Summary record of the 3118th meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-third session

Extract from the Yearbook of the International Law Commission:-
2011, vol. I
3118th meeting—5 August 2011

Friday, 5 August 2011, at 10 a.m.

Chairperson: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Later: Mr. Bernd H. NIEHAUS (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

In the absence of the Chairperson, Ms. Jacobsson, Vice-Chairperson, took the Chair.

Draft report of the International Law Commission on the work of its sixty-third session (continued)

Chapter VI. Effects of armed conflicts on treaties (concluded) (A/CN.4/L.785 and Add.1–2)

C. Recommendation of the Commission (concluded)

1. The CHAIRPERSON reminded Commission members that paragraph 9 of document A/CN.4/L.785 had been held in abeyance so that the Special Rapporteur could make a proposal on it.

2. Mr. CAFLISCH (Special Rapporteur) said that, in the light of the discussion at the previous meeting concerning the recommendation that the Commission wished to make to the General Assembly in transmitting to it the draft articles on the effects of armed conflicts on treaties, he was proposing the following text, which repeated almost word for word the recommendation accompanying the draft articles on the law of transboundary aquifers:

“(a) to take note of the draft articles on the effects of armed conflicts on treaties, and to annex them to the resolution;

(b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.”

The text of paragraph 9, as proposed by the Special Rapporteur, was adopted.

Section C, as amended, was adopted.

Chapter VI of the report of the International Law Commission, as a whole, as amended, was adopted.

“It is not characterized as wrongful because” should be replaced with the word “However”.

Paragraph (2), as amended, was adopted.

Paragraph (3)
9. Mr. GAJA (Special Rapporteur) said that in order to be precise, the word “only” in the penultimate sentence should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)
Paragraphs (4) to (6) were adopted.

Paragraph (7)
10. Mr. VÁZQUEZ-BERMÚDEZ said that one of the major differences between States and international organizations was that the latter did not possess general competence. He thus proposed that the beginning of the second sentence of paragraph (7) be reworded to read: “In contrast with States, they do not possess a general competence and have been”.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)
Paragraphs (8) and (9) were adopted.

The general commentary, as amended, was adopted.

11. The CHAIRPERSON invited the members of the Commission to begin their consideration of the commentaries to the articles on the responsibility of international organizations, reproduced in document A/ CN.4/L.784/Add.2.

PART ONE.
INTRODUCTION

Article 1. Scope of the present draft articles

Commentary

Paragraphs (1) to (9)
Paragraphs (1) to (9) were adopted.

Paragraph (10)
12. Sir Michael WOOD proposed that, for clarity and concision, the third and fourth sentences of paragraph (10) should be combined to read: “Although the articles on the responsibility of States for internationally wrongful acts do not mention international organizations when considering circumstances precluding wrongfulness, the content of international responsibility or the invocation of the international responsibility of a State, they may be applied by analogy also to the relation between a responsible State and an international organization.”

Paragraph (10), as amended, was adopted.

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

Article 2. Use of terms

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)
13. Mr. VÁZQUEZ-BERMÚDEZ said that the seventh sentence of paragraph (3) was not very clear and could be improved, including by giving examples.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)
Paragraphs (4) to (9) were adopted.

Paragraph (10)
14. Mr. GAJA (Special Rapporteur) said that in the seventh sentence the words “have been established by State organs” should be replaced with “have been established with the participation of State organs” and the remaining words deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (11) to (13)
Paragraphs (11) to (13) were adopted.

Paragraph (14)
15. Sir Michael WOOD said that in the English text, the first sentence of paragraph (10) was very awkward. He proposed to rework it later together with the Special Rapporteur.

It was so decided.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

Paragraph (15)
16. Mr. DUGARD said that the first footnote to the paragraph should refer to the last footnote to paragraph (4) of the commentary and not to the following footnote.

Paragraph (16)

Paragraph (17)
17. Mr. GAJA (Special Rapporteur) said that the footnote to paragraph (13) should refer to the penultimate footnote to paragraph (4) of the commentary. He would inform the secretariat about such errors so that the necessary corrections could be made.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21)
Paragraphs (17) to (21) were adopted.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21) were adopted.
Paragraph (22)

19. Sir Michael WOOD said that the final sentence was problematic because of its *a contrario* implications for the corresponding article in the Commission’s text on State responsibility for internationally wrongful acts.\(^{402}\) In the commentary to the article on State responsibility, the word “includes” had been used to reflect the fact that State organs could be defined not only by law but also by practice. That, of course, did not apply to international organizations, as an organization’s rules by definition included its established practice. Probably the simplest solution would be to delete the sentence.

20. Mr. McRAE said that he was not opposed to amending the sentence but would prefer that it not be deleted, since the subject had been discussed in plenary.

21. Sir Michael WOOD proposed that the sentence begin with the words “Subparagraph (c) leaves”, with everything before those words to be deleted.

*Paragraph (22), as amended, was adopted.*

Paragraphs (23) to (27)

*Paragraphs (23) to (27) were adopted.*

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

PART TWO.

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I.

GENERAL PRINCIPLES

Commentary

22. Sir Michael WOOD said that the paragraph was superfluous and proposed that it be deleted.

23. Mr. GAJA (Special Rapporteur) said that the introductory paragraph served a purpose but that he was not opposed to deleting it.

24. The CHAIRPERSON said that if she heard no objection, she would take it that the Commission wished to delete paragraph (1).

*It was so decided.*

*Article 3. Responsibility of an international organization for its internationally wrongful acts*

Commentary

*Paragraphs (1) to (6)*

*Paragraphs (1) to (6) were adopted.*

*The commentary to article 3 was adopted.*

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\(^{402}\) General Assembly resolution 56/83 of 12 December 2001, annex, art. 4, para. 2. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ..., 2001*, vol. II (Part Two) and corrigendum, pp. 26 et seq., paras. 76–77.
Article 7. Conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization

Commentary

Paragraph (1)

28. Mr. McRAE said that in the English text, the word “lending” should be replaced, in paragraph (1) and throughout, by the word “secondment”.

Paragraph (1) was adopted with that amendment to the English text.

Paragraphs (2) to (11) were adopted.

Paragraph (12)

29. Sir Michael WOOD said that in the fifth sentence, the words “The majority opinions appeared to endorse the views expressed …” suggested a lack of real support for those views.

30. Mr. GAJA (Special Rapporteur) said that he would propose more appropriate wording at a later stage.

Paragraph (12) was adopted, subject to subsequent amendment by the Special Rapporteur.

Paragraph (12 bis)

31. Mr. GAJA (Special Rapporteur) proposed the insertion of a paragraph (12 bis), to read:

“The majority opinions appeared to endorse the views expressed …” suggested a lack of real support for those views.

Paragraph (12 bis), as amended, was adopted.

Paragraph (13)

32. Sir Michael WOOD suggested replacing the word “judgment” at the start of the first sentence with the word “decision” and the words “the same person” with “Mr. Al-Jedda”.

Paragraph (12 bis), as amended, was adopted.

33. Mr. GAJA (Special Rapporteur) proposed replacing the beginning of the first sentence with the following phrase: “The question of attribution was also considered in a judgment of the District Court of The Hague”, with the rest of the sentence to remain unchanged. To reflect the further action taken on the case in July 2011, he also proposed that at the end of the paragraph, the following text be inserted:

“On appeal from the judgment of the District Court, the Court of Appeal of The Hague referred to the draft article (identical to the present article) which had been adopted by the Commission at first reading. The Court applied the criterion of ‘effective control’ to the circumstances of the case and reached the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica which had led to the killing of three Bosnian Muslim men after they had been evicted from the compound of Dutchbat.”

The text of footnote [X] would read:

“Nuhanović v. Netherlands, Appeal judgment of 5 July 2011, The Hague Court of Appeal, Civil Law Section, paras. 5.8 and 5.9 (available from http://zoekenuharv.u.n.org). The Court argued that the Netherlands had been able to prevent the removal of the victims. When giving a wide meaning to the concept of ‘effective control’ so as to include also the ability to prevent, the Court followed the approach taken by T. Dannenbaum, ‘Translating the standard of effective control into a system of effective accountability: how liability should be apportioned for violations of human rights by Member State troop contingents serving as United Nations peacekeepers’, Harvard International Law Journal, vol. 51, No. 1 (Winter 2010), p. 113, at p. 157. The Court considered the possibility of a dual attribution of conduct to the State of origin and the United Nations. This solution had been advocated by C. Leck, ‘International responsibility in United Nations peacekeeping operations: command and control arrangements and the attribution of conduct’, Melbourne Journal of International Law, vol. 10 (2009), p. 346, at pp. 362–364.”

Paragraph (13), as amended, was adopted.

The commentary to article 7, as amended, was adopted.

Mr. Niehaus (Vice-Chairperson) took the Chair.

Article 8. Excess of authority or contravention of instructions

Commentary

Paragraphs (1) to (10) were adopted.

The commentary to article 8 was adopted.

Article 9. Conduct acknowledged and adopted by an international organization as its own

Commentary

Paragraphs (1) to (5) were adopted.

The commentary to article 9 was adopted.
Chapter III. Breach of an International Obligation

Commentary

Paragraphs (1) to (3) were adopted. The commentary to chapter III was adopted.

Article 10. Existence of a breach of an international obligation

Commentary

Paragraphs (1) to (11) were adopted. The commentary to article 10 was adopted.

Article 11. International obligation in force for an international organization

Commentary

The commentary to article 11 was adopted.

Article 12. Extension in time of the breach of an international obligation

Commentary

The commentary to article 12 was adopted.

Article 13. Breach consisting of a composite act

Commentary

The commentary to article 13 was adopted.

Chapter IV. Responsibility of an International Organization in Connection with the Act of a State or Another International Organization

Commentary

Paragraphs (1) to (5) were adopted. Paragraphs (1) to (5) were adopted.

The commentary to chapter IV was adopted.

Article 14. Aid or assistance in the commission of an internationally wrongful act

Commentary

Paragraphs (1) to (6) were adopted. Paragraphs (1) to (6) were adopted.

The commentary to article 14 was adopted.

Paragraphs (1) to (6) were adopted. Paragraphs (1) to (6) were adopted.

The commentary to article 15 was adopted.

Paragraphs (1) to (6) were adopted. Paragraphs (1) to (6) were adopted.

The commentary to article 18 was adopted.

Article 16. Coercion of a State or another international organization

Commentary

Paragraphs (1) to (5) were adopted. Paragraphs (1) to (5) were adopted.

The commentary to article 16 was adopted.

Article 17. Circumvention of an international obligation through decisions and authorizations addressed to members

Commentary

Paragraphs (1) to (3) were adopted. Paragraphs (1) to (3) were adopted.

Paragraph (4)

34. Mr. McRAE suggested that the verb “elude” be replaced with “avoid”.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (12) were adopted. Paragraphs (5) to (12) were adopted.

Paragraph (13)

35. Mr. DUGARD asked whether the source of the quotation appearing in the paragraph could be given, since the statement was an important one.

36. Mr. GAJA (Special Rapporteur) said that the quotation was from a letter that had not been published and was thus very difficult to find. The document in question had probably been supplied by the Office of Legal Affairs.

37. The CHAIRPERSON said he took it that the Special Rapporteur would try to find the source so that it might be cited in the paragraph.

It was so decided.

Paragraph (13) was adopted, subject to possible subsequent amendment.

Paragraphs (14) and (15) were adopted. Paragraphs (14) and (15) were adopted.

The commentary to article 17, as amended and subject to possible subsequent amendment, was adopted.

Article 18. Responsibility of an international organization member of another international organization

Commentary

Paragraphs (1) and (2) were adopted. Paragraphs (1) and (2) were adopted.

The commentary to article 18 was adopted.

Article 19. Effect of this Chapter

Commentary

The commentary to article 19 was adopted.
CHAPTER V.
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary
Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to chapter V was adopted.

Article 20. Consent

Commentary
Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to article 20 was adopted.

Article 21. Self-defence

Commentary
Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 21 was adopted.

Article 22. Countermeasures

Commentary
Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 22 was adopted.

Article 23. Force majeure

Commentary
Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to article 23 was adopted.

Article 24. Distress

Commentary
Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 24 was adopted.

Article 25. Necessity

Commentary
Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

38. Mr. McRAE suggested that the conditions set by article 25 should be termed to apply “by analogy” rather than “per se”.

39. Mr. GAJA (Special Rapporteur) said that the expression “per se” was indeed not suitable and it should be replaced.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to article 25, as amended, was adopted.

Article 26. Compliance with peremptory norms

Commentary
Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 26 was adopted.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

Commentary
Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 27 was adopted.

PART THREE.

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Commentary
Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to Part Three was adopted.

CHAPTER I.

GENERAL PRINCIPLES

Article 28. Legal consequences of an internationally wrongful act

Commentary

The commentary to article 28 was adopted.

Article 29. Continued duty of performance

Commentary
Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 29 was adopted.

Article 30. Cessation and non-repetition

Commentary
Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to article 30 was adopted.
Article 31. Reparation
Commentary
Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.
The commentary to article 31 was adopted.

Article 32. Relevance of the rules of the organization
Commentary
Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.
The commentary to article 32 was adopted.

Article 33. Scope of international obligations set out in this Part
Commentary
Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.
The commentary to article 33 was adopted.

CHAPTER II.
REPARATION FOR INJURY
Article 34. Forms of reparation
Commentary
Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.
The commentary to article 34 was adopted.

Article 35. Restitution
Commentary
Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.
The commentary to article 35 was adopted.

Article 36. Compensation
Commentary
Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.
The commentary to article 36 was adopted.

Article 37. Satisfaction
Commentary
Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.
The commentary to article 37 was adopted.

Article 38. Interest
Commentary

The commentary to article 38 was adopted.

Article 39. Contribution to the injury
Commentary
Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.
The commentary to article 39 was adopted.

Article 40. Ensuring the fulfilment of the obligation to make reparation
Commentary
Paragraph (1)

Paragraph (1) was adopted, subject to minor editorial amendments to the English text.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.
The commentary to article 40 was adopted.

CHAPTER III.
SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW
Article 41. Application of this Chapter
Commentary
Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.
The commentary to article 41 was adopted.

Article 42. Particular consequences of a serious breach of an obligation under this Chapter
Commentary
Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.
The commentary to article 42 was adopted.

PART FOUR.
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I.
INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION
Article 43. Invocation of responsibility by an injured State or international organization
Commentary
Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.
The commentary to article 43 was adopted.
Summary records of the second part of the sixty-third session

CHAPTER II.

COUNTERMEASURES

Article 51. Object and limits of countermeasures

Commentary

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to article 51 was adopted.

Article 52. Conditions for taking countermeasures by members of an international organization

Commentary

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to article 52 was adopted.

Article 53. Obligations not affected by countermeasures

Commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

40. Mr. VASCIANNIE proposed that in the final sentence, the phrase “also in view of the difficulty of determining which human rights should be regarded as fundamental” be deleted.

Paragraph (3), as amended, was adopted.

The commentary to article 53, as amended, was adopted.

Article 54. Proportionality of countermeasures

Commentary

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 54 was adopted.

Article 55. Conditions relating to resort to countermeasures

Commentary

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 55 was adopted.

Article 56. Termination of countermeasures

Commentary
Paragraphs (1) and (2)  

Paragraphs (1) and (2) were adopted.

The commentary to article 56 was adopted.

Article 57. Measures taken by States or international organizations other than an injured State or international organization

Commentary

Paragraphs (1) and (2)  

Paragraphs (1) and (2) were adopted.

The commentary to article 57 was adopted.

PART FIVE.

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE CONDUCT OF AN INTERNATIONAL ORGANIZATION

General commentary

Paragraphs (1) to (5)  

Paragraphs (1) to (5) were adopted.

The commentary to Part Five was adopted.

Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

Commentary

Paragraphs (1) to (6)  

Paragraphs (1) to (6) were adopted.

The commentary to article 58 was adopted.

Article 59. Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

Commentary

Paragraphs (1) to (5)  

Paragraphs (1) to (5) were adopted.

The commentary to article 59 was adopted.

Article 60. Coercion of an international organization by a State

Commentary

Paragraphs (1) to (4)  

Paragraphs (1) to (4) were adopted.

The commentary to article 60 was adopted.

Article 61. Circumvention of international obligations of a State member of an international organization

Commentary

Paragraphs (1) to (10)  

Paragraphs (1) to (10) were adopted.

The commentary to article 61 was adopted.

Article 62. Responsibility of a State member of an international organization for an internationally wrongful act of that organization

Commentary

Paragraphs (1) to (13)  

Paragraphs (1) to (13) were adopted.

The commentary to article 62 was adopted.

Article 63. Effect of this Part

Commentary

Paragraphs (1) to (4)  

Paragraphs (1) to (4) were adopted.

The commentary to article 63 was adopted.

PART SIX.

GENERAL PROVISIONS

Article 64. Lex specialis

Commentary

Paragraphs (1) to (8)  

Paragraphs (1) to (8) were adopted.

The commentary to article 64 was adopted.

Article 65. Questions of international responsibility not regulated by these articles

Commentary

Paragraphs (1) and (2)  

Paragraphs (1) and (2) were adopted.

The commentary to article 65 was adopted.

Article 66. Individual responsibility

Commentary

Paragraphs (1) to (3)  

Paragraphs (1) to (3) were adopted.

The commentary to article 66 was adopted.

Article 67. Charter of the United Nations

Commentary

Paragraphs (1) to (3)  

Paragraphs (1) to (3) were adopted.

The commentary to article 67 was adopted.

Section E.2, contained in documents A/CN.4/L.784/Add.1–2, as a whole, as amended, was adopted.

The meeting rose at 12.50 p.m.