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Summary record of the 2949th meeting

Topic:
<multiple topics>

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2949th MEETING

Monday, 6 August 2007, at 3 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Later: Mr. Ian BROWNLIE

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

Mr. Vargas Carreño (Vice-Chairperson) took the Chair.

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

CHAPTER VII. *Effects of armed conflicts on treaties* (A/CN.4/L.708 and Corr.1 and Add.1)

A. Introduction (A/CN.4/L.708)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.708 and Corr.1)

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

Paragraph 5, as corrected in document A/CN.4/L.708/Corr.1, was adopted.

Paragraphs 5 bis and 5 ter

Paragraphs 5 bis and 5 ter, contained in document A/CN.4/L.708/Corr.1, were adopted, with an editorial correction to paragraph 5 bis proposed by Mr. McRae.

1. GENERAL REMARKS ON THE TOPIC

(a) Introduction by the Special Rapporteur

Paragraphs 6 to 9

1. Mr. GAJA said he wished to make a general remark on the manner in which the discussion on the topic had been presented in the draft report. A similar remark that he had made in the past had gone unheeded. Chapter VII, on the effects of armed conflicts on treaties, was very readable but represented what might be called creative

reporting. Chronological accuracy was obviously not sought in the interests of giving a clearer idea of the issues. However, that approach created certain distortions. Since the discussion was presented according to subtopics, the absence of comments on some subtopics might be taken as signifying that everyone agreed on those points. Moreover, the Special Rapporteur's responses were not always reflected, perhaps suggesting that he had had nothing to say on certain points, which was not necessarily true.

2. He suggested that at the Commission's sixtieth session the preparation of the draft report should be a bit less creative; above all, consistency amongst the various chapters should be pursued. The topic of armed conflict had been treated in a manner entirely different from the way in which other topics had been dealt with. The Secretariat should assist the Rapporteur in adopting a reasonably uniform approach.

3. In response to a question from the CHAIRPERSON, he said that he was not pressing for a revision of that chapter of the report, but simply urging the Secretariat to see that it was drafted differently in 2008.

Paragraphs 6 to 9 were adopted.

(b) Summary of the debate

Paragraph 10

4. Mr. PELLET said that the phrase "continued conception" in the second sentence seemed strange. He proposed that the word "continued" should be deleted.

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

(c) Special Rapporteur's concluding remarks

Paragraph 12

Paragraph 12 was adopted.

2. ARTICLE 1. SCOPE

(a) Introduction by the Special Rapporteur

Paragraph 13

Paragraph 13 was adopted.

(b) Summary of the debate

Paragraph 14

5. Mr. PELLET, supported by Mr. CANDIOTI, said that the second sentence was inaccurate: the word "conflicts" should be replaced by "treaties".

6. Mr. BROWNLIE (Special Rapporteur) said he did not think the sense was altered but had no objection to that proposal.

Paragraph 14, as amended, was adopted.

Paragraph 15

7. Mr. PELLET drew attention to the third sentence, which read: “It was also recalled that the Charter of the United Nations made reference to ‘regional arrangements’ ... as opposed to ‘international organizations’.” While that was certainly true from a legal standpoint, the reasoning seemed incomplete. Something should be added to clarify the point, or else the sentence should be deleted.

8. Mr. HASSOUNA said that he himself had made the point that the regional arrangements covered by Chapter VIII of the Charter were different from other organizations. He would prefer not to delete the phrase.

9. Ms. ESCARAMEIA said that she, like Mr. Pellet, had had difficulty understanding the sentence. It seemed strange to compare regional arrangements with international organizations. Moreover, she failed to see how the sentence fit in with the summary of the debate, and she agreed that something seemed to be missing in the logic. She supported the proposal to delete the sentence.

The third sentence of paragraph 15 was deleted.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted, with an editorial correction proposed by Mr. Gaja.

Paragraph 17

Paragraph 17 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 18

Paragraph 18 was adopted.

3. ARTICLE 2. USE OF TERMS

(a) Introduction by the Special Rapporteur

Paragraph 19

Paragraph 19 was adopted.

(b) Summary of the debate

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

10. Mr. CAFLISCH said that in the footnote regarding the *Tadić* case, it was cited as having been decided by an “Appeals Chamber”, but the reference should also specify the court of which that Chamber was part. The case was extremely well known and the decision had been widely disseminated.

With that editorial correction, paragraph 21 was adopted.

Paragraph 22

11. Mr. GAJA said that as the final sentence reflected comments he had made, he wished to propose that the first part of that sentence should be amended to read: “One should also consider the relationship between obligations under a treaty and other obligations ...” The remainder of the sentence, “that States ... in conflicts.”, would remain unchanged. The footnote at the end of the paragraph wrongly cited the *Kiel Canal Collision* case: he had actually referred to the S.S. “*Wimbledon*” case.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 24

Paragraph 24 was adopted.

4. ARTICLE 3. NON-AUTOMATIC TERMINATION OR SUSPENSION

(a) Introduction by the Special Rapporteur

Paragraph 25

Paragraph 25 was adopted.

(b) Summary of the debate

Paragraph 26

12. Mr. PELLET drew attention to the final sentence of the paragraph and proposed the addition of the word “solely” before the phrase “on the outbreak of armed conflict” and the word “also” before the phrase “on the likelihood of”.

Paragraph 26, as amended, was adopted.

Paragraph 27

Paragraph 27 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 28

13. Mr. PELLET said that in the final sentence, the French phrase “*en matière d’avis d’experts*” was a poor way of translating “in expert opinion”. He proposed that it should be replaced by “*sur le plan doctrinal*”.

14. Mr. BROWNLIE (Special Rapporteur) endorsed that proposal and said that in English as well, “in expert opinion” was not the “*mot juste*”. The use of the phrase “at the doctrinal level” would be a definite improvement.

Paragraph 28, as amended, was adopted.

5. ARTICLE 4. THE INDICIA OF SUSCEPTIBILITY TO TERMINATION OR SUSPENSION OF TREATIES IN CASE OF ARMED CONFLICT

(a) Introduction by the Special Rapporteur

Paragraph 29

Paragraph 29 was adopted.

(b) Summary of the debate

Paragraph 30

15. Mr. GAJA asked what was meant by the phrase “the interpretation of express provisions in a treaty” in the final sentence.

16. Mr. McRAE said that it was he who had made that point during the debate. What he had meant was that if a treaty contained no provisions on the consequences of armed conflict, there was nothing to interpret. A better way of conveying that point might be to replace the phrase “the interpretation of express provisions in a treaty” with the words “the interpretation of the provisions of a treaty”.

17. Mr. PELLET said that he had had the same problem as Mr. Gaja. One did not necessarily interpret only provisions in the light of articles 31 and 32 of the 1969 Vienna Convention: silence could also be interpreted. In the penultimate sentence, the words “*ou trop incertain*” (“or too uncertain”) should be inserted after the words “*trop compliqué*” (“too complicated”).

Paragraph 30, as amended by Mr. McRae and Mr. Pellet, was adopted.

Paragraphs 31 and 32

18. Mr. VÁZQUEZ-BERMÚDEZ proposed that a new paragraph should be inserted after paragraph 32 to reflect a view that had been expressed during the debate in plenary but was not covered in the draft report. The new paragraph would read: “It was also suggested that in addition to the intention of the parties another criterion should be included, namely the nature of the treaty, which depends on its subject matter.”

19. Mr. HMOUD recalled that there had also been a suggestion to cite the nature of armed conflict as an additional criterion. He proposed that an appropriate reference to the nature of armed conflict should be included in the new paragraph proposed by Mr. Vázquez-Bermúdez.

20. Mr. BROWNLIE (Special Rapporteur) said that the point made by Mr. Vázquez-Bermúdez was already covered in paragraph 31.

21. Mr. PELLET endorsed Mr. Brownlie’s comments. It would make more sense to make an addition to the second sentence of paragraph 31 following the colon, than to add a new paragraph, which in any case should logically follow paragraph 31 and not paragraph 32.

22. Mr. BROWNLIE (Special Rapporteur) said that paragraph 31 contained a long list of factors, including “the extent of the conflict”, which was more inclusive than the proposed new paragraph.

23. Mr. VÁZQUEZ-BERMÚDEZ said that there was no reference in paragraph 31 to the nature of the treaty, which was quite different from the object of the treaty. He would not insist on his proposal for a new paragraph; however, the point that had been made in plenary must be reflected somewhere. If the Commission decided that it should be reflected in paragraph 31, he would suggest

that the part of the second sentence which read “including: the object of the treaty” should be reformulated to read “including: the nature of the treaty, which depends on its subject matter”.

24. Mr. SABOIA endorsed the basic thrust of the proposal by Mr. Vázquez-Bermúdez and said that he would be in favour of an amendment to paragraph 31, if the Commission deemed it appropriate.

25. Ms. ESCARAMEIA said that the points made by Mr. Hmoud and Mr. Vázquez-Bermúdez could be reflected through two simple amendments to the second sentence of paragraph 31. First, the phrase “the extent of the conflict” should be expanded to read: “the nature and extent of the conflict”. Secondly, the phrase “including: the object of the treaty” should be reformulated to read: “including: the nature of the treaty, i.e. its subject matter; the object of the treaty ...”, with the remainder of the sentence unchanged.

26. Mr. VÁZQUEZ-BERMÚDEZ endorsed that proposal.

Paragraph 31, as amended by Ms. Escarameia, was adopted.

Paragraph 32 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 33

Paragraph 33 was adopted.

6. ARTICLE 5. EXPRESS PROVISIONS ON THE OPERATION OF TREATIES

ARTICLE 5 BIS. THE CONCLUSION OF TREATIES DURING ARMED CONFLICT

(a) Introduction by the Special Rapporteur

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted.

(b) Summary of the debate

Paragraph 36

Paragraph 36 was adopted.

7. ARTICLE 6 BIS. THE LAW APPLICABLE IN ARMED CONFLICT

(a) Introduction by the Special Rapporteur

Paragraph 37

Paragraph 37 was adopted.

(b) Summary of the debate

Paragraph 38

27. Ms. ESCARAMEIA expressed concern about the final clause in the first sentence, which read: “so as to clarify that human rights treaties were not to be excluded as a result of the operation of *lex specialis*”. Since it was a point that she had raised during the debate, she would prefer it to be reflected more accurately. She therefore proposed that it should be reformulate to read: “so as to

clarify that human rights treaties were not to be excluded as a result of the operation of international humanitarian law and that the categorization as *lex specialis* depended on the specific situation at issue”.

28. Mr. PELLET said that the reference to international humanitarian law would suffice, particularly since the question of *lex specialis* was already dealt with in the second sentence. It did not seem necessary to have two rather lengthy explanations of *lex specialis* in the same paragraph.

29. Mr. McRAE said that the reference to international humanitarian law was understandable, but that the second part of Ms. Escameia’s proposed text might give rise to confusion.

30. Mr. BROWNLIE (Special Rapporteur) said that the reference to *lex specialis* should be retained, since it related to the advisory opinion issued by the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.

31. Ms. ESCARAMEIA said that, in her view, the reference to *lex specialis* in the first sentence was too broad: the Court had been referring to a specific situation. Her intent, however, was merely that her view, right or wrong, should be accurately reflected in the report.

32. Mr. KOLODKIN pointed out that several members had referred to the Court’s advisory opinions in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case and in the *Legality of the Threat or Use of Nuclear Weapons* case and how they ought to be covered in draft article 6 *bis*. During the debate, he had recalled that in both advisory opinions the Court had used the term *lex specialis* with reference to humanitarian law. However, he felt that the second sentence of the paragraph reflected Ms. Escameia’s views.

33. Mr. SABOIA said that there was no clear link between the first and second sentences. The former referred to one of the advisory opinions in question, while the latter did not. In any event, he requested that the second sentence should be retained as currently worded because it reflected his own view. Perhaps another sentence could be added at the end of the paragraph to reflect Ms. Escameia’s differing view.

34. Ms. ESCARAMEIA said that she, too, had referred to the Court’s advisory opinions and might well have interpreted them differently from other members. Perhaps, as Mr. Saboia had suggested, it would be a good idea to draft another sentence indicating that some members considered that the advisory opinions in question did not necessarily lead to the conclusion that the law of armed conflict always constituted *lex specialis*.

35. The CHAIRPERSON suggested that, in order to expedite the proceedings, Ms. Escameia, Mr. Saboia, Mr. Pellet and any other members who so wished should briefly consult with a view to reaching agreement on a suitable text for paragraph 38.

It was so decided.

36. Ms. ESCARAMEIA proposed that, on the basis of informal consultations she had just held with Mr. Hmoud and Mr. Saboia, the following sentence should be added at the end of the paragraph: “Some other members were of the view that the article should be deleted because the applicability of human rights law, environmental law or international humanitarian law depended on specific circumstances, which could not be subsumed under a general article.”

37. Mr. GAJA said that he would have difficulty accepting the additional sentence proposed by Ms. Escameia. The phrase “depended on specific circumstances” suggested, doubtless unintentionally, that human rights law, environmental law and international humanitarian law generally did not apply.

38. Ms. ESCARAMEIA suggested that the word “choice” could be inserted, so that the relevant phrase would read “the choice of applicability of human rights law, environmental law or international humanitarian law ...”. That would avoid the implication that none of the bodies of law in question would apply.

39. Ms. JACOBSSON said that the word “choice” should be avoided. On the contrary, the paragraph dealt with one of the few situations in international law where States had no choice. She agreed with Mr. Gaja, however, that the wording of the proposed additional sentence should be amended.

40. Mr. HMOUD said that the intention behind the proposed additional sentence was to make it clear that there was no contradiction between the two bodies of law applicable in armed conflict.

41. Mr. PELLET said that the reference to *lex specialis* at the end of the first sentence needed some explanation; as it stood, it was ambiguous. He therefore suggested that the phrase “constituted by humanitarian law” should be inserted after the words “*lex specialis*”, in keeping with the wording of paragraph 106 of the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. By the same token, the word “humanitarian” should be inserted before the phrase “law of armed conflict” in the last sentence.

42. The CHAIRPERSON suggested that the Commission should accept the amendment proposed by Mr. Pellet and the addition of a new sentence worded as additionally proposed by Ms. Escameia.

It was so decided.

Paragraph 38, as amended, was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 39

43. Mr. GAJA said that he had some misgivings about the tone of the paragraph and in particular the second sentence, which read: “His instructions had been to take into account what the International Court of Justice had said in its advisory opinion in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, yet he

now conceded that the text should also refer to the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.” Perhaps the sentence should be redrafted.

44. Mr. BROWNLIE (Special Rapporteur) said that, in his view, the paragraph satisfactorily reflected the sequence of events relating to the preparation of draft article 6. It might now seem redundant, since the Working Group had subsequently decided to delete the draft article. However, he saw no need for any redrafting.

45. Mr. GAJA said that, in the light of those comments, he would not insist on any redrafting.

Paragraph 39 was adopted.

8. ARTICLE 7. THE OPERATION OF TREATIES ON THE BASIS OF THE NECESSARY IMPLICATION FROM THEIR OBJECT AND PURPOSE

(a) Introduction by the Special Rapporteur

Paragraph 40

Paragraph 40 was adopted.

(b) Summary of the debate

Paragraph 41

46. Mr. PELLET said that the words in brackets at the end of the penultimate sentence should be converted into a footnote.

Paragraph 41, as amended, was adopted.

Paragraph 42

Paragraph 42 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 43

Paragraph 43 was adopted.

9. ARTICLE 8. MODE OF SUSPENSION OR TERMINATION

(a) Introduction by the Special Rapporteur

Paragraph 44

Paragraph 44 was adopted.

(b) Summary of the debate

Paragraph 45

47. Mr. GAJA noted that there were no concluding remarks by the Special Rapporteur on draft articles 8 or 9. The Commission’s “creative reporting” approach would seem to demand some response to the debate from the Special Rapporteur, unless the intention was for the reader to interpret what lay behind the Special Rapporteur’s silence.

48. Ms. ESCARAMEIA said that the paragraph failed to reflect one aspect of the topic that had been discussed at length in the Commission. She therefore proposed that a sentence should be added at the end of the paragraph,

to read: “Some members also stated that the procedure foreseen in article 65 *et seq.* of the Vienna Convention on the Law of Treaties could not be applicable to situations of armed conflict, in which the procedure should be simpler.”

49. Mr. BROWNLIE (Special Rapporteur) said that he had no objection to the proposed amendment. That point of view had been expressed and should be reflected in the report.

50. Mr. CAFLISCH said that the discussion had dealt with a point that had yet to be resolved and should indeed be reflected in the report. He suggested, however, that the words “would not ... be applicable” should be amended to read “might not ... be applicable”.

51. Mr. McRAE suggested that the words “in which” should be replaced by the words “for which”.

Paragraph 45, as amended, was adopted.

10. ARTICLE 9. THE RESUMPTION OF SUSPENDED TREATIES

(a) Introduction by the Special Rapporteur

Paragraph 46

Paragraph 46 was adopted.

(b) Summary of the debate

Paragraph 47

Paragraph 47 was adopted.

11. ARTICLE 10. EFFECT OF THE EXERCISE OF THE RIGHT TO INDIVIDUAL OR COLLECTIVE SELF-DEFENCE ON A TREATY

(a) Introduction by the Special Rapporteur

Paragraph 48

Paragraph 48 was adopted.

(b) Summary of the debate

Paragraph 49

Paragraph 49 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 50

52. Mr. BROWNLIE (Special Rapporteur) said that he wished to recast the final phrase, “uncharted juridical territory”, which was a mixed metaphor: territory was “mapped” rather than “charted”. In response to a suggestion by Mr. McRae, he said that the phrase should read “uncharted juridical seas” rather than “uncharted juridical waters”.

53. Mr. PELLET said that the Special Rapporteur had not, as stated in the first sentence of the paragraph, “recalled” the general view but had “noted” it.

Paragraph 50, as amended by Mr. Brownlie (Special Rapporteur) and Mr. Pellet, was adopted.

12. ARTICLE 11. DECISIONS OF THE SECURITY COUNCIL

ARTICLE 12. STATUS OF THIRD STATES AS NEUTRALS

ARTICLE 13. CASES OF TERMINATION OR SUSPENSION

ARTICLE 14. THE REVIVAL OF TERMINATED OR SUSPENDED TREATIES

(a) Introduction by the Special Rapporteur

Paragraph 51

54. Mr. McRAE said that the third sentence lacked a main verb. He suggested that it should be reworded to read: “The point was that the issue of neutrality had not been ignored; it was just that the draft articles were to be without prejudice.”

Paragraph 51, as amended, was adopted.

(b) Summary of the debate

Paragraph 52

55. Mr. PELLET said that two aspects of the paragraph gave rise to concern. First, he could see no reason why Chapter VII of the Charter of the United Nations should not be given its proper title, which was “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. The Commission should not tinker with the original wording. Secondly, the meaning of the penultimate sentence as currently worded was obscure. He therefore suggested that the phrase “in the case of a topic specifically concerned with the effect of armed conflicts on treaties” should be inserted after the word “insufficient”.

Paragraph 52, as amended, was adopted.

Paragraph 53

Paragraph 53 was adopted.

Paragraph 54

56. Mr. BROWNLIE (Special Rapporteur) said that his view was that a fundamental change of circumstances following the outbreak of armed conflict between States parties to a treaty belonged to a different area of law; he had never said that the outbreak of armed conflict could not constitute a fundamental change of circumstances or a supervening impossibility of performance. He resented being misrepresented on such a basic question of law.

Paragraph 54 was deleted.

Paragraph 55

Paragraph 55 was adopted.

(c) Special Rapporteur’s concluding remarks

Paragraph 56

Paragraph 56 was adopted.

Section B, as amended, was adopted.

Mr. Brownlie took the Chair.

CHAPTER VIII. Responsibility of international organizations (continued) (A/CN.4/L.713 and Add.1–3)

C. Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (A/CN.4/L.713/Add.1–3)

1. TEXT OF THE DRAFT ARTICLES

Paragraph 1

Paragraph 1 was adopted.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION

Paragraph 2

Paragraph 2 was adopted.

Commentary to the chapeau of Part Two (Content of the international responsibility of an international organization)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to the chapeau of Part Two (Content of the international responsibility of an international organization) was adopted.

CHAPTER I. General principles

Commentary to draft article 31 (Legal consequences of an internationally wrongful act)

Paragraph (1)

57. Mr. VALENCIA-OSPINA asked whether it was necessary to number the paragraph, as there was only one.

58. The CHAIRPERSON replied that it was unnecessary.

The commentary to draft article 31, as amended, was adopted.

Commentary to draft article 32 (Continued duty of performance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

59. Mr. PELLET said that paragraph (2) was too succinct, since the last sentence merely stated “This will depend on the character of the obligation concerned.” For its meaning to be clear to the reader, the sentence should at the very least indicate which obligations could still be performed after a breach and which could not. An example of relevance to the article should be provided, as had been done in paragraph (4) of the commentary to article 33, but given the paucity of practice, a theoretical example would suffice. It was awkward to have such insubstantial commentaries, and he therefore asked the Special Rapporteur to find some examples.

60. Mr. GAJA (Special Rapporteur) said that the commentaries could be lengthened if the Commission so wished. He would look at the commentaries to the corresponding draft articles on the responsibility of States

for internationally wrongful acts³⁷⁶ in order to see if they offered any examples and, if they did, he would adapt them. If they did not provide any examples, he would submit that Mr. Pellet's remark had been made five years too late. Personally, he would prefer to retain the commentary as it stood rather than possibly stating the obvious.

61. The CHAIRPERSON suggested that after the Special Rapporteur had consulted the commentaries to the draft articles on the responsibility of States for internationally wrongful acts, he should report back briefly to the Commission at the following meeting.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Commentary to draft article 33 (Cessation and non-repetition)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to draft article 33 was adopted.

Commentary to draft article 34 (Reparation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraphs (3) and (4)

62. Mr. PELLET took issue with the phrase "*Ce fait révèle l'insuffisance ...*" in the French version of paragraph (3). The corresponding phrase "This fact points to ..." in the English was somewhat better. In his opinion, it would be more apt in the French version to use the expression "*Ce fait résulte de l'insuffisance ...*" ("This fact results from the inadequacy ..."). In addition, the French version of the last sentence in that paragraph was incomprehensible. In his view, the legal consequences to which it referred were those deriving from the organization's responsibility. Even if repetition was normally shunned in French, it would be clearer if the sentence spoke of the "*conséquences juridiques de sa responsabilité*" ("legal consequences of its responsibility"). Furthermore, paragraphs (3) and (4) should be inverted, because paragraph (4) concerned the actual principle of reparation and should therefore precede paragraph (3), whereas paragraph (3) concerned the implementation of the principle and ought to follow paragraph (4).

63. Mr. GAJA (Special Rapporteur) said that in English the words "results from" would be too strong; he therefore suggested the phrase "This fact is linked to the inadequacy ...". He agreed that it would be judicious to amend the last part of the last sentence of paragraph (3) so that it referred to the "legal consequences of the responsibility that it incurs under international law". On the other hand, he considered it inadvisable to invert paragraphs (3) and (4), as the argument regarding *ex gratia* compensation in paragraph (4) stood in opposition to what had been said in paragraph (3). Of course, it would be possible to ignore *ex gratia* compensation entirely, but none of the Commission members had deemed such action wise because the draft articles under consideration had to take into account

the fact that some international organizations had inadequate funds while others were very generous. He therefore considered that the order of the paragraphs in the commentary should be left unchanged, but would bow to the Commission's decision on the matter.

64. Mr. PELLET requested clarification of the meaning of "*indique le contraire*" and "point in a different direction", because he did not see why the fact that international organizations sometimes granted *ex gratia* compensation would exempt them from the legal consequences of their responsibility; that was a *non sequitur*. The opposite would be that they were bound to provide compensation. Since full reparation was the subject of paragraph (2), paragraph (4) would make sense if it followed paragraph (2), but as it stood paragraph (4) was ambiguous.

65. The CHAIRPERSON agreed that Mr. Pellet had some justification for stating that paragraph (4) was unclear.

66. Mr. McRAE said that part of the difficulty lay in the fact that the "different direction" related to the first and, possibly, second sentence of paragraph (3) rather than to the third sentence of that paragraph. He therefore suggested that recasting the last sentence of paragraph (3) to read "However, that inadequacy cannot exempt an organization from the legal consequences that result from its responsibility under international law" would avoid the problematical phrase "legal consequences that it incurs" while conveying the desired meaning. He further suggested that the difficulty posed by paragraph (4) could be surmounted by running its two sentences together so that they read: "The fact that international organizations sometimes grant compensation *ex gratia* is not due to an abundance of resources ...".

67. Mr. GAJA (Special Rapporteur) said that he could accept Mr. McRae's suggestions but would still prefer, in the second sentence in paragraph (3), the expression "linked to" rather than "results from".

Paragraphs (3) and (4), as amended, were adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 34, as amended, was adopted.

Commentary to draft article 35 (Irrelevance of the rules of the organization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

68. Mr. McRAE said that "suffer exceptions" should be replaced by "admit of exceptions".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft article 35, as amended, was adopted.

³⁷⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, commentary to draft article 29, p. 88.

Commentary to draft article 36 (Scope of international obligations set out in this Part)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

69. Mr. PELLET said that the inclusion of the word “likely” in the last sentence of the paragraph was indicative of an excessively cautious approach: the issues of international responsibility arising in the context of employment were certainly similar to those examined in the draft. He asked if any of the draft articles actually stipulated that an international organization was exempt from responsibility *vis-à-vis* its staff. The radical statement contained in paragraph (5) had been a shattering revelation, especially as in some of his reports the Special Rapporteur had rightly quoted examples of the abundant case law of international administrative tribunals.

70. Mr. GAJA (Special Rapporteur) expressed surprise at Mr. Pellet’s comment because, as paragraph (4) made clear, article 36, paragraph 2, was calqued on article 33, paragraph 2, of the draft articles on responsibility of States for internationally wrongful acts.³⁷⁷ That point had been discussed both in plenary and in the Drafting Committee. Part One of the draft articles dealt with the responsibility of international organizations in general, while Part Two and Part Three would cover only such obligations of international organizations as arose from internationally wrongful acts towards States, other international organizations or the international community as a whole. The limitation had been established for reasons which had been fully explained. That was why it was probably more accurate not to make any reference to an international organization’s responsibility towards its staff. The words “likely to be” had been included because the Commission had not analysed that matter and the draft articles and commentaries thereto did not deal with questions of employment. Assertions must not be made unless they were supported by proof, and that was the reason for the cautious tone of the sentence. Nevertheless, as it would not be too bold to say “are similar to”, he could accept the deletion of “are likely to be”. He was not, however, prepared to reopen the question of whether the Commission should include employment issues in the draft articles.

71. Mr. PELLET said that, although he had been convinced by most of the Special Rapporteur’s reply, the paragraph should nevertheless be amended because it was too late to make such a bald statement. He suggested that the sentence should read: “It emerges from article 36, paragraph 2, that the consequences of these breaches are not covered by the draft; certain issues of international responsibility arising in the context of the international civil service are very similar to those examined in the draft.” That wording would make sense and would be consistent with the idea that the draft articles on responsibility of States for internationally wrongful acts were not being called into question. While he had been persuaded by the Special Rapporteur’s argument, he would prefer not to beg the question by omitting an express reference to the relevant article.

Lastly, he once again urged the deletion of the phrase “likely to be”, since he was familiar with the branch of law in question and he saw no reason for such a defensive attitude.

72. Mr. GAJA (Special Rapporteur) repeated that he was prepared to delete “likely to be” but said that he had not quite grasped Mr. Pellet’s first proposal. The purpose of the paragraph in question was to explain the text of the article. It should not imply that what was said in Part Two with regard to States or other organizations would necessarily apply to natural persons.

73. Mr. PELLET drew attention to the fact that article 1, on the scope of the draft articles, stated that the draft articles applied to the international responsibility of an international organization for an act that was wrongful under international law. It excluded responsibility *vis-à-vis* officials or staff only in article 36, paragraph 2. While he agreed with the explanation of that exclusion provided by the Special Rapporteur, namely that the draft articles on the responsibility of international organizations should not diverge from those on State responsibility, he still did not concur with the wording of the last sentence of paragraph (5) and thought that it should be amended in the manner he had proposed.

74. The CHAIRPERSON suggested that the Special Rapporteur should prepare a proposal which would satisfy Mr. Pellet and submit it to the Commission at the next meeting.

The meeting rose at 5.55 p.m.

2950th MEETING

Tuesday, 7 August 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caffisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Mr. Yamada.

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

CHAPTER VIII. *Responsibility of international organizations (continued)* (A/CN.4/L.713 and Add.1-3)

C. **Text of the draft articles on responsibility of international organizations provisionally adopted so far by the Commission (*continued*)** (A/CN.4/L.713/Add.1-3)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION (*continued*)

1. The CHAIRPERSON recalled that two questions had been left in abeyance during the adoption of the

³⁷⁷ *Ibid.*, pp. 28 and 94.