prominence.

56. Ms. XUE (Rapporteur) said that the first sentence simply reflected the current state of legal regimes on liability. In order to meet the concerns raised by Mr. Brownlie, she proposed deleting the words “an exception and” in the first sentence and, in the second sentence, deleting the word “accordingly” and inserting “primarily” before “attaches to the operator”.

57. Mr. MANSFIELD supported the changes proposed by Ms. Xue.

58. Mr. Sreenivasa RAO (Special Rapporteur) said that Ms. Xue’s proposal was useful and took into account Mr. Brownlie’s concerns.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

59. Mr. MOMTAZ wondered whether the statement that the harmonization of national laws and legal systems

was potentially unachievable would not discourage all harmonization efforts in the future. Perhaps the word “unachievable” could be replaced by “difficult”.

60. Mr. MANSFIELD said that he was not as optimistic as Mr. Momtaz. He remembered the discussions on that point, and the real intention had been to say that, if it had not opted for non-binding principles, the Commission would be trying to harmonize tort laws, an extremely difficult undertaking indeed. He could go along with the proposal by Mr. Momtaz, but the Commission should be realistic: the harmonization of tort laws was probably an unachievable goal.

61. Mr. Sreenivasa RAO (Special Rapporteur) suggested recasting the phrase to read “have the advantage of not requiring a harmonization of national laws and legal systems, which is fraught with difficulties”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted with a minor editorial change.

The general commentary, as amended, was adopted.

Commentary to the draft preamble

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

62. Mr. MOMTAZ said that the words “*est sans incidences sur*” in the French version suggested that the draft principles would have no future role to play in the area of responsibility.

63. The CHAIRPERSON suggested that the problem could be addressed by amending the phrase to read “*n’affecte pas*”.

Paragraph (4) was adopted with that editorial change in the French version.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to the draft preamble, as amended, was adopted.

Commentary to draft principle 1 (Scope of application)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

64. Mr. Sreenivasa RAO (Special Rapporteur) said that the word “could” in the third sentence should be changed to “might”.

Paragraph (3) was adopted with that minor editorial change.

³⁷⁹ *Ibid.*, para. 76.

Paragraph (4)

65. Mr. KATEKA said that for the reader's sake, the footnote should indicate which of the multilateral environmental agreements referred to were in force. On a more general point, it would be useful if the footnotes cited full titles, rather than short forms and acronyms. Also, some footnotes had been repeated in full, where cross-references would have sufficed.

66. Ms. ESCARAMEIA said that some of the draft principles were couched in prescriptive language, and thus an obligation existed, even if it was not specified in multilateral, regional or bilateral arrangements. She therefore suggested inserting the word "further" before "specify" in the first line, so as to avoid the impression that, if an activity caused a problem, a State, notwithstanding the existence of the principles, was not required to notify or comply with other obligations unless there was a multilateral, regional or bilateral arrangement.

67. Mr. Sreenivasa RAO (Special Rapporteur) said that the Secretariat would take into account Mr. Kateka's comments on the footnotes and abbreviations. On his other point, the text had not specified the status of the conventions because, regardless of whether they were in force, they had been drawn upon as models and sources. Most of the conventions cited were not in fact in force and might never be; indicating which were or were not might thus give the reader the wrong impression.

68. With regard to Ms. Escarameia's comment, paragraph (4) was not intended to address the question of States' obligations arising under the principles. It merely provided that, in their multilateral, regional or bilateral arrangements, States which so desired could specify which activities came under the scope of the principles.

69. Ms. ESCARAMEIA wondered, then, if States did not specify those activities in their multilateral, regional or bilateral arrangements, whether the principles were useless, or whether there were still aspects of the principles which applied. The point of her proposal that States should "further" specify such activities was that at least activities in general should be covered, because otherwise it seemed that the principles had no scope without multilateral, regional or bilateral arrangements. If States wished to derogate from them or specify them in such arrangements, they could do so.

70. Mr. MANSFIELD said that he shared Ms. Escarameia's concerns, but he interpreted paragraph (4) very differently, namely, to mean that the draft principles applied to transboundary damage caused by, in effect, all hazardous activities not prohibited by international law. The commentary explained why the Commission had decided not to list all those activities. Paragraph (4) merely provided that, if they saw fit, States could specify particular activities which were covered, but actually the principles applied to all such hazardous activities, and all the obligations stemming from the principles applied in respect of those activities. Some would be dealt with through specific agreements, whereas others might not be. States might themselves specify them in their own

legislation. He thought that paragraph (4) was logical and could remain as it stood.

71. Mr. BROWNLIE said that paragraph (4) stated the obvious. It would not do much harm if it had been left out, but it was worth saying, and it provided a hinge on which the important material in the footnote could be set out. He therefore favoured retaining paragraph (4) in its current form. He did not share Ms. Escarameia's negative interpretation of it.

72. Mr. MELESCANU said that the idea might emerge more clearly if the material in paragraph (4) came at the end of paragraph (3).

Paragraph (4) was incorporated in paragraph (3).

Paragraphs (5) to (13)

Paragraphs (5) to (13) were adopted.

The commentary to draft principle 1, as amended, was adopted.

Commentary to draft principle 2 (Use of terms)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

73. Mr. BROWNLIE said that the words "concerned about" in the first sentence were unclear and should be changed to "closely related to".

Paragraph (7) was, as amended, adopted.

Paragraph (8)

74. Mr. GAJA said that, as he saw it, the third sentence from the end did not seem to follow from the previous one. Moreover, he was not clear on the distinction being drawn between the loss of income in that sentence and the pure economic loss discussed in the penultimate sentence. He sought clarification from the Special Rapporteur.

75. Mr. Sreenivasa RAO (Special Rapporteur) said that the point was that loss of income was sometimes specifically regulated; treaties or national laws might even disallow it as a head of loss under their compensatory regimes, while providing for alternative arrangements. For instance, loss suffered by factory workers was sometimes excluded, because it was specifically provided for elsewhere. Where such treaties or laws did not exclude compensation for loss of income, where they did not otherwise provide for it or where they were silent on that question, it was reasonable to expect that if an incident involving a hazardous activity directly caused loss of income, the victim was entitled to recover the loss. On the other hand, a distinction had to be made between pure economic loss not linked to personal injury or damage to property and the loss of income resulting from personal injury or property damage.

76. Mr. MANSFIELD said that replacing the phrase "the victim is entitled to recover the loss" by "efforts would be made to ensure that the victim is not left uncompensated"

in the third sentence from the end might make the idea clearer.

77. Mr. CANDIOTI said that Mr. Mansfield's proposal changed the emphasis of the sentence, which, in his view, should remain unchanged. Rather, the penultimate sentence should be reformulated to read: "On the other hand, other economic loss may arise that is not linked to personal injury or damage to property."

78. Mr. GAJA said that the logic of the paragraph had been improved but could be improved still further. Since the third sentence from the end related to pure economic loss, the penultimate and antepenultimate sentence should be reversed, incorporating the proposals of Mr. Candiotti and Mr. Mansfield. The final sentence of the paragraph should be deleted, since it applied to a later paragraph.

Paragraph (8), as amended, was adopted.

Paragraph (9)

79. Mr. MOMTAZ queried the need to refer to "natural features and sites and geological and physical formations" in the context of a country's natural heritage.

80. Mr. Sreenivasa RAO (Special Rapporteur) said that he had in mind such natural features as the Grand Canyon in the United States of America.

Paragraph (9) was adopted.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were adopted.

Paragraph (15)

81. Mr. GAJA said that he was concerned about the placement of footnote whose reference was placed after the words "domestic law". Paragraph (15) referred to reinstatement, but the footnote was largely concerned with the "Patmos" case, which, according to his understanding, did not relate to reinstatement. Perhaps the case could be mentioned elsewhere in the commentary.

82. Mr. Sreenivasa RAO (Special Rapporteur) said that the point was well taken. It might be more appropriate to link the text of the footnote with the discussion of the recent decisions of the United Nations Compensation Commission. The point was that environmental damage *per se* had received judicial recognition.

Paragraph (15) was adopted, subject to the appropriate relocation to the penultimate sentence of the text of the footnote whose reference was placed after the words "domestic law".

Paragraphs (16) to (25)

Paragraphs (16) to (25) were adopted.

Paragraph (26)

83. Mr. GAJA pointed out a significant misprint in the third sentence in the English version, which should read: "... territory, jurisdiction or control by a State".

Paragraph (26), as amended, was adopted.

Paragraph (27)

84. Mr. BROWNLIE said that the word "demarcate" should be replaced by the word "identify".

Paragraph (27), as amended, was adopted.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were adopted.

The commentary to draft principle 2, as amended, was adopted.

Commentary to draft principle 3 (Purposes)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

85. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the final phrase of the first sentence ("and should in fact be compensated"), which did not appear in the French version, be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

86. Mr. BROWNLIE said that, in the second sentence, the phrase "to put protection" should be replaced by the phrase "to recognize protection".

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (12)

Paragraphs (7) to (12) were adopted.

Paragraph (13)

87. Mr. GAJA proposed that the following sentence, in the footnote whose reference was placed at the end of paragraph after the word "function", should be deleted: "It is also preparing to implement the European Directive, 2004, and which will become effective by 2007 that imposed strict liability and polluter-pays principle for environmental harm." It was redundant to specify that Ireland was preparing to implement the Directive, since the same applied to all member States of the European Union.

Paragraph (13), as amended, was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

88. Mr. Sreenivasa RAO (Special Rapporteur) said that, in the first sentence, the words "also implicates on" should be replaced by the words "is related to".

Paragraph (16), as amended, was adopted.

Paragraph (17)

89. Mr. GALICKI said that the commentary should be consistent in its nomenclature. The case cited as the *Factory at Chorzow* case in paragraph (16) was called the *Chorzów Factory* case in paragraph (17). He believed the latter was the more common short form.

90. Mr. Sreenivasa RAO (Special Rapporteur) said that he proposed to add more detailed references in the footnote whose reference was placed after the word “function” in the sixth sentence, rather than simply referring the reader to the Commission’s report on its fifty-third session.³⁸⁰

Paragraph (17) was adopted, subject to an expansion of the above-mentioned footnote.

Paragraph (18)

91. Mr. GAJA said that the reference to international tribunals in the first sentence and to awards in the last should be accompanied by footnotes detailing the tribunals and awards concerned.

92. Mr. BROWNLIE said that the order of words should be changed at the end of the first sentence, to read “by the International Court of Justice and other international tribunals”.

93. Mr. MANSFIELD said that, in the last sentence, the word “fuller” should be replaced by the word “full”.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

The commentary to draft principle 3, as amended, was adopted.

Commentary to draft principle 4 (Prompt and adequate compensation)

Paragraph (1)

94. Mr. MANSFIELD suggested that the phrase “denude the principle of prompt and adequate compensation of its essential purpose”, in the penultimate sentence (c), should be replaced by the phrase “defeat the purpose of prompt and adequate compensation”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

95. Ms. ESCARAMEIA suggested that, in the second sentence, the word “necessarily” should be inserted in the phrase “is not obliged”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (12)

Paragraphs (4) to (12) were adopted.

Paragraph (13)

96. Mr. BROWNLIE and Mr. MANSFIELD proposed minor editorial amendments.

Paragraph (13), as amended, was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

97. Mr. GAJA said that the words “test foreseeability” in the penultimate sentence should read “foreseeability test”.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (22)

Paragraphs (17) to (22) were adopted.

Paragraph (23)

98. Mr. Sreenivasa RAO (Special Rapporteur) said, in reply to a question from Mr. MOMTAZ that, in the last sentence of the footnote on Special Drawing Rights, the word “receive” had the sense of “import”, which could be used instead.

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (37)

Paragraphs (24) to (37) were adopted.

Paragraph (38)

99. Ms. ESCARAMEIA said that, in the second sentence, the phrase “make every effort to” should be deleted, to bring the commentary into line with the provisions of principle 4, paragraph (5).

Paragraph (38), as amended, was adopted.

Paragraph (39)

Paragraph (39) was adopted.

The commentary to draft principle 4, as amended, was adopted.

Commentary to draft principle 5 (Response measures)

Paragraph (1)

100. Mr. GAJA said that, since the role of the operator was secondary with regard to response measures, the emphasis of the fourth sentence should be changed by reformulating it along the following lines: “Second, it is expected to ensure that appropriate measures are taken within the means ...”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

101. Mr. GAJA suggested that, in the interests of clarification, a sentence should be inserted after the second sentence concerning notification, to read: “It shall contain all relevant information that is available to the State of origin.”

Paragraph (2), as amended, was adopted.

³⁸⁰ *Ibid.*, Draft articles on State responsibility for internationally wrongful acts, article 36 (Compensation) and commentary thereto, p. 102.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

102. Mr. BROWNLIE said that the last sentence needed some adjustment.

103. Mr. Sreenivasa RAO (Special Rapporteur) said that the idea that the commentary was trying to convey was that some States might need one kind of assistance but not another, while others might need assistance not immediately but later. The assistance should therefore be tailored to the needs of each individual State. He suggested that the last sentence should be reformulated to read: “In this process, the States concerned may seek such assistance as they may desire and need from competent international organizations”

Paragraph (5), as amended, was adopted.

Paragraph (6)

104. Mr. Sreenivasa RAO (Special Rapporteur) proposed some minor editorial amendments: in the third sentence, the word “principles” should be replaced by the word “principle”. In the fourth sentence, the word “equally” should be inserted after the word “could”. In the penultimate sentence, the word “including” should be replaced by the phrase “which includes”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

105. Mr. GAJA said that, in order to avoid excessive use of the word “necessary”, the second half of the penultimate sentence should be reformulated to read: “the State of origin should make arrangements to take such action.”

106. Ms. ESCARAMEIA said that, in the same phrase, the word “should” should be replaced by the word “shall”, in line with the provisions of principle 5, subparagraph (b).

Paragraph (8), as amended, was adopted.

Paragraph (9)

107. Mr. BROWNLIE said that the word “viewed” should be replaced by the word “considered”.

Paragraph (9), as amended, was adopted.

Paragraph (10)

108. Mr. BROWNLIE said that, in order to be consistent with other portions of the text, the word “jurisdiction” in the third sentence should be followed by the words “and control”.

109. Mr. GAJA said that the additional words should be “or control”.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

The commentary to draft principle 5, as amended, was adopted.

Commentary to draft principle 6 (International and domestic remedies)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

110. Mr. Sreenivasa RAO (Special Rapporteur) said that the fourth sentence should be reformulated and divided into two, as follows:

“Article 3 of the Convention provides equal right of access to persons who have been or may be affected by an environmentally harmful activity in another State. The right of equal access to courts or administrative agencies of that State is provided ‘to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on.’”

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with a minor editorial change.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

111. Ms. ESCARAMEIA said that the words “first principle” in the penultimate sentence were confusing, since they seemed to suggest that there was a further principle within the principle of non-discrimination, and that that further principle was only “essentially” procedural. She suggested that the first part of the sentence should be reformulated to read: “The procedural aspect of this principle means that”.

112. Mr. Sreenivasa RAO (Special Rapporteur) explained that he had wished to emphasize that the principle of non-discrimination had both procedural and substantive aspects.

113. Ms. XUE (Rapporteur) suggested the following form of words: “In terms of the procedural aspect, it means that”.

Paragraph (5), as amended, was adopted.

The meeting rose at 1.10 p.m.