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Summary record of the 2656th meeting

Topic:
Adoption of the report

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2656th MEETING

Monday, 14 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

CHAPTER VI. *Unilateral acts of States* (A/CN.4/L.595 and Add.1)

1. The CHAIRMAN invited the members of the Commission to consider chapter VI of the draft report.

A. Introduction

Paragraphs 1 to 11 (A/CN.4/L.595)

Paragraphs 1 to 11 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

1. DOCUMENTS BEFORE THE COMMISSION AND MEETINGS DEVOTED TO THE TOPIC

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

2. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

Paragraph 19

2. Mr. MOMTAZ said that, in the French text, the words *ou forclusion* should appear in brackets after the word *estoppel* in paragraph 15, which was where they were used for the first time.

Paragraph 19, as amended in French, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

3. Mr. LUKASHUK said that the words “or politically” in the second sentence should be deleted because the Commission had decided to consider only unilateral acts having legal effects at the international level.

4. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, although paragraph 21 reflected exactly what he had said in introducing his report, he did not object to the deletion proposed by Mr. Lukashuk.

5. Mr. TOMKA said that paragraph 21 should be kept as it stood because, although the Commission had decided to consider only unilateral acts having legal effects, States could still commit themselves politically at the international level.

6. Mr. PELLET said that at least the words “or not” in the third line should be deleted.

7. The CHAIRMAN said he took it that the Commission wished to adopt paragraph 21, as amended by Mr. Pellet.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

8. Mr. TOMKA said that, when reference was made to a new draft article, the text should be reproduced in a footnote to make it easier to understand the report. That was what the Commission had done in chapter IV on State responsibility. That comment naturally applied to all the other paragraphs in which a new draft article was mentioned.

9. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that he agreed with Mr. Tomka and would comply with his request.

Paragraph 22 was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

10. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that the third sentence contained an error: the word “dependence”, which was used three times, should be replaced by the word “independence”.

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

Paragraph 27

11. Mr. PELLET said that the second sentence was obscure and he thought that the Special Rapporteur had meant that the 1969 Vienna Convention defined the treaty without excluding other acts that might be characterized as treaties.

12. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, in Spanish, the sentence in question reflected exactly what he had said, namely, that a treaty, as defined in the Vienna Convention, was not the only type of treaty act to which the Convention could apply.

13. After an exchange of views in which the SPECIAL RAPPORTEUR, Mr. ECONOMIDES, Mr. HAFNER, Mr. KATEKA, Mr. PAMBOU-TCHIVOUNDA, Mr. PELLET and Mr. TOMKA took part, the CHAIRMAN suggested that the consideration of paragraph 27 should be suspended until the Rapporteur had held informal consultations with the members concerned to arrive at a text that would be acceptable to everyone.

It was so agreed.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

14. Mr. BROWNLIE said that, in the penultimate sentence, the word “enlarging” should be replaced by the word “extending”.

Paragraph 29, as amended in English, was adopted.

Paragraphs 30 to 32

Paragraphs 30 to 32 were adopted.

Paragraph 33

15. Mr. MOMTAZ said that he had doubts about the meaning of the last sentence and the reasons why it had been necessary to refer to the establishment of commissions of enquiry by the Security Council, a question which had nothing to do with the rest of the paragraph.

16. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that the Security Council could adopt decisions under Chapter VII of the Charter of the United Nations which could be a ground for the invalidity of a unilateral act. Under Chapter VI of the Charter, it could adopt only recommendations, which were not a ground for invalidity, except that it could also—and that was the only exception—take a decision to establish a commission of enquiry.

Paragraph 33 was adopted.

3. SUMMARY OF THE DEBATE

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

17. Mr. LUKASHUK proposed that, for reasons of logic, the words “organize and clarify” in the second sentence should be replaced by the words “clarify and organize”.

18. Mr. MOMTAZ, referring to the last sentence, said he did not think that a unilateral act could be a substitute for treaty law. It would be more appropriate to say that it could be a substitute for treaty-making procedure.

19. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, when States wanted to maintain a certain legal relationship, but could not have recourse to a treaty act because political circumstances prevented them from doing so, they could operate by means of a unilateral act. As Rapporteur, he was prepared to try to find wording that would better reflect that idea.

20. Mr. TOMKA said that the problem could be solved by simply stating that a unilateral act could be regarded as “a substitute for a treaty”.

21. Mr. ECONOMIDES said that he agreed with that proposal and that it would be even more accurate to say that a unilateral act could be considered as a substitute for a treaty act, since that was exactly what was meant.

22. Mr. GOCO, referring to the fourth sentence, said that the words “at best as old as treaties” was awkward.

23. Mr. BROWNLIE proposed that the words “at least as old as treaties” should be used.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

24. Mr. PAMBOU-TCHIVOUNDA said that paragraph 37 simply repeated the idea already expressed in the first sentence of paragraph 36.

25. The CHAIRMAN suggested that the first sentence of paragraph 36 should be replaced by paragraph 37.

It was so agreed.

Paragraphs 36 and 37, as amended, were adopted.

Paragraph 38

26. Mr. MOMTAZ said that he did not understand the beginning of the third sentence, which read “In deciding how to ‘codify’ such relative freedom of action”, since there was an apparent contradiction between “freedom” and “codify”. In order to avoid any misunderstanding, he proposed that the sentence should read: “In trying to

find ways of codifying the rules which limit freedom of action ...”.

27. Mr. GOCO said that the sentence was explained by the sentences which preceded it, which explained which freedom of action was meant and why it was characterized as “relative”.

28. Mr. SIMMA said that he was the one who had expressed the view stated in that sentence, which accurately reflected what he had said. It was precisely in order to show how strange the idea of “codifying” a freedom was that that word was in quotation marks.

29. Mr. TOMKA said that there was a contradiction between “codify” and “freedom of action”, but it was not the only one in the report, which did nothing more than sum up sometimes contradictory opinions expressed during the discussions. For example, the beginning of paragraph 35 stated that unilateral acts were important and were part of day-to-day diplomatic practice, whereas, at the end of paragraph 36, it was stated that the Commission had “few tools or guidelines” for codifying the rules “of a little known area”. Opposing views had been expressed during the discussions and it was quite normal for the report to reflect them.

Paragraph 38 was adopted.

Paragraph 39

30. Mr. PAMBOU-TCHIVOUNDA, supported by Mr. ECONOMIDES, proposed that the word “present” should be replaced by the word “observed”.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

31. Mr. LUKASHUK proposed that, in the seventh sentence, the words “as well as that of the acts of international organizations” should be deleted.

32. Mr. ECONOMIDES said that, although he was the one who had expressed that opinion, he also considered that those words were not relevant.

Paragraph 42, as amended, was adopted.

Paragraphs 43 to 47

Paragraphs 43 to 47 were adopted.

Paragraph 48

33. Mr. PELLET proposed that, in the French text, the words *accord officieux* should be replaced by the words *accord informel*.

Paragraph 48, as amended in the French text, was adopted.

Paragraphs 49 and 50

Paragraphs 49 and 50 were adopted.

Paragraph 51

34. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic), referring to the last sentence, said that he did not quite see how the concept of “multilateral” unilateral acts could have been abandoned, since, to his knowledge, it had never been referred to. The sentence should therefore be deleted.

Paragraph 51, as amended, was adopted.

Paragraphs 52 and 53

Paragraphs 52 and 53 were adopted.

Paragraph 54

35. The CHAIRMAN, speaking as a member of the Commission, said that the words “an unilateral act” were used several times and should be replaced by the words “a unilateral act”. He requested the Rapporteur to deal with that question.

36. Mr. TOMKA said that the words “*Nuclear Tests case*” should be replaced by the words “*Nuclear Tests cases*” because there had been two cases.

Paragraph 54, as amended, was adopted.

Paragraphs 55 and 56

Paragraphs 55 and 56 were adopted.

Paragraph 57

37. Mr. TOMKA said that, at the end of the sixth sentence, the word “(Jurisdiction)” should be added after the words “*Maritime Delimitation and Territorial Questions between Qatar and Bahrain case*”.

Paragraph 57, as amended, was adopted.

Paragraph 58

38. Mr. PELLET said that, at the end of the first sentence, the words “since peoples, national liberation movements or individuals could also be the beneficiaries of legal commitments” would be clearer than the words “since peoples, national liberation movements or individuals could also give rise to legal obligations”.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal and that the end of the first sentence should be amended to read: “could also be beneficiaries of legal commitments”.

It was so agreed.

40. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, in the first sentence, it might not be accurate to say that “some members wondered”, since only one member had done so.

41. Mr. KATEKA, supported by Mr. Sreenivasa RAO, proposed that the words “some members wondered” should be replaced by the relatively neutral words “it was queried”.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraphs 59 to 68

Paragraphs 59 to 68 were adopted.

Paragraph 69

43. Mr. PELLET said that, since the last sentence of the French text, which corresponded to the last two sentences of the English text, duplicated the sentences which preceded it, it should be deleted.

44. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to delete the last two sentences of the English text and the last sentence of the French text.

It was so agreed.

Paragraph 69, as amended, was adopted.

Paragraphs 70 to 73

Paragraphs 70 to 73 were adopted.

Paragraph 74

45. The CHAIRMAN, replying to a question by Mr. Goco, said that the words “one view” were not necessarily synonymous with the words “one member”.

46. Mr. CANDIOTI noted that, in the French text, those words had been translated as *un membre*. They should therefore be replaced by the words *selon une opinion* and the secretariat should be requested to harmonize the entire text.

Paragraph 74, as amended in the French text, was adopted.

Paragraphs 75 to 80

Paragraphs 75 to 80 were adopted.

Paragraph 81

47. Mr. TOMKA said that, in the last sentence, the words “1977 *Eastern Timor case*” should be replaced by the words “1995 *East Timor case*”.

Paragraph 81, as amended, was adopted.

Paragraph 82

Paragraph 82 was adopted.

Paragraph 83

48. Mr. PELLET said that he did not understand the eighth sentence because a presumption of incompetence would be more logical than a presumption of competence. The seventh sentence was also not very logical.

49. Mr. TOMKA said that the entire paragraph should be looked at again. He proposed that the Rapporteur should try to find the statement being referred to in the relevant summary record and check with the person who had made that statement before informing the Commission of his conclusion.

50. The CHAIRMAN said that the adoption of paragraph 83 should be deferred until that problem had been solved by the Rapporteur.

It was so agreed.

Paragraphs 84 to 94

Paragraphs 84 to 94 were adopted.

Paragraph 95

51. Mr. BROWNLIE said that in the second sentence he was not very satisfied with the words “objective status of that State”, especially in relation to neutral status. He proposed that the word “objective” should be deleted.

52. Mr. HAFNER said that the problem could be solved if the words “objective status” were replaced by the words “status *erga omnes*”.

53. Mr. KUSUMA-ATMADJA said that he did not agree with Mr. Hafner’s proposal, since it was “obligations *erga omnes*” that were referred to, not “status *erga omnes*”.

54. Mr. PAMBOU-TCHIVOUNDA, noting that the Commission should be careful not to mix things up, said that he agreed with the comment by Mr. Kusuma-Atmadja.

55. Mr. TOMKA said that there was no need to modify the word “status” because an example was given in the following sentence.

56. Mr. PELLET said he also thought that Mr. Brownlie’s wise proposal should be adopted.

57. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 95, as amended by Mr. Brownlie.

It was so agreed.

Paragraph 95, as amended, was adopted.

Paragraph 96

58. Mr. BROWNLIE said that the word “unopposability” at the end of the second sentence should be replaced by the word “inopposability”.

Paragraph 96, as amended in English, was adopted.

Paragraphs 97 to 101

Paragraphs 97 to 101 were adopted.

Paragraph 102

59. Mr. PELLET proposed that, in order to make paragraph 102 mean something, the words “stemming directly from the law” should be replaced by the words “stemming directly from general international law”.

60. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that he accepted Mr. Pellet’s proposal. The words “cases of absolute invalidity” should be replaced by the words “causes of absolute invalidity”.

Paragraph 102, as amended, was adopted.

Paragraphs 103 to 106

Paragraphs 103 to 106 were adopted.

Paragraph 107

61. Mr. TOMKA, referring to the penultimate sentence, said he wondered whether the words “continued to be binding” should not be replaced by the words “continued to be operative”.

62. Mr. SIMMA proposed that the words “became operative again” should be used.

63. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 107, as amended by Mr. Simma.

It was so agreed.

Paragraph 107, as amended, was adopted.

Paragraphs 108 and 109

Paragraphs 108 and 109 were adopted.

64. Mr. TOMKA, noting that the paragraphs which followed related to the Special Rapporteur’s summing up, said he wondered whether, in keeping with the usual practice, they should not be placed in a new section 4, to be entitled “Special Rapporteur’s concluding remarks”. The

current section 4 (Establishment of the Working Group) (A/CN.4/L.595/Add.1) would become section 5.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt that proposal.

It was so agreed.

Paragraphs 110 to 114

Paragraphs 110 to 114 were adopted.

Paragraph 115

66. Mr. TOMKA, noting that the last sentence did not faithfully reflect the debate, proposed that it should be replaced by the following sentence: “That point could be further examined by the Working Group”.

Paragraph 115, as amended, was adopted.

Paragraphs 116 to 123

Paragraphs 116 to 123 were adopted.

Paragraph 124

67. Mr. BROWNLIE proposed that the paragraph should be simplified and made more general.

68. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that he would submit a new text along those lines.

69. The CHAIRMAN said he took it that the Commission wished to leave paragraph 124 pending.

It was so agreed.

Paragraph 125

70. The CHAIRMAN said that Mr. Tomka’s comment on paragraph 115 also applied to paragraph 125 and invited the Rapporteur to amend that paragraph accordingly.

Paragraph 125 was adopted on that understanding.

4. ESTABLISHMENT OF THE WORKING GROUP (A/CN.4/L.595/Add.1)

Paragraphs 126 to 128

71. Mr. PELLET, recalling that the report of the Working Group had not been submitted to the Commission and had therefore not been considered, questioned whether these paragraphs should be adopted. He noted, for example, that, in the *chapeau* of paragraph 127, reference was made to “a strong measure of support” for certain points concerning further work on the topic. Where did that strong measure of support come from? It certainly did not come from the Commission.

72. Mr. TOMKA, replying to Mr. Pellet, proposed that it should be stated that the Working Group had provided such support.

73. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said it was true that the Working Group had not been able to report to the Commission. He nevertheless thought that its work should be reflected in the report of the Commission. He therefore accepted Mr. Tomka's proposal.

74. Mr. PELLET said that Mr. Tomka's proposal was good, but it did not go far enough. He himself proposed that it should be explained at the end of paragraph 127 or in a paragraph 127 bis that the Commission had not been able to discuss the conclusions in question.

75. Mr. HAFNER said that he also supported Mr. Tomka's proposal, but noted that, if it was accepted, there would be no need for paragraph 128.

76. Mr. LUKASHUK said that he did not agree with the conclusion stated in paragraph 127 (a), since the legal effects produced by unilateral acts were predetermined by international law.

77. The CHAIRMAN recalled that subparagraphs (a) to (d) were conclusions by the Working Group, not by the Commission.

78. Mr. PELLET said that that was how he understood paragraph 127 and, as to substance, he supported Mr. Lukashuk's comment. He agreed with Mr. Tomka's proposal, reiterated his proposal that a new paragraph 127 bis should be added, in a sentence to follow paragraph 127, and suggested that paragraph 128, which he found legitimate, should be retained.

79. Mr. HAFNER, referring to paragraph 128, asked whether the Commission could really request the views of delegations in the Sixth Committee on points which it had not considered. For the sake of logic, that paragraph should perhaps begin with the word "Nevertheless".

80. Mr. ECONOMIDES suggested that the content of the additional paragraph 127 bis proposed by Mr. Pellet should be transferred to paragraph 128, which would be amended along the lines indicated by Mr. Hafner.

81. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that Mr. Economides' idea was acceptable.

82. The CHAIRMAN invited the Rapporteur to submit a new text at the next meeting.

The meeting rose at 1 p.m.

2657th MEETING

Monday, 14 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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

CHAPTER VI. *Unilateral acts of States (concluded) (A/CN.4/L.595 and Add.1)*

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

4. ESTABLISHMENT OF THE WORKING GROUP (concluded) (A/CN.4/L.595/ADD.1)

Paragraphs 127 and 128 (concluded)

1. The CHAIRMAN said that, following consultations, a new formulation of the *chapeau* of paragraph 127 had been proposed, to read:

“The Working Group reported that while, in the light of the above-mentioned circumstances, no final conclusions could be drawn from the meetings held, there was a strong measure of support in the Working Group for the following points concerning further work on the topic:”

The new text would then be followed by subparagraphs (a) to (d) as currently worded.

2. Paragraph 128 would then read:

“The Commission did not have time to consider the report of the Working Group. However, the Commission agreed that it would be useful to seek the views of Governments on points (a), (b) and (c) above and that the Secretariat should proceed along the lines suggested in point (d) above.”

3. Mr. HAFNER asked whether the Working Group had submitted a formal report to the Commission in the form of a document.

4. The CHAIRMAN said that, strictly speaking, no formal report had been submitted. The main thrust of the paragraph was, however, that the Commission had not