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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3649th meeting
Held at the Palais des Nations, Geneva, on Thursday, 27 July 2023, at 3 p.m.

Contents

Present:

Chair:	Ms. Galvão Teles
Members:	Mr. Argüello Gómez
	Mr. Asada
	Mr. Aurescu
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.15 p.m.

Draft report of the Commission on the work of its seventy-fourth session (*continued*)

Chapter V. Settlement of disputes to which international organizations are parties (*continued*) (A/CN.4/L.977 and A/CN.4/L.977/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V of its draft report contained in document A/CN.4/L.977/Add.1.

Commentary to draft guideline 2 (*Use of terms*) (*continued*)

Paragraph (18)

Mr. Lee said that the statement in the first sentence, that international legal personality was only rarely explicitly conferred upon an international organization in its constituent instrument, was contradicted in the literature, notably in the writings of Niels Blokker, and in his own experience, which indicated that such cases had become more common since the 1990s. He therefore suggested that the words "In the past" should be inserted at the beginning of the first sentence. In the second sentence, "have" should be replaced with "had" and a third sentence should be added: "Since the 1990s, however, the practice of providing for explicit clauses on international legal personality of the organization seems to have become more common."

Mr. Reinisch (Special Rapporteur) said that he agreed with the proposed wording, with a slight modification in the new third sentence, replacing "providing for" with "including".

Paragraph (18), as amended, was adopted.

Paragraph (19)

Ms. Ridings said that the phrase "as a rule" in the final sentence was inappropriate, as it had normative implications. It should be replaced with "usually".

Mr. Paparinskis said that the paragraph seemed to be reaffirming the position laid out in the Commission's 2011 articles on the responsibility of international organizations, which made the same point without any reference to scholarship. If that was the case, it would be preferable to use the same wording as in the articles. He further proposed to delete the wording from the start of the second sentence to the end of the block quotation. The remaining text in paragraph (19) could then be merged into paragraph (18) as it followed on from the content of that paragraph. To avoid unnecessary detail in footnote 73, the wording after "para. 61" could be deleted. In footnote 74, the wording after the reference to the publication by Schermers and Blokker could also be deleted.

Mr. Forteau said that the word "also" in the first sentence should be deleted, as it was not introducing a supplementary argument but, rather, an explanation of what had gone before.

Mr. Nguyen said that, in the penultimate sentence, the words "could not carry out some functions" should be replaced with "could not carry out its main functions".

Mr. Reinisch (Special Rapporteur) said that the word "also" in the first sentence did provide a link to the previous paragraph; however, he would be prepared to agree to its deletion, as proposed by Mr. Forteau. The wording proposed by Mr. Nguyen for the penultimate sentence – "its main functions" instead of "some functions" – might make the sentence too restrictive; as he understood it, in the opinion of the International Court of Justice in the International Fund for Agricultural Development case, the court had been referring to functions more broadly. He suggested that the word "some" should simply be omitted. He was grateful to Ms. Ridings for her explanation of the inappropriateness of the phrase "as a rule"; he agreed with her proposal to replace it with "usually".

As to the suggestions made by Mr. Paparinskis, it would be possible simply to direct the reader to the advisory opinion of the International Court of Justice in *Reparation for injuries suffered in the service of the United Nations*. However, in previous discussions,

Commission members had agreed that it was preferable to provide some information, rather than simply a reference to a source. Furthermore, the wording embraced other opinions of the Court and the Commission. In footnote 74, his intention had been to include literature from different parts of the world, so he would prefer not to delete the second part.

Mr. Vázquez-Bermúdez said that, to avoid introducing too much flexibility into the text, the words "as a rule" should simply be deleted.

The Chair said she took it that the Commission wished to adopt the paragraph after omitting the word "also" in the first sentence, replacing "some functions" with "its functions" and omitting the words "as a rule".

Paragraph (19) was adopted, with those amendments.

Paragraphs (20) to (25)

Paragraphs (20) to (25) were adopted.

Paragraph (26)

Mr. Forteau proposed that, at the beginning of the final sentence, the adjective "legal" should be inserted to qualify the word "dispute", or, alternatively, the words "on a point of law" should be added after "dispute".

Mr. Cissé said that, for purposes of clarity and precision, the word "definition" after "*Mavrommatis*" should be replaced with "case".

Mr. Forteau said that the wording "*Mavrommatis* definition" had already been used in paragraph (25), which had just been adopted.

The Chair said she took it that the Commission wished to adopt the paragraph with the inclusion of the words "on a point of law" after "dispute" in the final sentence.

Paragraph (26), as amended, was adopted.

Paragraph (27)

Mr. Forteau suggested that, in footnote 88, the words "in particular" should be inserted after "See", as similar situations might arise in disputes other than those involving international responsibility.

Ms. Okowa, recalling the Commission's plenary debate about what constituted a legal dispute, sought clarification as to how paragraph (27) related to disputes that concerned only facts, and not points of law.

Mr. Reinisch (Special Rapporteur) said that paragraph (27) had been included in the commentary precisely because of the concern expressed by some members of the Commission during the plenary debate and in the Drafting Committee to the effect that a dispute based purely on points of fact could not amount to a legal dispute in the absence of any relation to a point of law. It should not be read as denying the possibility that a purely factual dispute could arise.

Mr. Forteau suggested that inserting the words "within the meaning of the present draft guidelines" after "will only amount to a legal dispute" might clarify matters.

Ms. Okowa asked whether a case in which the parties conceded the legal points but sought to establish whether certain facts had occurred, such as had happened in the *Trail Smelter* arbitration, would constitute a legal dispute within the meaning of the draft guidelines if paragraph (27) was retained as drafted.

The Chair, speaking as a member of the Commission, expressed doubts about whether the paragraph was needed in the text.

Mr. Jalloh said that there seemed to be some inconsistency between the wording of the paragraph itself and the reference given in footnote 88, which could explain the concerns expressed. It might be easiest to delete the paragraph entirely; alternatively, some of the text from the footnote could be moved to the body of the text so as to clarify the point.

Mr. Forteau said that the paragraph was important, as had been highlighted within the Drafting Committee by Mr. Mavroyiannis. Deleting the word "only" might be sufficient to allay the concerns expressed. In the footnote, he suggested adding the words "the Court has jurisdiction in disputes concerning" in the parentheses, before the citation from the Statute of the International Court of Justice.

Mr. Paparinskis said that the paragraph and footnote built on the discussion that had taken place within the Drafting Committee, as reflected in the statement he had delivered as its Chair. He broadly supported the paragraph as drafted, as well as the suggestion made by Mr. Forteau. In his understanding, the words "relevant" and "relate to" would mean that disputes such as those described by Ms. Okowa would indeed be classed as legal disputes for the purposes of the draft guidelines. Even if the law was clear, a factual issue relating to its interpretation or application would give rise to a legal dispute.

Mr. Grossman suggested that the quotation from the Statute of the International Court of Justice could be moved from the footnote to paragraph (27) itself, and introduced with the words "as stated by the International Court of Justice".

The Chair said she took it that the Commission agreed to delete the word "only" from paragraph (27) and to amend footnote 88 to read: "See, in particular, Article 36, para. 2 (c), of the Statute of the International Court of Justice (the Court has jurisdiction in all legal disputes concerning 'the existence of any fact which, if established, would constitute a breach of an international obligation')."

Paragraph (27) was adopted, with those amendments.

Paragraph (28)

Mr. Forteau suggested that the last sentence of footnote 89 should be deleted because it was couched in overly general terms, giving the impression that international organizations were always parties to underlying disputes with States; moreover, it referred to contentious cases before the International Court of Justice, while the rest of the footnote referred to advisory proceedings.

With that amendment, paragraph (28) was adopted.

Paragraph (29)

Paragraph (29) was adopted.

Paragraph (30)

Mr. Paparinskis suggested that the word "well" should be deleted from the first sentence of the paragraph.

Paragraph (30), as amended, was adopted.

Paragraphs (31) to (33)

Paragraphs (31) to (33) were adopted.

Paragraph (34)

Mr. Forteau, noting that the wording of draft guideline 2 (c) was inspired by Article 33 of the Charter of the United Nations, suggested that the following sentence should be added at the end of the paragraph: "Reciprocally, this provision is without prejudice to the possible existence of such an obligation" [*Réciproquement, cette disposition est sans préjudice de l'existence éventuelle d'une telle obligation*]. The Commission should avoid giving the impression that it was excluding the possibility of such an obligation existing under other provisions.

Mr. Grossman Guiloff said that the suggested addition was unnecessary and superfluous. Paragraph (34) concerned Article 33 of the Charter and the value thereof.

Mr. Forteau pointed out that paragraph (34) related not to Article 33 of the Charter *per se* but to draft guideline 2 (c), even though the wording of the latter was borrowed from

the former. While no obligation was set out in draft guideline 2 (c), allowance must be made for the fact that other instruments might create such obligations for international organizations. The 1946 Convention on the Immunities and Privileges of the United Nations, for instance, established the obligation to make provision for dispute settlement. Ensuring that the definition in draft guideline 2 (c) was without prejudice to the existence of such an obligation in other instruments would be crucial for the Commission's future work.

The Chair suggested that the word "reciprocally" was not needed in the additional sentence proposed by Mr. Forteau.

Mr. Jalloh said that, while he could understand Mr. Grossman Guiloff's point, the amendment suggested by Mr. Forteau added value to the paragraph.

Mr. Reinisch (Special Rapporteur) said that he understood Mr. Forteau's concern but was not convinced that a "without prejudice" clause was needed. The fact that some instruments might contain obligations to settle certain types of disputes in a particular way was captured to some extent in paragraph (33). The Commission's plenary debate had focused on forms of dispute settlement that did not imply any particular solution to a given dispute. He did not consider that the wording of paragraph (34) prejudged anything. Nevertheless, if an additional sentence was to be added, he would prefer not to include the word "reciprocally". The intent of the paragraph was to clarify what was not covered by the draft guideline in question, which merely listed forms of dispute settlement: it did not attempt to classify them as obligatory or recommended.

Mr. Grossman Guiloff, reiterating his view that it would be superfluous to add a "without prejudice" clause and expressing full support for the comments of the Special Rapporteur, said that paragraph (34) did not give rise to any confusion. It was clear that draft guideline 2 (c) simply listed forms of dispute settlement, without seeking to override any other treaty provision. If a "without prejudice" clause was needed in paragraph (34), it might well be that similar clauses were needed elsewhere in the commentaries to the present draft guidelines.

Mr. Vázquez-Bermúdez said that the Special Rapporteur's explanation as to why no such clause was needed was perfectly clear.

Mr. Jalloh expressed the view that some of the confusion he and others saw stemmed from the fact that Article 33 of the Charter of the United Nations was quoted directly in paragraph (34). Rephrasing the text might obviate the problem.

The Chair, speaking as a member of the Commission, agreed that the use of quotation marks around the phrase "seek a solution", which was used in Article 33 of the Charter but not in draft guideline 2 (c), was infelicitous and potentially misleading.

Mr. Forteau added that the paragraph as drafted was so misleading that it might even be taken to imply that Article 33 of the Charter established the obligation "to actually resolve a dispute", which was not the case.

Mr. Grossman Guiloff said that the paragraph was factual and rooted in the jurisprudence of the International Court of Justice. No "without prejudice" clause was needed, unless it was a general one referring to the entire set of draft guidelines. Altering the paragraph would require detailed consideration; he would leave it unaltered, especially in view of the explanation given by the Special Rapporteur.

Mr. Mavroyiannis said that Article 33 of the Charter simply listed means of peaceful settlement. It created no obligation to settle or even attempt to settle a dispute unless it presented a threat to international peace and security. Draft guideline 2 (c) merely reproduced that list. Listing means of dispute settlement did not *ipso facto* create any obligation to settle disputes, but such obligations might exist in other instruments. Some clarification was needed.

Mr. Reinisch (Special Rapporteur) said that he had included paragraph (34) precisely because the issue of whether there was an obligation to engage in dispute settlement or resolve disputes had been discussed both during the Commission's plenary debate and in the Drafting Committee. The easiest solution to the important questions raised would be to delete the paragraph altogether. However, he understood the concerns voiced by Mr. Forteau,

Mr. Mavroyiannis and others regarding the potentially misleading comparison with the wording of Article 33 of the Charter and the causal construction used. He therefore suggested deleting the word “Because”; splitting the paragraph into two sentences after the phrase “as Article 33 of the Charter does”; deleting the word “also”; and inserting the words “to seek a solution or” before “to actually resolve a dispute”. That would leave open the question of whether obligations in the area of dispute settlement might exist in other instruments, while clarifying that no such obligations were contained in draft guideline 2 (c).

Mr. Forteau said that he was in favour of deleting the paragraph. Although it went to the very heart of the topic, the Commission should refrain from taking a position either way. However, if the paragraph was to be retained, he proposed that the words “as such” should be inserted after “cannot be understood” to make clear that such a characterization of draft guideline 2 (c) was without prejudice to the question of whether other draft guidelines could be understood to lead to an obligation to seek a solution or to actually resolve a dispute. Also, the word “contain” should be replaced with “refer to”. It would be incorrect to say that a definition could “contain” an obligation.

Mr. Grossman Guiloff said that it was not the time to begin proposing “without prejudice” clauses and questioning the meaning of Article 33 of the Charter, which was supported by extensive jurisprudence. The paragraph reflected the discussions that had taken place and should be retained as it was.

The Chair, speaking as a member of the Commission, said that she too was in favour of deleting the paragraph, as sufficient information relating to draft guideline 2 (c) could already be found in the preceding paragraphs.

Mr. Grossman Guiloff said that the Special Rapporteur was best placed to provide guidance on the way forward. As not all members were in favour of deleting the paragraph, it was necessary to find a consensual solution. His view was that the paragraph was not redundant and accurately reflected the content of Article 33 of the Charter.

Mr. Reinisch (Special Rapporteur) said that he had no strong opinion regarding the proposed replacement of the word “contain” with “refer to”, as draft guideline 2 (c) neither contained nor referred to an obligation to seek a solution or to actually resolve a dispute.

The Chair, speaking as a member of the Commission, said that the replacement of the word “contain” with “refer to” would add greater nuance.

Mr. Jalloh said that he supported the Special Rapporteur’s reformulation of the paragraph, as amended by Mr. Forteau. As “means of dispute settlement” was the term defined in draft guideline 2 (c), he proposed that those words should either be enclosed in quotation marks or, to establish a clearer link to Article 33 of the Charter, preceded by the word “various”.

Mr. Fife said that he was strongly in favour of deleting the paragraph. Even if the proposed amendments were incorporated, the paragraph would not do justice to the extremely important issue that it sought to address.

Mr. Mavroyiannis said that his preference would be to retain the paragraph as reformulated by the Special Rapporteur and amended by Mr. Forteau.

Mr. Reinisch (Special Rapporteur) said that he agreed with the proposals made by Mr. Forteau and Mr. Jalloh. In addition, the quotation marks enclosing the words “seek a solution” could be deleted.

The Chair said that, as amended, the paragraph would read: “Draft guideline 2, subparagraph (c), lists ‘means of dispute settlement’ and does not refer to an obligation to seek a solution of certain disputes, as Article 33 of the Charter does. It is clear that such a provision, found in the draft guideline entitled ‘Use of terms’, cannot be understood as such to lead to an obligation to seek a solution or to actually resolve a dispute.”

Paragraph (34), as amended, was adopted.

The Chair invited Mr. Asada to present the revised version of the proposal for a new paragraph to be inserted after current paragraph (5), drawing attention to an informal document that had been circulated, in English only, showing the proposed text.

Mr. Asada said that, following informal consultations among interested members, the proposal had been revised, such that it now read:

> The reference to an entity "established by a treaty or other instrument governed by international law" is not intended to resolve particular questions related to the determination of the existence of international legal personality and the status of certain entities, such as the Organization for Security and Co-operation in Europe (OSCE), which was originally created as the Conference on Security and Co-operation in Europe (CSCE) by the Helsinki Final Act of 1975, but was later institutionalized by the Charter of Paris for a New Europe of 1990 and renamed as the OSCE in 1995.

Mr. Vázquez-Bermúdez, supported by **Mr. Ruda Santolaria**, said that the proposal touched on an issue that fell outside the scope of the topic. As reference was already made to OSCE in footnote 74, it did not need to be addressed in a separate paragraph of the commentary.

Ms. Mangklatanakul said that she supported the general idea of the proposal. The new text that had been proposed and footnote 74 addressed different issues. The fact that OSCE was a unique case made it more likely to become involved in disputes. It would be useful to have a text to which reference could be made in the event of such a dispute.

Mr. Reinisch (Special Rapporteur) said that the specific case of OSCE had been discussed in both the plenary and the Drafting Committee. When drafting footnote 74, he had taken the view that, while the Commission could not ignore the controversy surrounding the international legal personality and the status of OSCE, it needed to avoid taking a position on the matter. It had originally been proposed that a new paragraph should be added to the commentary to draft guideline 2 to explain that the words "established by a treaty or other instrument governed by international law" in that provision did not exclude the rare cases, such as that of OSCE, in which international organizations were established by a non-legally binding instrument. The Commission could not address such cases without additional thought and discussion. That element had been dropped from the revised version of the proposal, which included a more general reference to the "international legal personality and the status" of certain entities such as OSCE. Yet it was unclear whether the revised version, with its limited scope, would add anything to the commentary that could not already be found in footnote 74. One solution might be to insert the words "and the status" after "international legal personality" in the penultimate sentence of footnote 74.

The Chair said she took it that, instead of inserting the proposed new text as a separate paragraph, the Commission wished to amend footnote 74 in the manner proposed by the Special Rapporteur.

It was so decided.

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

Chapter VI. Prevention and repression of piracy and armed robbery at sea (A/CN.4/L.978 *and* A/CN.4/L.978/Add.1)

The Chair invited the Commission to turn its attention to chapter VI of the draft report, on prevention and repression of piracy and armed robbery at sea, starting with the portion of the chapter contained in document A/CN.4/L.978.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Paragraph 7

Paragraph 7 was adopted subject, to its completion by the secretariat.

C. Text of the draft articles on the prevention and repression of piracy and armed robbery at sea provisionally adopted by the Commission at its seventy-fourth session

1. Text of the draft articles

Paragraph 8

The Chair recalled that the text of draft articles 1, 2 and 3 had already been adopted; only the introductory sentence of paragraph 8 remained to be adopted.

Paragraph 8 was adopted.

The Chair invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.978/Add.1, noting that an informal document containing proposed amendments by the Special Rapporteur had been circulated to members.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-fourth session

Paragraph 2

The introductory sentence of paragraph 2 was adopted.

Commentary to draft article 1 (Scope)

Paragraph (1)

The Chair said that, in the informal document circulated to members, the Special Rapporteur had proposed replacing the last two sentences of paragraph (1) with the following sentence: “The provision should be read together with draft articles 2 and 3, which set out the scope of these two crimes and serve to delimit the scope of the topic.”

Mr. Savadogo said that, as several references were made in the commentaries to the United Nations Convention on the Law of the Sea, it should be specified in paragraph (1) that the scope of the draft articles exceeded the scope of the Convention in that the draft articles addressed armed robbery at sea while the Convention did not.

Mr. Forteau said that, in the sentence proposed by the Special Rapporteur, the word “should” should be replaced with “has to” and the words “set out” should be replaced with “define”. Given the number of amendments that had been proposed in the informal document and the fact that they were not always clear, a consolidated version of the commentaries should be provided to members for review.

Mr. Nguyen said that, as both articles 2 and 3 delimited the geographical areas in which the crimes of piracy and armed robbery at sea occurred, the word “geographical” should be inserted before the phrase “scope of these two crimes” in the proposed final sentence.

Mr. Forteau, supported by **Mr. Fathalla**, said that the insertion of the word “geographical” would unduly restrict the scope of the definitions contained in draft articles 2 and 3 to their geographical aspects.

Mr. Oyarzábal said that paragraph (1) could be simplified by replacing the text of the paragraph in its entirety with the following: “Draft article 1 specifies the scope of the present draft articles, indicating that they apply to piracy and armed robbery at sea as defined in draft articles 2 and 3.”

Mr. Fife said that he wished to associate himself with the remarks made by Mr. Savadogo and Mr. Forteau. It would be helpful for the text to be simplified, as proposed by Mr. Oyarzábal, and to indicate, as suggested by Mr. Savadogo, that one of the crimes addressed in the draft articles was beyond the scope of the United Nations Convention on the Law of the Sea.

Mr. Cissé (Special Rapporteur) said he agreed with Mr. Forteau and Mr. Fathalla that the scope of the draft articles should not be unduly restricted. He was not opposed to indicating that the scope of the draft articles exceeded that of the United Nations Convention on the Law of the Sea with regard to armed robbery at sea, although he did not find such an indication necessary. He agreed with Mr. Oyarzábal's proposal for simplifying the paragraph.

The meeting rose at 6.05 p.m.