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Summary record of the 2708th meeting

Topic:
<multiple topics>

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161. Mr. ECONOMIDES said that article 9 applied in cases where there was an absence of official authority. That was not true of Governments in exile, however, since the State continued to exist, and he had doubts as to whether Governments in exile fell within the purview of article 9.

162. Mr. GALICKI pointed out that the Polish Government in exile had been recognized by the Western allies, had concluded treaties with the former Union of Soviet Socialist Republics and had even signed the Convention on International Civil Aviation.

163. Mr. CRAWFORD (Special Rapporteur) said that, in those examples, the actions of the Government in exile were covered by article 4, not article 9. Article 9 would apply only vis-à-vis States that did not recognize a Government in exile as constituting a Government. The discussion illustrated the very fine line between the workings of the two articles and explained his reluctance to get into such issues. He said that he would add some clarification of the position of Governments in exile.

It was so agreed.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Commentary to article 10 (Conduct of an insurrectional or other movement)

Paragraphs (1) to (16)

Paragraphs (1) to (16) were adopted.

The commentary to article 10 was adopted.

Commentary to article 11 (Conduct acknowledged and adopted by a State as its own)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

164. Mr. PELLET proposed that the paragraph should be deleted. He could not see the relevance of the Tellini case to article 11.

165. Mr. CRAWFORD (Special Rapporteur) said that the case had been cited because it had established the general rule that the acts of private parties were not attributable to the State. It had been agreed that some reference to that rule would be included in the commentary. If paragraph (3) was read in conjunction with paragraph (4), the sense was clearer.

The meeting rose at 6.10 p.m.

2708th MEETING

Thursday, 9 August 2001 at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

CHAPTER V. *State responsibility (continued)* (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2-10)

E. *Text of the draft articles on responsibility of States for internationally wrongful acts (continued)* (A/CN.4/L.608/Add.1 and Corr.1 and Add.2-10)

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

PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE (*continued*)

CHAPTER II. ATTRIBUTION OF CONDUCT TO A STATE (*continued*)

Commentary to article 11 (Conduct acknowledged and adopted by a State as its own) (*continued*) (A/CN.4/L.608/Add.10)

Paragraph (3) (*continued*)

1. The CHAIRMAN recalled that Mr. Pellet had proposed that paragraph (3) should be deleted.

2. Mr. CRAWFORD (Special Rapporteur) said that he wanted paragraph (3) to be retained. He was prepared to move it or, if that was not possible, merge it with paragraph (2). He proposed that any decision on that paragraph and the place which might be assigned to it should be postponed until the following meeting.

It was so agreed.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

3. Mr. GALICKI proposed that the words “by third parties” at the end of the first sentence should be deleted and that the words “third State” should be replaced by the words “a State” in the corresponding footnote.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

CHAPTER VI. Reservations to treaties (concluded)* (A/CN.4/L.609 and Add.1–5)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (concluded)* (A/CN.4/L.609/Add.2–5)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED AT THE FIFTY-THIRD SESSION (concluded)* (A/CN.4/L.609/Add. 3–5)

Commentaries to guidelines 2.4.3 (Time at which an interpretive declaration may be formulated), *2.4.4 [2.4.5]* (Non-requirement of confirmation of interpretative declarations made when signing a treaty), *2.4.5 [2.4.4]* (Formal confirmation of conditional interpretative declarations formulated when signing a treaty), *2.4.6 [2.4.7]* (Late formulation of an interpretative declaration) and *2.4.7 [2.4.8]* (Late formulation of a conditional interpretative declaration) (A/CN.4/L.609/Add.5)

The commentaries to guidelines 2.4.3 to 2.4.7 were adopted.

Section C.2, as amended, was adopted.

Section C, as amended, was adopted.

Chapter VI, as amended, was adopted.

CHAPTER VIII. Unilateral acts of States (A/CN.4/L.611)

A. Introduction

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 11 to 13

Paragraphs 11 to 13 were adopted.

Paragraph 14

4. Mr. PELLET proposed that, in the last sentence, the words “for the time being” should be added before the word “feasible” and that the words “in other areas” should be replaced by the words “on particular categories of unilateral acts”.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 22

Paragraphs 15 to 22 were adopted.

Paragraph 23

5. Mr. GAJA proposed that the words “and effects” should be added after the words “legal validity” at the end of the paragraph.

Paragraph 23, as amended, was adopted.

Paragraph 24

Paragraph 24 was adopted.

Paragraph 25

6. Mr. GAJA said that, in the second sentence, the word “States” should be replaced by the words “the acts”.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 28

Paragraphs 26 to 28 were adopted.

Paragraph 29

7. Mr. BROWNLIE proposed that the following new sentence should be added at the end of the paragraph: “It was also stated that the jurisprudence did not reflect the categories of unilateral acts which tend to feature in doctrine.”

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 35

Paragraphs 30 to 35 were adopted.

Paragraph 36

8. Mr. GAJA proposed that the end of the paragraph should be amended to read: “although a clear distinction between the two questions cannot always be made.”

Paragraph 36, as amended, was adopted.

Paragraph 37

9. Mr. GAJA proposed that, at the end of the second sentence, the words “but which had not interpreted” should be replaced by the words “without interpreting” and that the end of the third sentence should be amended to read: “not on the intention which might be subjective and, in many cases, quite elusive”. He found the last sentence confusing and proposed that it should be deleted.

Paragraph 37, as amended, was adopted.

* Resumed from the 2701st meeting.

Paragraph 38

Paragraph 38 was adopted.

Paragraph 39

10. Mr. GAJA, supported by Mr. ECONOMIDES, proposed that the first sentence should be deleted because it was confusing.

Paragraph 39, as amended, was adopted.

Paragraph 40

11. Mr. MELESCANU, supported by Mr. PELLET, pointed out that paragraph 40 did not faithfully reflect the points of view which had been expressed during the discussions of that question. It should therefore be indicated that objections or reservations had been formulated in connection with the reference to the preparatory work as a supplementary means of interpreting a unilateral act.

Paragraph 40, as amended, was adopted.

Paragraph 41

12. Mr. PELLET said it should also be indicated that the members of the Commission had requested the Special Rapporteur to submit a consolidated version of the draft articles as a whole.

13. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed that he would provide a text to the secretariat.

It was so agreed.

Paragraph 41 was adopted.

Paragraphs 42 to 45

Paragraphs 42 to 45 were adopted.

Paragraph 46

14. Mr. GOCO, referring to the end of the paragraph, said that it should be explained what was meant by "the relevant circumstances".

15. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), supported by Mr. PELLET and Mr. CANDIOTI, said that what was meant were circumstances within the meaning of article 32 of the 1969 Vienna Convention, the idea being that, if the preparatory work was not taken into account as a supplementary means of interpreting unilateral acts, it could be at least taken into account as a circumstance in which the unilateral act had been adopted. He therefore proposed that the end of the paragraph should be amended to read: "part of the relevant circumstances under which the unilateral act took place".

Paragraph 46, as amended, was adopted.

Paragraph 47

Paragraph 47 was adopted.

Section B, as amended, was adopted.

Chapter VIII, as amended, was adopted.

CHAPTER IX. Other decisions and conclusions of the Commission (A/CN.4/L.612)

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

16. Mr. CRAWFORD said that the Working Group on the commentaries to the draft articles on State responsibility referred to in paragraph 6 had carried out very useful work and that that should be indicated by amending the last sentence to read: "The Working Group, chaired by Mr. Melescanu, was composed of only 12 members of the Commission and engaged in a useful preliminary review of commentaries on the topic of State responsibility."

Paragraph 6, as amended, was adopted.

Section A, as amended, was adopted.

B. Date and place of the fifty-fourth session

Paragraph 7

Paragraph 7 was adopted.

Section B was adopted.

C. Cooperation with other bodies

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

17. Mr. TOMKA proposed that the words "of the Council of Europe" should be added after the words "Public International Law" in the first sentence.

Paragraph 10, as amended, was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Section C, as amended, was adopted.

D. Representation at the fifty-sixth session of the General Assembly

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

18. The CHAIRMAN said that, since paragraph 14 was not complete, the Commission might adopt it at a later meeting.

*It was so agreed.***E. International Law Seminar**

Paragraphs 15 to 27

*Paragraphs 15 to 27 were adopted.**Section E was adopted.***CHAPTER VII. Diplomatic protection (A/CN.4/L.610)****A. Introduction**

Paragraph 1

19. Mr. PELLET proposed that the last sentence should be deleted.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 6

20. Mr. PELLET said that the terms “articles” and “draft articles” were used indiscriminately throughout the text. For the sake of consistency, the same term should always be used. The term “draft articles” would probably be preferable.

21. The CHAIRMAN said that the secretariat would make the necessary corrections.

*Paragraphs 2 to 6 were adopted.**Section A, as amended, was adopted.***B. Consideration of the topic at the present session**

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

Paragraph 12

22. Mr. PELLET, supported by Mr. BROWNLIE, said that the words “since the *Nottebohm* case” should be replaced by the words “the Court noted in the *Nottebohm* case”. That doctrine had existed well before the case in question.

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

23. Mr. RODRÍGUEZ CEDEÑO said that, in the second sentence of the Spanish text, the word *forzosamente* should be replaced by the word *solamente*.

24. Mr. BROWNLIE said too frequent references to Vattel should be avoided. He therefore proposed that the reference to the “Vattelian” approach should be deleted.

Paragraph 15, as amended, was adopted.

Paragraph 16

25. Mr. GAJA said that the words “when that obligation was not opposable to it” at the end of the paragraph should be replaced by the words “when that obligation was not owed to it”.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

26. Mr. PELLET proposed that, in order to reflect the discussion faithfully, the following sentence should be added at the end of the paragraph: “It was stated that in fact only the nationality at the time of the claim mattered.”

Paragraph 18, as amended, was adopted.

Paragraph 19

27. Mr. GOCO proposed that the end of the second sentence and the beginning of the third sentence should be merged to read: “. . . diplomatic protection was not a human rights institution or the best mechanism for the protection of human rights . . .”.

28. Mr. DUGARD (Special Rapporteur), supported by Mr. CANDIOTI, Mr. TOMKA, Mr. BROWNLIE and Mr. RODRÍGUEZ CEDEÑO, said that it was better to keep the wording as it stood.

29. Mr. SIMMA proposed that the words “the structure of” in the fourth sentence should be deleted.

Paragraph 19, as amended by Mr. Simma, was adopted.

Paragraph 20

30. Mr. PELLET proposed that the second part of the second sentence should be amended to read: “. . . situations where, as a result of its implementation, the

individual would otherwise have no possibility of obtaining protection by a State”.

31. Mr. BROWNLIE said that he supported that proposal. He also proposed that, in the third sentence, the word “should” should be added before the word “relate”.

32. Mr. SIMMA proposed that, in that same sentence, the word “exemption” should be replaced by the word “exception”.

33. Mr. DUGARD (Special Rapporteur) said that he accepted the three proposed amendments, but noted that the word “exception” should read “exceptions”.

34. Following an exchange of views in which Mr. CANDIOTI, Mr. CRAWFORD, Mr. ECONOMIDES, Mr. GAJA, Mr. GALICKI, Mr. GOCO, Mr. MELESCANU, Mr. PELLET, Mr. Sreenivasa RAO, Mr. RODRÍGUEZ CEDEÑO, Mr. ROSENSTOCK, Mr. SIMMA, Mr. DUGARD (Special Rapporteur) and Mr. TOMKA (Chairman of the Drafting Committee) took part, the CHAIRMAN said that the structure of the third sentence should be looked at again because, as it stood, it confused involuntary changes of nationality with involuntary transfers of claims. He therefore proposed that the members of the Commission should invite the Special Rapporteur to amend the wording of that sentence, which could perhaps be split in two. In the meantime, he proposed that it should be left in square brackets and that the adoption of paragraph 20 should be deferred.

It was so agreed.

Paragraph 21

Paragraph 21 was adopted.

Paragraph 22

35. Mr. PELLET proposed that the following sentence should be added at the end of the paragraph: “Serious doubts were also expressed on whether the concept of assignment was well founded.”

Paragraph 22, as amended, was adopted.

Paragraphs 23 to 25

Paragraphs 23 to 25 were adopted.

Paragraph 26

36. Mr. GAJA proposed that, at the beginning of the sentence, the words “before moving on to the question of exhaustion of local remedies” should be deleted. In subparagraph (c), the word “power” should be replaced by the word “right” and the words “on behalf” should be deleted.

Paragraph 26, as amended, was adopted.

Paragraph 27

37. Mr. BROWNLIE, referring to the first sentence, asked the Special Rapporteur whether the words “the Vattelian legal fiction” could not be replaced by more explicit wording that it would be easier for ordinary readers to understand.

38. Mr. DUGARD (Special Rapporteur) said that he was prepared to discuss that wording with Mr. Brownlie.

39. The CHAIRMAN proposed that the members of the Commission should postpone the adoption of paragraph 27 until the Special Rapporteur had proposed new wording for the first sentence.

It was so agreed.

Paragraphs 28 to 37

Paragraphs 28 to 37 were adopted.

Paragraph 38

40. Mr. PELLET, referring to paragraphs 38 and 41 of the French version, proposed that the word *argument* should be replaced by the word *moyen* in accordance with the decision taken earlier by the Commission. In order to reflect the idea, as expressed during the discussions, that arguments in international law and in internal law might not be the same, he proposed that the words “and vice versa” should be added at the end of the last sentence of paragraph 38.

Paragraph 38, as amended in the French text, was adopted.

Paragraphs 39 to 50

Paragraphs 39 to 50 were adopted.

The meeting rose at 12.45 p.m.

2709th MEETING

Thursday, 9 August 2001, at 3.10 p.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.