

2827th MEETING

Tuesday, 3 August 2004, at 3.10 p.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

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

Chapter IV. Diplomatic protection (concluded) (A/CN.4/L.653 and Corr.1 and Add.1)

C. Text of the draft articles on diplomatic protection adopted by the Commission on first reading (concluded) (A/CN.4/L.653 and Add.1)

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

1. The CHAIRPERSON recalled that consideration of some paragraphs in Chapter IV on diplomatic protection had been deferred so that they could be redrafted to reflect members' comments at an earlier meeting. He invited the Special Rapporteur to introduce the proposed new texts.

Commentary to article 5 (Continuous nationality) (concluded)

Paragraph (5) (concluded)

2. Mr. DUGARD (Special Rapporteur) proposed that paragraph (5) should read:

"The entitlement of the State to exercise diplomatic protection begins at the date of the official presentation of the claim. There was, however, support for the view that if the individual should change his nationality between this date and the making of an award he ceases to be a national for the purposes of diplomatic protection. According to this view the continuous nationality rule requires the bond of nationality 'from the time of the occurrence of the injury until the making of the award'. In the light of the paucity of such cases in practice the Commission preferred to take no position on this subject."

3. Mr. CANDIOTI said that the phrase "until the making of the award" used in the third sentence was restrictive, since diplomatic protection did not necessarily end in an award: it could also result in a judgement or agreement. Perhaps therefore the phrase "until the settlement of the claim" would be more appropriate.

4. Mr. PELLET pointed out that the phrase in the third sentence could not be amended because it was a direct quotation from the ninth edition of *Oppenheim's International Law*,¹ as indicated by the footnote to the original text, which, presumably, was to be retained in the new text

¹ Jennings and Watts, *op. cit.* (2815th meeting, footnote 9).

proposed by the Special Rapporteur. A reference should also be included in that footnote to the ICSID decision in the *Loewen* case. As for the proposed new paragraph proper, he felt uneasy about the phrase "the Commission preferred to take no position on this subject". That was not correct: the Commission had indeed taken a position on the subject, which was reflected in article 5; whether one agreed with it was a different matter. Perhaps wording to the effect that the Commission felt it would be premature to sanction that trend would be more appropriate.

5. Mr. BROWNLIE observed that it was customary to use the full initials of writers cited. The footnote should therefore refer to "R.Y. Jennings".

6. Mr. DUGARD (Special Rapporteur) pointed out that the latest edition of *Oppenheim's International Law* referred to "Sir Robert Jennings".

7. Mr. BROWNLIE said that either "R.Y. Jennings" or "Sir Robert Jennings" would be acceptable.

8. Mr. DUGARD (Special Rapporteur), responding to Mr. Pellet, said that the *Loewen* case concerned the continuous nationality rule in the context of corporations, and was referred to in that connection in the commentary to article 10. However, if Mr. Pellet insisted, a reference to the case could also be included in the footnote. As for the last sentence, he was not quite sure how to express the position taken by the Commission. The intent was to bring the matter to the attention of States, and possibly to seek their guidance.

9. Mr. PELLET suggested, in the light of the Special Rapporteur's comments, that the last sentence should end with the more flexible phrase "the Commission preferred to maintain the rule reflected in article 5".

10. Mr. AL-BAHARNA suggested that, in order to meet Mr. Candioti's concern, the words "or a judgement" should be added after the words "the making of an award" in the second sentence, thereby leaving the quotation from *Oppenheim's International Law* in the third sentence intact.

11. The CHAIRPERSON said he took it that the Commission wished to adopt the text of paragraph (5) read out by the Special Rapporteur, as amended by Mr. Pellet and Mr. Al-Baharna and with the editorial amendment to the footnote requested by Mr. Brownlie.

Paragraph (5), as amended, was adopted.

Commentary to article 10 (Continuous nationality of a corporation) (concluded)

Paragraph (2) (concluded)

12. Mr. DUGARD (Special Rapporteur) proposed that the text following the words "in this sense" at the end of paragraph (2) should be replaced by the text just adopted for paragraph (5) of the commentary to article 5.

13. Mr. MATHESON said he presumed that the references to "the individual", "his nationality" and "he

ceases” would be amended to read “the corporation”, “its nationality” and “it ceases”.

Paragraph (2), as amended, was adopted.

Commentary to article 17 (Actions or procedures other than diplomatic protection) (*concluded*)

New paragraph (1) *bis*

14. Mr. DUGARD (Special Rapporteur) proposed the insertion of a paragraph (1) *bis*, which would read:

“This draft article is primarily concerned with the protection of human rights by means other than diplomatic protection. It does, however, also embrace the rights of States, natural persons and other entities conferred by treaties and customary rules on other subjects, such as the protection of foreign investment. The draft articles are likewise without prejudice to such rights that exist under procedures other than diplomatic protection.”

15. The CHAIRPERSON asked whether the new paragraph reflected the concerns expressed by Mr. Pellet and other members at the previous meeting.

16. Mr. PELLET, while welcoming the new paragraph, said that it seemed logically to belong with paragraph (2).

17. Mr. DUGARD (Special Rapporteur) proposed that the new paragraph should become paragraph (4) *bis*, since paragraphs (1) to (4) dealt with human rights conventions, whereas paragraph (5) was more general in scope.

18. The CHAIRPERSON said he took it that the Special Rapporteur’s proposal was acceptable to the Commission.

Paragraph (1) bis was adopted as paragraph (4) bis.

Section C, as amended, was adopted.

B. Consideration of the topic at the present session (*concluded*)
(A/CN.4/L.653 and Corr.1)

19. The CHAIRPERSON invited the Commission to consider the proposed text, of a tribute to the Special Rapporteurs, to be inserted as paragraph 18 *bis* of section B of chapter IV, to read:

“At its 2827th meeting, held on 3 August 2004, the Commission expressed its deep appreciation for the outstanding contribution the two Special Rapporteurs, Mr. Mohamed Bennouna and Mr. John Dugard, had made to the treatment of the topic through their scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on diplomatic protection.”

The tribute to the Special Rapporteurs was adopted by acclamation.

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

Chapter V. Responsibility of international organizations (*concluded*)
(A/CN.4/L.654 and Corr.1 and Add.1)

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (*concluded*) (A/CN.4/L.654/Add.1)

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

Commentary to article 4 (General rule on attribution of conduct to an international organization)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

20. Mr. PELLET said that the paragraph was not explicit enough. He therefore suggested that the third sentence should begin with the phrase “By refraining from referring to exclusive applicability ...”.

21. Mr. GAJA (Special Rapporteur) endorsed that amendment.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

22. Mr. PELLET suggested two amendments that would make the text clearer. Firstly, the words “of draft article 4” should be added at the end of the penultimate sentence, in view of the references to other articles and paragraphs. Secondly, in the last sentence, the words “paragraph 8” should read “paragraph (8) of the present commentary”, to avoid any suggestion that it was the paragraph of an article.

23. Mr. GAJA (Special Rapporteur), welcoming the proposed amendments, said that the reference to “paragraph (8)” should in fact be a reference to “paragraph (9)”.

Paragraph (13), as amended and corrected, was adopted.

Paragraph (14)

Paragraph (14) was adopted with a minor amendment to the French text.

Commentary to article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

24. Mr. PELLET said that, in the French text, the word “*écrire*” would be preferable to the word “*dire*” in the second sentence. In the final sentence, the reference should be to “the United Nations Operation in the Congo”, rather than the plural “Operations”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

25. Mr. MOMTAZ said that, in the French text, the phrase “*fournisseur de ressources*” in the first sentence should be replaced by the phrase “*fournisseur de contingents*”, which appeared in the final sentence. In the third sentence, the phrase “by members of peacekeeping forces” should be inserted after the title of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, in order to avoid ambiguity.

26. Mr. GAJA (Special Rapporteur), after endorsing the first proposed amendment, which concerned only the French text, said that the second was more arguable: it could not be inferred from the quotation from the *United Nations Juridical Yearbook* that the obligations in question were on members of peacekeeping forces rather than on States. Regrettably few details had been given. In his view, it would be preferable to leave the text unchanged in respect of the second proposed amendment until he could find an authoritative statement as to how members of peacekeeping forces were affected.

27. Mr. MOMTAZ said that, without his proposed insertion, the reader would not understand the significance of the reference to the Convention.

28. The CHAIRPERSON said that the quotation from the *United Nations Juridical Yearbook* took care of both concerns expressed, clearly stating that responsibility for enforcing the provisions of the Convention lay with the States parties, and also referring to criminal acts of the military personnel of troop-contributing States.² He suggested that the proposed insertion was therefore unnecessary.

Paragraph (6) was adopted with a minor amendment to the French text.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Commentary to article 6 (Excess of authority or contravention of instructions)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

29. Mr. PELLET said that, as it stood, the last sentence was difficult to understand, even with the help of the preceding explanation. Not only would an additional explanation be welcome, but the text would be clearer if the final part of the sentence were rewritten to read “... the ‘on-duty’ conduct may be so attributed, even if it is *ultra vires*, provided that it relates to the functions entrusted to the person concerned”.

30. Mr. GAJA (Special Rapporteur) said that while the proposed amendment made for a clearer text, it read more

² See United Nations, *Juridical Yearbook 1994* (Sales No. E.00.V.8), p. 450.

into the quotation from the *United Nations Juridical Yearbook* than was explicitly stated therein. The value of the quotation was that although it did not deal with *ultra vires* conduct, it made a rare distinction between on-duty and off-duty acts, suggesting that the former could be attributable to an international organization in certain circumstances. The last sentence of the paragraph was intended as a comment on the passage quoted. If the proposed amendment were adopted, that nuance would be lost.

31. Mr. PELLET said that, once the sibylline utterances in the commentaries had been deciphered, he could see little difference between the Special Rapporteur’s position and his own. The problem might be solved if the last sentence were recast as two sentences, the first ending after the words “so attributed”.

32. After further contributions to the discussion by Mr. ECONOMIDES, Mr. PELLET and the CHAIRPERSON, Mr. GAJA (Special Rapporteur) suggested that a second sentence, beginning after the words “so attributed.”, could be formulated so as to read: “Consideration would then need to be given to the question of how any *ultra vires* conduct relates to the functions entrusted to the person concerned”.

Paragraph (9), as amended, was adopted.

Commentary to article 7 (Conduct acknowledged and adopted by an international organization as its own)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

33. Mr. GALICKI said that the last sentence of the paragraph appeared to contradict the beginning of draft article 7. He had a suspicion that the word “not” was redundant.

34. Mr. GAJA (Special Rapporteur) agreed that double negatives were inelegant. He had merely echoed the commentary to article 11 of the draft articles on responsibility of States for internationally wrongful acts.³ When an international organization acknowledged or adopted conduct as its own, that conduct might or might not be attributable under other articles. Acknowledgment and adoption were the decisive elements and constituted independent criteria for attribution. He therefore proposed amending the last sentence to read: “In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.”

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

³ See 2792nd meeting, footnote 5.

35. Mr. ECONOMIDES suggested the addition of the phrase “at least with regard to the fields within their competence” at the end of the first sentence, since it went without saying that an international organization could acknowledge a wrongful act as its own only if it concerned a matter within its competence.

36. Mr. GAJA (Special Rapporteur) said that it might be better to amend the second sentence to read: “The question may arise of the competence of the international organization for making that acknowledgement and adoption, and of which organ or agent would be competent to do so.”

Paragraph (5), as amended, was adopted.

Section C, as amended, was adopted.

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

Chapter VI. Shared natural resources (A/CN.4/L.655 and Corr.1)

A. Introduction (A/CN.4/L.655)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.655 and Corr.1)

Paragraphs 5 to 8

Paragraphs 5 to 8 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SECOND REPORT

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

Paragraph 10 was adopted with a minor drafting amendment.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Paragraph 13

Paragraph 13, as amended by document A/CN.4/L.655/Corr.1, was adopted.

Paragraph 14

Paragraph 14 was adopted with a minor editorial amendment.

Paragraphs 15 to 17

Paragraphs 15 to 17 were adopted.

Paragraph 18

37. Mr. OPERTTI BADAN drew attention to the fact that, in the Spanish version of the document, the Guarani aquifer should always be spelled with initial capital letters.

38. Mr. PELLET said that the paragraph should make it clear to the ordinary reader that the Guarani aquifer System was common to Argentina, Brazil, Paraguay and Uruguay, perhaps by listing the four countries in parentheses.

39. Mr. ECONOMIDES asked whether the reference to “the two aquifer systems” in the last sentence should simply be a reference to “the two aquifers”.

40. Mr. MANSFIELD said that, in the first sentence, the word “should” should be inserted between “Commission” and “deal”; in the second sentence, the word “exemplified” should be changed to “explained”.

41. Mr. OPERTTI BADAN, referring to the question raised by Mr. Economides, said that the Guarani aquifer was not a system. The penultimate and last sentences should be amended accordingly.

42. Mr. GAJA said that, with reference to Mr. Pellet’s proposal regarding the Guarani aquifer, it would be wise to avoid the term “common to”. A more neutral term would be preferable.

43. Mr. OPERTTI BADAN suggested that it would suffice to insert the names of the four countries concerned in parentheses, after the words “Guarani aquifer”, as already suggested by Mr. Pellet.

Paragraph 18, as amended, was adopted.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Paragraph 21

Paragraph 21 was adopted with two minor drafting amendments proposed by the Special Rapporteur.

Paragraph 22

Paragraph 22 was adopted.

The meeting rose at 6.05 p.m.

2828th MEETING

Wednesday, 4 August 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.
