

Document:-  
**A/CN.4/2864**

**Summary record of the 2864th meeting**

Topic:  
**Fragmentation of international law: difficulties arising from the diversification and expansion of international law**

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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”<sup>1</sup>,

\* Resumed from the discussions at the 2860th meeting.

<sup>1</sup> Vol. 15, No. 3 (2002), pp. 553–579.

in which the authors discussed the effects of the proliferation of international courts. In the article they noted that two judges of the ICJ, Judge Schwebel and Judge Guillaume, had expressed their concern that such a development might affect the unity of international law, by leading to conflicts between the Court's judgments and those of other international tribunals, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court and WTO panels.

2. However, institutional fragmentation need not affect the continuity and unity of international law. In *The Development of International Law by the International Court*, Judge Hersch Lauterpacht had pointed out that the ICJ, by its nature as a court of law, would continue to play its role through the practice of referrals to the Court, notwithstanding the provisions of article 59 of its Statute, and that, pursuant to article 38, paragraph 1 (d), of the Statute, the Court was also to apply judicial decisions as subsidiary means for the determination of rules of law.<sup>2</sup> The weight of past decisions of international courts and awards of international arbitral tribunals would constitute a bulwark of international jurisprudence in the future.

3. Mr. ECONOMIDES, speaking on a point of clarification, said he had several times been criticized for distinguishing between "good" and "bad" fragmentation. All rules of international law, whether customary, conventional or institutional, other than rules of *jus cogens*, to which *lex specialis* did not apply, could be fragmented. Such fragmentation could, in his view, be positive in cases where it strengthened an international rule, or negative, in cases where it weakened that rule.

4. Mr. KOSKENNIEMI (Chairperson of the Study Group) said that it was perhaps unnecessary to draw conclusions at the present juncture. The Bureau had thought it useful to set aside the present meeting for discussion of the topic of fragmentation, as the last opportunity at the present session for members to provide input to the study to be produced by the Study Group. As the study would be rather substantial and lengthy, and as it would not be possible for the Commission to discuss it in its entirety at the next session, he had wanted to give members a chance to address some of its aspects at the current session.

5. Members appeared broadly to have endorsed the work of the Study Group and the direction it had taken. The five studies referred to in his briefing note had not been the subject of any detailed debate; indeed, it had not been his intention to hold such a debate at the present stage.

6. As Chairperson of the Study Group, he was pleased that it would be possible to continue the preparation of the substantive study and the conclusions in the period between the two sessions, on the basis of work done to date. The necessary documents would be available at the beginning of the fifty-eighth session for perusal and comment by members, so that conclusions could be adopted as early as possible.

7. There being no need for any detailed reflection on what had after all been a rather short debate, he proposed

that the meeting should be suspended to enable the Study Group to convene and spend the remainder of the meeting dealing with other matters on its agenda.

8. The CHAIRPERSON said he took it that Mr. Koskenniemi's proposal was acceptable to the Commission.

*It was so agreed.*

*The meeting rose at 3.20 p.m.*

## 2865th MEETING

*Thursday, 4 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.

### **Draft report of the International Law Commission on the work of its fifty-seventh session (continued)\***

CHAPTER IX. *Unilateral acts of states (concluded)\** (A/CN.4/L.672 and Add.1-2)

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

1. The CHAIRPERSON invited the members of the Commission to resume consideration of chapter IX of the draft report of the Commission, on unilateral acts of States.

Paragraph 25

2. Mr. PELLET proposed adding to the word "identify" in the second sentence the phrase "the legal regime applicable to" and, in the last line, amending the word "freedoms" to read "freedom of action".

*Paragraph 25, as amended, was adopted.*

Paragraph 26

3. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) drew attention to the first sentence and proposed that the word "political" should be deleted and that the word "legal" should be inserted before the word "obligations".

4. Mr. PAMBOU-TCHIVOUNDA proposed that the words "enter into obligations" in the first sentence should be replaced with "undertake commitments", which would make the word "legal" unnecessary, and that the words "and their legal regime" should be added at the end of the last sentence.

<sup>2</sup> London, Stevens and Sons, 1958.

\* Resumed from the discussions at the 2863rd meeting.