

Document:-  
**A/CN.4/SR.2657**

**Summary record of the 2657th meeting**

Topic:  
**Adoption of the report**

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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

had time to consider in plenary the points on which the Chairman of the Working Group had reported.

*Paragraphs 127 and 128, as amended, were adopted.*

2. INTRODUCTION BY THE SPECIAL RAPporteur OF HIS THIRD REPORT (concluded) (A/CN.4/L.595)

Paragraph 27 (concluded)

5. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) suggested that the second sentence of paragraph 27 should be reformulated to read: “The Convention had to do with a type of conventional act, the treaty, which it defined, but without excluding other types of conventional acts distinct from a treaty as defined in article 2, paragraph 1 (a), of the Convention, to which the rules of the Convention could be applied irrespective of the Convention itself.”

6. Mr. ECONOMIDES said that the phrase “distinct from a treaty” was superfluous and would simply create confusion. The phrase “other types of conventional acts” fully covered the distinction. He would not, however, press the point.

7. The CHAIRMAN said that, if the formulation “as defined in article 2, paragraph 1 (a), of the Convention” was to be used, the phrase “distinct from a treaty” should be retained.

*Paragraph 27, as amended, was adopted.*

3. SUMMARY OF THE DEBATE (concluded)

Paragraph 83 (concluded)

8. The CHAIRMAN said the Rapporteur had proposed that the last five sentences of paragraph 83, starting with the word “Furthermore”, which dealt with drafting questions not usually addressed in the report, should be deleted.

*Paragraph 83, as amended, was adopted.*

Paragraph 124 (concluded)

9. The CHAIRMAN said it had been proposed that three sentences should be deleted from paragraph 124. As amended, the paragraph would read:

“In response to the question whether any pattern could be discerned from the replies of Governments to the questionnaire (A/CN.4/511) the Special Rapporteur said that some of the replies had been critical of the treatment of the topic, but had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account in subsequent reports.”

*Paragraph 124, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter VI, as amended, was adopted.*

CHAPTER VIII. *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)* (A/CN.4/L.597)

**A. Introduction**

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.*

Paragraph 13

10. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that, at the end of paragraph 13, the phrase “did not subtract from it” should be replaced by “only facilitated identifying and defining that obligation”.

*Paragraph 13, as amended, was adopted.*

Paragraph 14

*Paragraph 14 was adopted.*

Paragraph 15

11. Mr. PELLET said it was not clear what was meant by the expression “right of engagement”, in the penultimate sentence.

12. Mr. Sreenivasa RAO (Special Rapporteur) said that the expression could be replaced by the words “right of consultation”.

*It was so agreed.*

13. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed replacing the words “So if”, at the beginning of the third sentence, by the word “furthermore”, and ending the sentence with the word “risk”.

14. He said that the remainder of the third sentence should be redrafted to read: “The phrase ‘acts not prohibited by international law’, originally intended to distinguish liability from responsibility, might not be necessary or, indeed, appropriate to define the scope of the regime on prevention.” Mr. PELLET said that the proposed redrafting raised the perennial problem of the distinction drawn in English between liability and responsibility, a distinction that did not exist in French and Spanish.

15. After a brief discussion in which Mr. GALICKI, Mr. PELLET, Mr. Sreenivasa RAO (Special Rapporteur) and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the problem could be avoided by altering the phrase “distinguish them from wrongful acts” to “distinguish these activities from those covered by the topic of State responsibility”.

*It was so agreed.*

16. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed that the words “it would become prohibited”, in the fifth sentence, should be replaced by “it could arguably be prohibited”. He said that the last sentence of paragraph 15 should be amended for the sake of clarity to read “In his opinion, deleting the reference to the words ‘acts not prohibited by international law’ would not create further problems, and might even secure a greater consensus for the draft articles.”

*It was so agreed.*

17. Mr. SEPÚLVEDA said that the third sentence, in the amended form, still created difficulties in the Spanish and French versions, as the word *responsabilidad* or *responsabilité* were repeated, which was plainly nonsense.

18. Mr. PELLET commented that the Commission was going round in circles. He suggested that the second sentence might read “While State responsibility dealt with wrongful acts, international liability, the subject of the present report, dealt with compensation.” The French translation of the very last sentence was wrong and should be more closely aligned with the original English.

19. Mr. TOMKA suggested that, in order to facilitate comprehension, the word “liability” should be added in brackets after the relevant term in the French, Spanish and Russian versions.

20. Mr. KABATSI enquired whether the phrase in the second sentence of paragraph 15 “acts not necessarily prohibited by international law” might not imply that international liability, in certain circumstances, covered acts prohibited by international law.

21. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Kabatsi had made a pertinent drafting point. It would be better to recast the phrase to read “acts not expressly/explicitly prohibited by international law”.

22. Mr. TOMKA said that the word “necessarily” should simply be deleted.

*Paragraph 15, as amended, was adopted.*

Paragraph 16

*Paragraph 16 was adopted.*

Paragraph 17

23. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed that, the phrase “particular attention needed to be paid to the preamble” should be replaced by “necessary attention be paid to this concern in the preamble”.

24. Mr. MOMTAZ said that the text should refer to draft articles and not articles. Furthermore, the French version should be brought into line with the wording proposed by Mr. Pellet for paragraph 15. The expression “universal endorsement” might cause some difficulties and should be deleted. The sentence would then read “In order to encourage a broader consensus on the draft articles ...”.

*Paragraph 17, as amended, was adopted.*

Paragraph 18

*Paragraph 18 was adopted.*

Paragraph 19

*Paragraph 19 was adopted with minor editing changes.*

Paragraphs 20 to 26

*Paragraphs 20 to 26 were adopted.*

Paragraph 27

*Paragraph 27 was adopted with a minor editing change.*

Paragraphs 28 to 32

*Paragraphs 28 to 32 were adopted.*

Paragraph 33

25. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that the last sentence of the paragraph should be redrafted to read “The prevention articles would also apply to cases where there was no agreement or clear legal prescription that the activity involved was prohibited.”

*Paragraph 33, as amended, was adopted.*

Paragraph 34

26. Mr. HAFNER observed that “the principle of precaution” should be called “the precautionary principle”.

*Paragraph 34, as amended, was adopted.*

Paragraph 35

*Paragraph 35 was adopted.*

Paragraph 35 bis

27. Mr. PAMBOU-TCHIVOUNDA objected that paragraph 35, concerning the preamble, made no reference to the views he had expressed with regard to the fifth preambular paragraph. He therefore proposed that a new paragraph 35 bis be added, reading:

“As to the subject matter, however, one member observed that the fifth preambular paragraph contained innovative wording which endowed the set of draft articles with a vital conceptual basis, indeed with the key to the whole system, in respect of both the section on prevention and a future section, which should be devoted to compensation. The paragraph, dealing with the freedom of States to carry on or permit activities in their territory, should, according to that member, be transferred to a specific provision in the actual body of

the draft articles, namely a draft article 2 bis on the obligation of prevention.”

28. He believed that the wording he was proposing for the attention of the Rapporteur, the Special Rapporteur and indeed the whole Commission, reflected what he felt was a remarkable, essential feature of the preamble.

29. Mr. ROSENSTOCK said that he had no objection to the inclusion of a reference to Mr. Pambou-Tchivounda’s opinion, but it would have to be more succinct than the paragraph he had just proposed.

30. Mr. PELLET wondered if it would be possible to say “One member suggested that, in view of its importance, the principle set forth in the fifth preambular paragraph on the rights of States freely to carry on activities in their territory, deserved to be laid down in the actual body of the draft articles”. That formulation would be more sober and more appropriate to a report which was not supposed simply to reiterate the views of each and every member.

31. Mr. Sreenivasa RAO (Special Rapporteur) said that he would be pleased to include a brief reference to Mr. Pambou-Tchivounda’s view.

32. Mr. PAMBOU-TCHIVOUNDA said he could agree to his concerns being formulated along the lines suggested by Mr. Pellet.

*Paragraph 35 bis was adopted.*

Paragraph 36

*Paragraph 36 was adopted.*

Paragraphs 37 and 38

33. Mr. PAMBOU-TCHIVOUNDA said he had problems with the concept of duty of prevention in paragraph 37 and thought that, before that concept was addressed, a draft article on the obligation of prevention should be formulated. He drew attention to the summary record of the 2642nd meeting, at which he had proposed wording for such a provision, and suggested that the relevant paragraphs of the record should be incorporated in the report.

34. Mr. PELLET said he was opposed to transforming the Commission’s report into a collage of the summary records. He would, however, accept wording along the lines of “According to one member, an article on the obligation of prevention should be included”.

35. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the order of paragraphs 37 and 38 should be reversed in order to improve the logical sequence and better reflect the discussion. He also proposed that in paragraph 38, to become paragraph 37, the word “covering” should be replaced by “deleting the words”.

*It was so agreed.*

*Paragraphs 37 and 38, as amended, were adopted.*

Paragraphs 39 and 40

*Paragraphs 39 and 40 were adopted.*

Paragraph 40 bis

36. Mr. MIKULKA (Secretary to the Commission) read out the following wording proposed by a member: “The view was also expressed that the proposed deletion would be tantamount to legitimizing prohibited activities, which would not be acceptable.”

*Paragraph 40 bis was adopted.*

Paragraph 41

*Paragraph 41 was adopted.*

Paragraph 41 bis

37. Following consultations suggested by Mr. TOMKA and the CHAIRMAN, Mr. MIKULKA (Secretary to the Commission) read out the following wording, to become paragraph 41 bis: “With regard to draft article 3, according to one member the definition of the obligation of prevention should be dealt with in a separate article.”

38. Mr. ECONOMIDES, recalling that he, too, had taken that viewpoint, proposed that the words “according to one member” should be replaced by “the view was expressed that”.

*It was so agreed.*

*Paragraph 41 bis, as amended, was adopted.*

Paragraph 42

39. Mr. PELLET said that the words “could be given” did not seem accurate and proposed that they should be replaced by “was required”.

40. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase “for any kind of activity” was too broad.

41. After a brief discussion in which Mr. HAFNER and Mr. PELLET took part, the CHAIRMAN suggested that the phrase should be replaced by the words “for any activity falling within the scope of these draft articles”.

*It was so agreed.*

*Paragraph 42, as amended, was adopted.*

Paragraphs 43 and 44

*Paragraphs 43 and 44 were adopted.*

Paragraph 45

42. Mr. GAJA proposed that the phrase “the balance of interest was correctly maintained, that” should be deleted and that the words “level of interest” should be replaced by “level of risk”.

*Paragraph 45, as amended, was adopted.*

Paragraph 46

*Paragraph 46 was adopted.*

Paragraph 46 bis

43. Mr. ECONOMIDES, supported by Mr. MOMTAZ, proposed the insertion of a new paragraph, to read: "With regard to article 19, paragraph 2, it was pointed out that this provision contains gaps that could be filled by referring to article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses".

*It was so agreed.*

*Paragraph 46 bis was adopted.*

Paragraph 47

44. Mr. TOMKA proposed that the word "framework" should be inserted before the word "convention".

*Paragraph 47, as amended, was adopted.*

Paragraphs 48 and 49

*Paragraphs 48 and 49 were adopted.*

Paragraph 50

45. Mr. PELLET suggested that, for consistency with wording used earlier in paragraph 15, the phrase "principle of engagement" should be replaced by "principle of consultation".

46. Mr. Sreenivasa RAO (Special Rapporteur) said that, if Mr. Pellet's suggestion was adopted, the end of the preceding sentence should be changed from "engage themselves" to "consult among themselves".

47. Mr. HAFNER said that, arguably, there was no such concept as a principle of consultation. The sentence should be reformulated to eliminate any reference to such a principle.

48. Mr. Sreenivasa RAO (Special Rapporteur) proposed the following alternative wording: "Emphasizing consultation at the earliest possible stage was the main value of the draft".

49. Mr. BROWNLIE said that the phrase "principle of consultation" should be retained. It was an unusual locution, but the Commission was, in point of fact, creating such a principle within the framework of the draft articles, thus differentiating it from the more common reference to consultation as one of a list of options in general international law.

50. Mr. ECONOMIDES suggested that the word "principle" could be replaced by "need" or "necessity". The salient part of the sentence, after all, was that consultation was desirable at the earliest possible stage.

51. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the word "principle" should be replaced by the word

"duty", which was stronger and conveyed better the idea of obligation.

52. The CHAIRMAN recalled that paragraph 15 had contained the phrase "right of engagement". "Right of consultation" might, by analogy, be appropriate in paragraph 50.

53. Mr. MOMTAZ suggested that "obligation", the word the Special Rapporteur had mentioned, might be the appropriate one to use.

54. Mr. KUSUMA-ATMADJA said he considered both "obligation" and "duty" acceptable, but the latter was stronger.

55. The CHAIRMAN suggested that the word "obligation" should be used.

*Paragraph 50, as amended, was adopted.*

Paragraph 51

56. Mr. ROSENSTOCK said that the word "leaving" was surely a typographical error and should be deleted.

*Paragraph 51, as amended, was adopted.*

Paragraph 52

57. Mr. ECONOMIDES said that the wording "he saw no need for the Commission to redraft it" was inappropriate: it implied annoyance on the part of the Special Rapporteur. It should therefore be changed or deleted.

58. Mr. Sreenivasa RAO (Special Rapporteur) said he accepted that point. An alternative would be to reformulate the whole second half of the paragraph to read: "since article 19 had generally met with the approval of Governments, he proposed its retention without any changes".

*Paragraph 52, as amended, was adopted.*

Paragraph 53

*Paragraph 53 was adopted.*

Paragraph 54

59. The CHAIRMAN suggested that a sentence should be added to the effect that the Drafting Committee had not had time to consider the draft preamble and revised draft articles 1 to 19 at the current session.

60. Mr. Sreenivasa RAO (Special Rapporteur) said that, in haste, he had inserted the title of the draft articles before the preamble. The appropriate position, however, was after the preamble and immediately before article 1.

61. Mr. GAJA said that the preamble read like a draft resolution. The Drafting Committee should consider only the draft articles and replace the existing draft preamble with one that would be appropriate to the draft convention.

62. Mr. TOMKA supported the Chairman's suggestion. The sentence might be worded: "Owing to lack of time, the Drafting Committee was not able to consider the draft preamble and articles". It was also necessary to clarify the status of the annex. There was no clear connection between it and the report, except for the statement in footnote 6. At the least, footnote 9 should be expanded to remind the reader of the status of the annex. As for the draft preamble, he would reiterate his view that the last three paragraphs were inappropriate. They belonged in a draft resolution of the General Assembly and it was not for the Commission to take on the task of drafting such a resolution. The proposal that the title should be placed after the draft preamble was quite acceptable. The draft articles were not a finished product adopted by the Commission, but a text proposed by the Special Rapporteur. Any criticism would be for him to deal with.

63. The CHAIRMAN raised the question of what the annex was annexed to. Its status might be clearer if, following the example of the reports on diplomatic protection and unilateral acts of States, the annex formed a footnote.

64. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that suggestion. The appropriate place would be in footnote 6, which would also make it clear that the draft articles were his responsibility alone.

65. The CHAIRMAN said that the annex was too long for a footnote. The format, however, could be discussed later.

66. Mr. HAFNER supported the view that the status of the annex should be more clearly signposted in a footnote. The suggestion that the title should be moved, however, was more problematic. If it was moved, there would effectively be no preamble and States would justifiably view the existing text as a draft resolution of the General Assembly.

67. Mr. ECONOMIDES said that it would be a pity to lose the positive ideas contained in the draft preamble. He therefore suggested that the phrase "*The General Assembly*" and the "*Adopts*" and "*Invites*" changes should be deleted. What was left would be an appropriate preamble.

68. The CHAIRMAN suggested that, regardless of the status of the annex, the whole text should be referred to the Drafting Committee, which could make the necessary revisions.

69. Mr. ROSENSTOCK said he concurred. Mr. Hafner was correct in saying that the existing text did not constitute the preamble to a convention, but further discussion within the Commission was unnecessary. The text proposed by the Special Rapporteur had been referred to the Drafting Committee and there would be time for the Commission to reach a decision when it went through the final text paragraph by paragraph.

70. Mr. PELLET said that the Commission should not risk reopening the whole discussion. What States wished to see was the text proposed by the Special Rapporteur, which, until the Commission had endorsed it, remained his responsibility alone. A fuller explanation than that suggested by Mr. Tomka should be added to the end of paragraph 54, along the following lines: "However, for the

convenience of States, the Commission annexes to the present chapter the text of the draft preamble and revised articles as proposed by the Special Rapporteur".

71. Mr. BROWNLIE said that it was obviously extremely helpful to have the draft preamble and revised articles available for reference, preferably in an annex, although he endorsed what other members had said about the status of the annex. He trusted that any inconsistencies with other chapters of the report would be tidied up.

*Paragraph 54, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter VIII, as amended, was adopted.*

*The meeting rose at 6 p.m.*

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## 2658th MEETING

*Tuesday, 15 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. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.*

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### Cooperation with other bodies (concluded)\*

[Agenda item 9]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN extended a welcome to Mr. Guillaume, President of the International Court of Justice, whose visit reflected the close ties between ICJ and the Commission.

2. Mr. GUILLAUME (President of the International Court of Justice) said that he wished first to thank the Chairman for his welcome and, above all, for himself and

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\* Resumed from the 2655th meeting.