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Summary record of the 2863rd meeting

Topic:
<multiple topics>

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The commentary to article 13 was adopted.

Commentary to article 14 (Coercion of a State or another international organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to article 14 was adopted.

Commentary to article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations)

Paragraph (1)

50. Mr. MATHESON said that the language in the last part of the first sentence was not entirely clear with respect to the relationship between the two elements described in the sentence. It could be clarified by replacing the words “thereby circumventing” with “and that would circumvent”.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

51. Mr. PELLET wondered whether, as paragraph (6) was very abstract, it could not be illustrated with a reference to the *Matthews v. United Kingdom* case, in which, as he interpreted it, the Court had found against the United Kingdom, not for implementing the Act concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, but for doing so in a way which did not necessarily result from the position of the European Community. The inclusion of such an example would enrich the commentary.

52. Mr. GAJA (Special Rapporteur) said he was not persuaded by the proposal to refer to the *Matthews* case. Although the United Kingdom had in fact implemented an act in a particular way, that act had been an international agreement, not an act of the European Community. It was an act which had modified the treaty by opening up the possibility of elections by universal suffrage. A better example might be the *Cantoni v. France* case, although there had been no breach, and from that point of view the *Matthews* case would have been more convincing. He would review the various cases to see whether he could find a better example in time for the following day's meeting.

53. The CHAIRPERSON suggested that, in view of the Special Rapporteur's remarks, further discussion of paragraph (6) should be postponed until the next plenary meeting.

It was so agreed.

The meeting rose at 5.55 p.m.

2863rd MEETING

Wednesday, 3 August 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Shared natural resources (concluded) (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Corr.1 and Add.1, A/CN.4/555 and Add.1)

[Agenda item 4]

REPORT OF THE WORKING GROUP

1. The CHAIRPERSON invited the Chairperson of the Working Group on Shared natural resources to introduce the report of the Working Group.
2. Mr. CANDIOTI (Chairperson of the Working Group on Shared natural resources), introducing the report of the Working Group (A/CN.4/L.681 and Corr.1), said that during the 11 meetings which the Working Group held from 19 May to 28 July 2005 the Working Group considered the draft articles submitted by the Special Rapporteur in the annex to his third report (A/CN.4/551 and Corr.1 and Add.1) with a view to the possible submission of a revised text that would take into account the debate on the topic in the Commission. The Working Group had had the benefit of the advice and briefings of experts on groundwaters from UNESCO and the International Association of Hydrogeologists, and had had a briefing by the Franco-Swiss Genevese Aquifer Authority on 12 July 2005. All that had facilitated the work of the Working Group.
3. Eight draft articles, which the Working Group had reviewed in the course of its work, were contained in the annex to the report.
4. With regard to form, the Working Group had essentially agreed with the approach proposed by the Special Rapporteur that the focus should be on the substance without prejudice as to the final form. Thus reference was made to “draft articles” wherever “Convention” appeared in the text presented by the Special Rapporteur. The question of the final form was, of course, an important matter, and some members had expressed a wish for the Working Group to address it at some particular point. It was to be hoped that such an opportunity would be afforded if the Commission decided to reconvene the Working Group in 2006. The Working Group had not completed its work, and proposed, in paragraph 6 of its report, that the Commission consider reconvening it during the first part of its fifty-eighth session. The Working Group was mindful

of the busy work schedule that was anticipated for the next year, but it nevertheless hoped that the Commission would be able to complete its first reading of the draft articles in 2006.

5. Consistent with the Commission's practice, the Working Group had not dealt with final clauses. It had also employed footnotes or square brackets as appropriate to denote points that might require resolution, further consideration or clarification at a later stage or elaboration in the commentary. The article numbers appearing in square brackets corresponded to those in the Special Rapporteur's third report. The Working Group had also agreed to organize the draft articles in such a way that the general principles applicable would appear in the earlier chapters. Accordingly, the articles that had appeared as draft articles 3 and 4 in the Special Rapporteur's third report, concerning bilateral and regional arrangements and the relationship between the draft articles and other conventions and international agreements, respectively, would be addressed, together with their placement, at a later stage.

6. The Working Group had also considered whether it would be necessary to structure the draft articles by setting out obligations that applied to all States generally, obligations of aquifer States and obligations of aquifer States *vis-à-vis* third States. Recently it had been focusing on the obligations of aquifer States and would revert to related issues at a later stage.

7. Turning to the substance of the draft text, he said that draft articles 1 and 2 were essentially the same as those proposed by the Special Rapporteur. The additional reference to "underground" to describe a geological formation in the definition of the term "aquifer" was meant to underscore the fact that aquifers were found on the subsurface. A number of footnotes or square brackets reflected issues that might require further consideration by the Commission or elaboration in the commentary, including points which the Working Group thought could best be dealt with in the commentary rather than in the texts of draft articles.

8. During the Commission's debates some members had made comments about the principles of territorial sovereignty and permanent sovereignty over natural resources. Draft article 3, on sovereignty of aquifer States, sought to reflect a convergence of views on the way the issue should be addressed in the context of the draft articles. It simply reflected the proposition that an aquifer State had sovereignty over the portion of a transboundary aquifer or aquifer system located within its territorial jurisdiction. It was clearly understood that sovereignty was not absolute. As noted in the footnote, the second sentence would have to be reviewed after consideration of the draft articles as a whole.

9. Draft article 4, on equitable and reasonable utilization, took a different approach from that taken by the Special Rapporteur. It did not provide different standards for determining reasonable utilization between a recharging and a non-recharging aquifer. The distinction between the two types of aquifer was maintained, but the same minimum standard of reasonable utilization applied to both. The aim was thus to maximize the long-term benefits derived from the use of the water contained in the

aquifer or aquifer system, and to that end the States concerned should establish an overall plan for utilization, taking into account present and future needs and alternative water resources. In addition, there was a need in the case of recharging aquifers to maintain the continued effective functioning of the aquifer or aquifer system, in which case utilization levels should not be such as to prevent such functioning. That did not imply that the level of utilization must necessarily be limited to the level of recharge. That point would be explained in the commentary, as would such other notions as "long-term benefits" and "agreed lifespan of the aquifer or aquifer system", which were contained in an earlier draft by the Special Rapporteur.

10. In both paragraphs of draft article 4, the phrase "in their respective territories" had been deleted to take into account the peculiarities of transboundary aquifers. Paragraph 3 had also been deleted, as it had been felt that the question of cooperation could be dealt with elsewhere.

11. The factors to be taken into account in determining equitable and reasonable utilization were contained in draft article 5, which had largely been kept in the form proposed by the Special Rapporteur. Certain points such as the replacement of "natural conditions" with "natural characteristics" in paragraph 1 (a) and the elements relating to viability and costs in paragraph 1 (h), would be elaborated in greater detail in the commentary. Moreover, the Working Group had considered it necessary to include the place of the aquifer or aquifer system in the related ecosystem as a relevant factor for reasonable utilization, which could be a germane consideration in arid regions. However, that subparagraph remained in brackets, in view of the different meanings attached to the term "ecosystem" within the scientific community, and the Special Rapporteur would seek further clarification on that point, taking also into account draft article 12, on protection and preservation of ecosystems. Some members had felt that that factor would be a useful corollary to the obligation set out in that draft article.

12. The Working Group had also discussed the special consideration to be given to drinking water and other vital human needs. That was why a reference to vital human needs, which had initially been reflected in draft article 11, on the relationship between different kinds of utilization, in the Special Rapporteur's third report, had been added to the end of paragraph 2 of draft article 5.

13. Draft article 6, which dealt with the obligation not to cause harm to other aquifer States, addressed the question of harm arising from utilization or from activities other than utilization and the question of the elimination and mitigation of significant harm despite the exercise of due diligence. The Working Group had agreed to consider addressing in a separate article compensation in circumstances where harm resulted despite efforts to eliminate or mitigate it. It was clearly understood that the concept of significant harm was a relative one, and that the matter would be adequately dealt with in the commentary.

14. There was no major change of substance in draft article 7, on the obligation to cooperate. While the Working Group had agreed to proceed on the basis of existing precedents, including the 1997 Watercourses Convention,

questions had been raised as to whether the principles of sovereign equality and territorial integrity could be better reflected elsewhere than in a provision on cooperation. That matter might be reconsidered at a later stage. The principle of sustainable development had been included as a general principle that ought to be taken into account as well. It must be distinguished from the principle of sustainable utilization in the context of draft article 4. The Working Group had decided to speak of “equitable and reasonable” utilization rather than simply “reasonable” utilization, as had been done in the original text.

15. Paragraph 2 of draft article 7 had been simply streamlined, and some of the elements contained in the Special Rapporteur’s draft would be reflected in the commentary.

16. The changes made to draft article 8 were of a drafting nature. It was understood that some of the scientific terms would be clarified in the commentary.

17. He concluded by thanking all members of the Working Group and the Special Rapporteur and said he hoped that the Working Group would complete its work in 2006. He recommended that the Commission take note of the report of the Working Group and said that the Commission would take up the question of reconvening the Working Group at its fifty-eighth session.

18. The CHAIRPERSON thanked the members of the Working Group on Shared natural resources and suggested that the Commission should take note of the report of the Working Group and add to chapter IV of the draft report of the Commission (A/CN.4/L.667) a new paragraph 3 *bis* that would read:

At its 2863rd meeting, held on 3 August 2005, the Commission took note of the report of the Working Group. It welcomed the significant progress made by the Working Group, which had considered and amended eight draft articles. It took note of the proposal by the Working Group to reconvene the Group at its session in 2006 so that it could complete its work.

New paragraph 3 bis was adopted.

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

CHAPTER VI. Responsibility of international organizations (concluded) (A/CN.4/L.669 and Add.1)

19. The CHAIRPERSON invited the members of the Commission to resume consideration of chapter VI, section C, of the draft report of the Commission, on responsibility of international organizations.

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission

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

Commentary to draft article 15 (Decisions, recommendations and authorizations addressed to member States and international organizations)

New paragraph (5 *bis*)

20. Mr. GAJA (Special Rapporteur) proposed that a new paragraph (5 *bis*) should be inserted before paragraph 6; the new paragraph would read:

A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgement on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, the European Court of Human Rights considered conduct that member States of the European Community take when implementing binding EC acts and observed:

“... a State would be fully responsible under the Convention [for the Protection of Human Rights and Fundamental Freedoms] for all acts falling outside its strict international legal obligations ... numerous Convention cases ... confirm this. Each case (in particular, the *Cantoni* judgement, p. 1626 at paragraph 26) concerned a review by this Court of the exercise of State discretion for which EC law provided”.

21. A footnote would refer to the paragraph from which the quotation was taken.

22. The CHAIRPERSON thanked the Special Rapporteur and suggested that the Commission adopt new paragraph (5 *bis*) of the commentary to draft article 15.

New paragraph (5 bis) was adopted.

Paragraph (6)

23. Mr. PELLET said that the correct expression in French was “*décision obligatoire*” and not “*décision contraignante*”.

Paragraph 6 was adopted with a drafting change in the French version.

Paragraphs (7) to (12)

Paragraphs (7) to (12) were adopted.

The commentary to draft article 15 was adopted.

Commentary to draft article 16 (Effect of this chapter)

The commentary to draft 16 was adopted.

Commentary to draft article 8 (Existence of a breach of an international obligation) (continued)

Paragraph (10) (concluded)

24. The CHAIRPERSON invited members to resume consideration of paragraph (10) of the commentary to draft article 8.

25. Mr. GAJA (Special Rapporteur) said that the proposal made by Mr. Kolodkin and Mr. Pellet at the previous meeting to include the text of paragraph (10) in the commentary to draft article 16 risked creating confusion. Draft article 16 had a specific purpose, since it concerned a specific chapter, whereas paragraph (10) contained a general statement. He preferred the other proposal, which was to introduce a final clause in the draft articles that would clarify matters.

It was so decided.

26. Mr. PELLET welcomed the proposal by the Special Rapporteur but said that he reserved his position with regard to the substance of the matter; under the circumstances, he questioned whether draft article 16, to which he continued to object, was really useful.

Section C, as amended, was adopted.

Chapter VI, as amended, was adopted.

CHAPTER VII. Diplomatic protection (A/CN.4/L.670)

27. The CHAIRPERSON invited the members of the Commission to begin consideration of chapter VII of the draft report of the Commission on diplomatic protection.

A. Introduction

Paragraphs 1 to 17

Paragraphs 1 to 17 were adopted.

Paragraph 18

28. Mr. GAJA proposed that the second sentence should state, even if it was already implicit, that the commentary had been adopted at the same time as the draft articles; that could be done by adding the words “and the commentaries thereto” after the word “articles” in the first sentence.

Paragraph 18, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraphs 19 to 22

Paragraphs 19 to 22 were adopted.

Paragraph 23

29. Mr. GAJA proposed that the order of the last two sentences of the paragraph should be reversed for the sake of logic, as the cases mentioned in the last sentence in fact illustrated what was said in what was currently the antepenultimate sentence.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 34

Paragraphs 24 to 34 were adopted.

Paragraph 35

30. Mr. PELLET said that the last clause of the last sentence was unacceptable, since the progressive development of law was as much a statutory function of the Commission as was codification. He wished to know the Special Rapporteur’s views on the matter.

31. Mr. DUGARD (Special Rapporteur) endorsed the view expressed by Mr. Pellet and proposed that the clause in question should be deleted.

32. Mr. BROWNLIE said that the deletion notwithstanding, the sentence still seemed somewhat out of context. He therefore proposed that it should be deleted entirely.

33. Mr. PELLET objected to such a deletion, since the sentence explained why the Commission had decided to retain the *Mavrommatis* principle. Accordingly, he proposed that the latter portion of the sentence, beginning with the words “and the Commission had sought” should be replaced with the words “and for this reason it has been retained”.

Paragraph 35, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VII, as amended, was adopted.

CHAPTER VIII. Expulsion of aliens (A/CN.4/L.674)

34. The CHAIRPERSON invited the Commission to begin its consideration of chapter VIII of the report, on expulsion of aliens.

A. Introduction

Paragraphs 1 to 2

Paragraphs 1 to 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 4

35. Mr. GAJA proposed that the words “applicable to international law” in the penultimate sentence should be deleted.

It was so decided.

36. Mr. PAMBOU-TCHIVOUNDA said that he did not like the word “genuine” in the third sentence, which seemed to imply that there were questions of international law that were “not genuine”. He proposed that the phrase in question should be amended to read “important questions of international law”.

Paragraph 4, as amended, was adopted.

Paragraphs 5 to 10

Paragraphs 5 to 10 were adopted.

Paragraph 11

37. Mr. KOSKENNIEMI said that it was his view that was reflected in paragraph 11, and his comments had been somewhat distorted. He therefore proposed that, in order for the view he had expressed to be stated correctly, the word "typical" should be deleted from the second sentence, the words "the social process" in the same sentence should be replaced with the words "typical cases" and, in the final sentence, the word "significance" should be replaced with the words "intended direction".

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 18

Paragraphs 12 to 18 were adopted.

Paragraph 19

38. Mr. RODRÍGUEZ CEDEÑO proposed that the words "political asylum-seekers" in the second sentence should be replaced with the words "political refugees" and that the words "asylum-seekers and" should be inserted following the comma immediately after the first set of parentheses. He also believed that the Caracas Convention, mentioned in the paragraph, was in fact the Inter-American Convention of 1954.

39. The CHAIRPERSON said that the title would be checked.

40. Mr. PAMBOU-TCHIVOUNDA said that he did not like the word "viability" in the last sentence.

41. Mr. PELLET said that the whole last sentence was absurd because it stated something that was self-evident: it was obviously impossible to define the term "alien" without raising questions of nationality. He therefore proposed that the sentence should be deleted.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Paragraph 22

42. Mr. Sreenivasa RAO said that the word "could" in the fifth sentence should be amended to "would".

It was so decided.

43. Mr. RODRÍGUEZ CEDEÑO said that the portion of the paragraph from the fourth sentence on should be placed under heading (c), which dealt specifically with the right to expel.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

44. Mr. GAJA said that the suggestion mentioned in the first sentence of paragraph 24 was his, and it had been somewhat distorted. He proposed that the beginning of

that sentence should be reworded to read: "It was further suggested that the study should consider a set of issues".

Paragraph 24, as amended, was adopted.

Paragraph 25

45. Mr. RODRÍGUEZ CEDEÑO said that it had been stressed throughout the debate that expulsion procedures should be official or formal so that the persons concerned would have a remedy available. Accordingly, he proposed that a new sentence should be inserted after the first sentence of paragraph 25 that would read: "It was noted that the act of expulsion must be formal in order for the person concerned to be afforded an opportunity to appeal."

46. Mr. MATHESON said that that was just an opinion. He therefore proposed rewording Mr. Rodríguez Cedeño's proposed new sentence to read: "It was suggested that the act of expulsion ...".

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

Paragraph 27

47. Mr. PAMBOU-TCHIVOUNDA proposed that the words "faisaient l'objet" in the second sentence of the French text should be replaced with the word "relevaient".

Paragraph 27 was adopted with a minor drafting change to the French version.

Paragraph 28

48. Ms. ESCARAMEIA noted that the Special Rapporteur had said that the Commission ought to prepare draft articles on the topic. She therefore proposed that the word "covering" in the second sentence should be replaced with "drafting articles on".

Paragraph 28, as amended, was adopted.

Paragraph 29

Paragraph 29 was adopted.

Paragraph 30

49. Mr. PELLET proposed that the words "arising from" in the final sentence should be replaced with the words "pertaining to".

Paragraph 30, as amended, was adopted.

Paragraph 31

50. Mr. PELLET said he was appalled at the idea that the Commission would not consider questions of refusal of admission, movements of population or situations of decolonization or self-determination, nor the position of the occupied territories in the Middle East. He felt that the very point of the topic had been done away with, and he wished to know just what the Commission was

going to talk about if it was not going to consider any of those questions.

51. The CHAIRPERSON pointed out that the text reflected the conclusions of the Special Rapporteur and that they could not be amended in his absence.

Paragraph 31 was adopted.

Paragraph 32

52. Mr. GAJA said that he was not sure what the second sentence meant; it was unfortunate that the Special Rapporteur was not present to clarify it. He proposed that the words “both the case” should be replaced with the words “all cases” and that the remainder of the sentence should be deleted.

53. Mr. BROWNLIE proposed replacing the words “of a legal nature” with “with legal consequences”.

54. Mr. PELLET said he thought Mr. Brownlie’s proposal distorted the Special Rapporteur’s meaning, since an expulsion could take place without a formal act and still have legal consequences. The French text was in fact correct, although the word “formal” might be added to modify “unilateral act” for the sake of clarity.

55. Mr. BROWNLIE proposed that the word “legal” should be deleted from the expression “unilateral legal act” in the second sentence, since the word had been incorrectly used twice in that sentence.

56. Mr. MATHESON said he did not think that a distinction was being drawn between acts that had legal consequences and those that did not, but between formal and informal acts. He therefore proposed either ending the first sentence after the phrase “the taking of a formal act”, or adding “and also include informal acts” after that phrase.

57. Mr. GAJA proposed replacing the words “both the case” with “this case”; the words “and also informal acts” could be added, and the rest of the sentence would be deleted.

58. Mr. MANSFIELD said that he could accept either Mr. Matheson’s first proposal or the insertion of the words “formal and informal cases of expulsion” after the word “both” in the second sentence, with the remainder of the sentence deleted.

59. Mr. PELLET proposed that the words “unilateral legal act” should be amended to read “formal unilateral acts” and the words “of an act” to read “of a conduct”, since the fundamental idea was to contrast a formal unilateral act with conduct.

60. Mr. CANDIOTI concurred with Mr. Pellet and endorsed Mr. Matheson’s proposal to end the sentence after the words “formal act” and to amend the words “not to require” to read “not necessarily to require”.

61. Mr. PAMBOU-TCHIVOUNDA asked whether the amendments being proposed for adoption also concerned the French text, which did not appear to pose any

problem; if they did, he wished to have the words “in all cases” added after the word “necessarily”, since that word did not seem sufficiently explicit in the light of the original version.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Section B, as amended, was adopted.

Chapter VIII as a whole, as amended, was adopted.

CHAPTER V. Effects of armed conflicts on treaties (continued) (A/CN.4/L.668)

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

62. The CHAIRPERSON invited the Commission to return to paragraph 78 of chapter V of the draft report (A/CN.4/L.668), on effects of armed conflicts on treaties, and said that Mr. Brownlie had proposed a new sentence to replace the last sentence of the paragraph, to read: “It could not be presumed that the States concerned could rely on such a proviso unless the legal conditions existed necessitating suspension or termination.”

Paragraph 78, as amended, was adopted.

CHAPTER IX. Unilateral acts of states (A/CN.4/L.672 and Add.1–2)

63. The CHAIRPERSON invited the members of the Commission to consider chapter IX of the draft report of the Commission on unilateral acts of States (A/CN.4/L.672 and Add.1 and 2).

A. Introduction (A/CN.4/L.672)

Paragraphs 1 to 19

Paragraphs 1 to 19 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.672/Add.1)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

64. Ms. ESCARAMEIA said that she did not understand what was meant in the second and third sentences, in particular the phrase “ramifications of certain acts”.

65. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed the deletion of the second sentence.

66. Mr. PELLET endorsed that proposal and added that he did not understand what was meant by the first sentence, either.

67. Mr. ECONOMIDES found the beginning of the first sentence awkward, particularly the words “lead to

international treaties”, and proposed deleting the entire sentence.

68. The CHAIRPERSON suggested that paragraph 7 as a whole should be deleted.

Paragraph 7 was deleted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

69. Ms. ESCARAMEIA proposed that the words “if necessary” should be deleted.

Paragraph 10, as amended, was adopted.

Paragraph 11

70. Ms. ESCARAMEIA proposed that the words “for some members” should be added before the words “the diversity of effects” in the first sentence in order to reflect that there had been a variety of opinions expressed; she further proposed inserting, at the end of that sentence, a new sentence that would read: “Some others, however, thought that it was possible to establish such a regime.” Turning to the antepenultimate sentence, she said that the reason some members had found article 7 of the 1969 Vienna Convention too restrictive was not just because they thought that legislative and judicial acts should be included, but because the circle of persons mentioned in that article might be too restrictive. She therefore proposed that the words “cases of declarations of other members of the executive, as well as” should be inserted after the word “studying”.

71. Mr. PELLET drew attention to numerous problems in the French version and proposed a number of amendments: in the fourth sentence, the words “*afin de procéder à*” should be replaced by “*d*”; in the fifth sentence, the word “*champ*” should be replaced by the word “*cercle*”; and in the sixth sentence, the words “*d’actes unilatéraux ... du comportement*” should be replaced by “*entre actes unilatéraux ... d’une part et des comportements d’autre part*” and the words “*relevant de*” by the words “*relatives à*”.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

72. Mr. PELLET drew attention to the French text and proposed that the words “*étude comparative des*” should be replaced by the words “*comparaison avec les*”.

Paragraph 14 was adopted with a minor drafting change to the French version.

Paragraph 15

73. Mr. PELLET said that it would be safer and more accurate to amend the phrase “unanimously accepted” to read “accepted by consensus”. He also proposed replacing the word “then” in the final sentence with the word “also”.

Paragraph 15, as amended, was adopted.

Paragraphs 16 and 17

Paragraphs 16 and 17 were adopted.

Paragraph 18

74. Mr. GAJA proposed that the word “exploratory” in the fourth sentence should be amended to read “expository”.

75. Mr. PELLET pointed out that the word “*expositif*” did not exist in French and would have to be replaced.

76. Mr. ECONOMIDES proposed that the words “*une étude expositive*” in the French text should be amended to read “*un exposé*”.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

77. Mr. Sreenivasa RAO said that he did not understand the last sentence of the paragraph.

78. Mr. PELLET agreed that the sentence did not make sense and said that the preceding sentence was not much better. In addition, it would be better in the French text to speak of “*licéité*” rather than “*légalité*”, and he proposed that the final sentence should be deleted.

Paragraph 20, as amended, was adopted.

Paragraph 21

Paragraph 21 was adopted.

Paragraph 22

79. Mr. PELLET proposed that the words “according to some members” should be inserted before the words “in any event”.

Paragraph 22, as amended, was adopted.

Paragraph 23

80. Mr. PELLET proposed that the first part of the first sentence should be amended to read: “It was also pointed out that, besides States’ intentions and the conditions, the authority, the capacity or competence of the author and the deciding factors ...”. He also requested that the word “*expectation*” in the last sentence of the French version should be replaced with the word “*expectative*”.

81. Mr. GAJA proposed that the beginning of the last sentence should be reworded to read: “If such acts were

not accepted by other States and did not raise any legitimate expectations for those States ...”.

82. Mr. Sreenivasa RAO said that he could accept the correction proposed by Mr. Pellet, although the English text did not seem to pose any problem. With regard to the second sentence, he proposed that the latter portion should be reworded to read “or treated as a basis for valid legal engagements by other States”.

83. The CHAIRPERSON suggested that the Commission should adopt paragraph 23 as amended by Mr. Sreenivasa Rao.

Paragraph 23, as amended, was adopted.

Paragraph 24

84. Mr. BROWNLIE said that he did not understand what the first sentence meant. He found it impossible to believe that a legal act could have no antecedent in either customary or treaty law.

85. Mr. PELLET said that the meaning was not much clearer in the French version. He proposed the following wording for the first sentence: “Several members remarked that the only unilateral acts *par excellence* that ought to be considered were autonomous acts, namely acts that had no specific antecedent in customary or treaty law.” In his view, the problem that arose in the English text had to do with the use of the term “antecedent”, which should perhaps be replaced by “basis” or “habilitation”.

86. Mr. BROWNLIE said that he still did not understand what was meant by an autonomous act.

87. Mr. PELLET said that Mr. Brownlie was complaining about the substance of the problem. However, many members had supported that position, and it must therefore be mentioned in the report.

88. Ms. ESCARAMEIA said that the term “basis” might give the impression that such acts had no legal justification. She proposed the following wording: “or acts that were not already governed by treaties or a specific rule of treaty law”.

89. Mr. CANDIOTI proposed replacing the words “several members” with “some members”. He also wanted the report to contain a few words about the position of those who, like himself, thought that, in legal terms, there was no such thing as an autonomous act.

90. Mr. ECONOMIDES recalled that he had been among the “several” or “some” members who had defended that argument and that he had linked the question of the autonomy of acts with that of sources of law. He proposed that the second part of the first sentence should be reworded to read: “valid as a source of international law and not those that derived from customary or treaty law”.

91. Mr. PELLET said that Mr. Brownlie’s criticism was directed at the substance rather than at the form. However, the position was one that had been supported by several members, and it must therefore be reflected in the report.

He could accept the wording proposed by Mr. Economides, even though he did not entirely agree with him. He nevertheless proposed that the phrase in question should read “... those deriving from a treaty authorization”. He added that, in proposing the wording “that had no specific antecedent”, he had intentionally sought to refer back to the very rules that Ms. Escarameia had mentioned.

92. Mr. BROWNLIE said that he preferred Mr. Economides’ wording, even though he still found that view outrageous.

93. Mr. CHEE said that if experts could not understand the paragraph, it was hard to imagine how mere mortals would be able to do so. To him the paragraph was incomprehensible, and he still did not understand what was meant by “auto-normativity” and “hetero-normativity”.

94. Mr. Sreenivasa RAO said that he had no objection to the wording proposed by Mr. Economides and suggested that a few words should be added at the end of the paragraph to reflect Mr. Brownlie’s position.

95. The CHAIRPERSON suggested that the Commission should adopt the paragraph as amended by Mr. Pellet, Mr. Candiotti and Mr. Economides.

Paragraph 24, as amended, was adopted.

The meeting rose at 1 p.m.

2864th MEETING

Wednesday, 3 August 2005, at 3.05 p.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Yamada.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law (concluded)* (A/CN.4/L.676 and Corr.1, and A/CN.4/549, sect. E)

[Agenda item 9]

1. Mr. CHEE said he had taken the floor to endorse the conclusions reached by Mr. Koskeniemi and Professor Päivi Leino in an article which had appeared in the *Leiden Journal of International Law* in 2002 under the title “Fragmentation of international law? Postmodern anxieties”¹,

* Resumed from the discussions at the 2860th meeting.

¹ Vol. 15, No. 3 (2002), pp. 553–579.