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Summary record of the 2953rd meeting

Topic:
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Commentary to draft article 42 (Contribution to the injury)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 42 was adopted.

Commentary to draft article 43 (Ensuring the effective performance of the obligation of reparation)

Paragraph (2)

44. Mr. PELLET said that, in order to justify the very important fact that the purpose of draft article 43 was not to transfer the responsibility of an international organization to a State, the commentary was based on opinions expressed by States and on practice. However, an equally important theoretical consideration did not appear in the commentary: since international organizations were considered to have legal personality, they were responsible, and their responsibility could not be transferred to a State. In order to reflect that consideration in the commentary, the following sentence should be added at the end of paragraph (2): “Moreover, since it is recognized that international organizations have international legal personality of their own, it is [in theory] inconceivable that they should not be held solely responsible for their internationally wrongful acts.” A footnote referring to the advisory opinion of the ICJ in the case concerning *Certain Expenses of the United Nations* might also be added after the words “of their own”.

45. Mr. GAJA (Special Rapporteur) said that the footnote was inappropriate because it referred only to the United Nations. Moreover, the text proposed by Mr. Pellet was unnecessary and belonged more at the beginning of the commentary, in connection with paragraph (1).

46. The CHAIRPERSON proposed that the Special Rapporteur and Mr. Pellet should agree on wording and that the Special Rapporteur should report back to the Commission at the next meeting, until when the adoption of paragraphs (1) and (2) would be suspended.

It was so decided.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

47. Mr. GAJA (Special Rapporteur), supported by Mr. PELLET, proposed that the words “in the Drafting Committee” in the first line should be deleted and that the words “the Drafting Committee” in the last line should be replaced by the words “the Commission”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

48. Mr. PELLET said that the words “of the Drafting Committee” should also be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

49. Mr. NOLTE said that the second sentence, which went too far, should be toned down somewhat because it implied that, for all organizations, the general duty to cooperate involved an obligation to finance the organization. That was open to question, however, as the example of the International Tin Council showed. He therefore proposed that the word “generally” should be added after the word “may” in the second sentence.

Paragraph (6), as amended, was adopted.

Paragraph (7)

50. Mr. PELLET said that the two opinions reflected in paragraph (7) should be shown separately in two sentences, the first ending with the words “general international law” and the second, which would follow on immediately, beginning with the words “Other members considered that that principle could be stated by the Commission...”.

51. After a discussion in which Ms. ESCARAMEIA, Mr. GAJA (Special Rapporteur), Mr. HMOUD, Mr. NOLTE and Mr. PELLET took part, Mr. Pellet’s proposal was adopted following an indicative vote.

Paragraph (7), as amended, was adopted.

The meeting rose at 12.55 p.m.

2953rd MEETING

Wednesday, 8 August 2007, at 3.05 p.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsen, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Petrič, 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 drew attention to the portion of chapter VIII contained in document A/CN.4/L.713/Add.1. One issue remained to be settled, namely a proposal by Ms. Escarameia for an additional sentence to be inserted in paragraph (5) of the commentary to draft article 36.

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

Paragraph 5 (concluded)*

2. Mr. GAJA (Special Rapporteur) said that the proposed new text, to be inserted after the first sentence, would read: “Another area is that of breaches committed by peacekeeping forces and affecting individuals.” The footnote would read: “See, for instance, General Assembly resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations.”

Paragraph (5) of the commentary to draft article 36, as amended, was adopted.

The commentary to draft article 36, as amended, was adopted.

3. The CHAIRPERSON invited the Commission to consider a number of issues that had been left pending in the portion of chapter VIII contained in document A/CN.4/L.713/Add.2.

Commentary to draft article 43 (Ensuring the effective performance of the obligation of reparation) (concluded)

Paragraph (1) (concluded)

4. Mr. GAJA (Special Rapporteur) said that Mr. Pellet had proposed that the following sentence should be added at the beginning of the paragraph: “International organizations that are considered to have a separate international legal personality are in principle the only subjects for which the legal consequences of their internationally wrongful acts are entailed.”

5. Mr. McRAE suggested that the second half of the sentence should be recast to read: “... the only subjects whose internationally wrongful acts entail legal consequences”.

6. The CHAIRPERSON said that it would be safer to retain the text proposed by the Special Rapporteur, which was the product of careful consultations.

Paragraph (1), as amended, was adopted.

Paragraph (7) (concluded)

7. Mr. GAJA (Special Rapporteur) said that in order to clarify any possible ambiguity, he had thought it worthwhile to expand the commentary, since some members of the Commission favoured the view that the obligation of reparation already existed under general international law, while others considered that it did not exist or that it could be stated only as a possible rule of progressive development. He therefore proposed the following text to replace the existing first sentence of the paragraph:

“The majority of the Commission maintained that no duty arose for members under general international law to take all appropriate measures in order to provide the responsible organization with the means for fulfilling its obligation to make reparation. However, some members were of the contrary opinion, while some other members expressed the view that such an obligation should be stated as a rule of progressive development.”

Paragraph (7), as amended, was adopted.

* Resumed from the 2950th meeting.

The commentary to draft article 43 as a whole, as amended, was adopted.

Commentary to draft article 44 [43] (Application of this chapter)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 44 [43] was adopted.

Commentary to draft article 45 [44] (Particular consequences of a serious breach of an obligation under this chapter)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

8. Mr. PELLET said that it was not clear from the statement by the Russian Federation quoted in the paragraph that the draft article concerned serious breaches of obligations under *jus cogens* rather than simply unlawful acts. He therefore proposed that the quotation should be deleted or else given a context in order to show the link with serious breaches.

9. Mr. GAJA (Special Rapporteur) said that, in the context, it was clear that the Russian Federation was addressing serious breaches of obligations under peremptory norms of general international law. He had included the quotation because it was a specific reply to the question that had been put to Governments. There was no need for clarification. He would, however, engage in further consultations if the Commission so wished.

10. Mr. KOLODKIN said that he saw no problem with the quotation. The first sentence of the paragraph set the scene, and the context of the quotation was clear.

11. Mr. CANDIOTI said that he understood Mr. Pellet’s concern. The Commission was endorsing the Russian Federation’s opinion, which seemed to be that States should cooperate in terminating any unlawful act by an international organization, whereas the draft article was concerned solely with serious breaches of general international law.

12. Mr. KOLODKIN proposed that the quotation should be deleted. Thus no one State would be singled out.

13. Mr. SABOIA, supported by Mr. PELLET, said that the solution proposed by Mr. Kolodkin was fair. The quotation should be deleted, but the reference to the statement by the Russian Federation should be retained for ease of consultation.

14. The CHAIRPERSON said that he took it that the Commission wished to delete the quotation from the Russian Federation.

It was so decided.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

15. Mr. PELLET said that his concern with regard to paragraph (6) was the same as that regarding paragraph (2): the quotation from the advisory opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* referred to an illegal situation but did not specify in what way the situation involved a serious breach of international law. He therefore suggested that the quotation should be replaced by one indicating the seriousness of the breach involved.

16. Mr. GAJA (Special Rapporteur) said that the quotation bore no relation to the one in paragraph (2), which he had chosen because it had neatly expressed a point of view. In the case of paragraph (6), the problem was that the ICJ had not said in so many words that there existed an obligation under a peremptory norm of general international law. Indeed, there was no reference to peremptory norms in the advisory opinion. The opinion was well known and, in his view, there was no need for the Commission to go into detail on the Court's conclusions.

17. Mr. HMOUD pointed out that the delegation of Jordan, the observer for Palestine and other interested delegations had considered the whole legal regime of the wall to be contrary to the right to self-determination, which was a peremptory norm of international law. ICJ had not spelled that out, but he hoped that the implication that a peremptory norm had been breached had been intentional.

18. Mr. PELLET proposed that the quotation should be replaced by the following sentence, which appeared in paragraph 159 of the advisory opinion: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall", which, at the least, implied that serious breaches of international law were involved.

Paragraph (6) was provisionally adopted, subject to the outcome of further consultations between the Special Rapporteur and Mr. Pellet.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

1. TEXT OF THE DRAFT ARTICLES (concluded)**

19. The CHAIRPERSON drew attention to document A/CN.4/L.713/Add.3, which contained the text of the draft articles on responsibility of international organizations. Since the Commission had already provisionally adopted the draft articles, it did not need to consider them again. He therefore took it that the Commission agreed to include the text of the draft articles in Chapter VIII.

It was so decided.

Section C.1 of Chapter VIII of the report of the Commission was adopted.

CHAPTER IV. *Reservations to treaties (continued)**** (A/CN.4/L.706 and Add.1-3)

20. The CHAIRPERSON drew attention to the portion of Chapter IV contained in document A/CN.4/L.706/Add.2, which contained a summary of the debate on the twelfth report on reservations to treaties.

21. Ms. ESCARAMEIA suggested that the Commission should defer consideration of the document, which, although substantive, had been issued only that morning. Members would have had little time in which to absorb the information.

22. The CHAIRPERSON said that, regrettably, exigencies of time required the Commission to proceed with its consideration of the document immediately.

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

Paragraph 1

23. The CHAIRPERSON said that paragraph 1 was redundant and should be deleted.

Paragraph 1 was deleted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

24. The CHAIRPERSON said that the blanks in the first phrase should be filled as follows: "At its 2950th and 2951st meetings, on 7 August 2007, ...".

Paragraph 4, as orally revised, was adopted.

Paragraph 5

Paragraph 5 was adopted.

4. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS TWELFTH REPORT

Paragraph 6

25. Mr. PELLET said that, as it stood, the penultimate sentence was meaningless. He therefore suggested the following amendment: "Moreover, there was no need to consider treaty provisions that expressly authorize a reservation to be anticipated acceptances."

Paragraph 6, as amended, was adopted.

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

26. Mr. PELLET (Special Rapporteur) proposed, first, that the words "which was also contained" in the second sentence should be amended to read "although it was contained". Secondly, the beginning of the third sentence, which read "Retaining it might serve to indicate ..."

** Resumed from the 2949th meeting.

*** Resumed from the 2951st meeting.

should be reworded to read “Retaining it had the advantage of indicating ...”.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 14

Paragraphs 9 to 14 were adopted.

Paragraph 15

27. Mr. PELLET (Special Rapporteur) said that the words “a question” in the first sentence should be amended to read “another question”.

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 18

Paragraphs 16 to 18 were adopted.

5. SUMMARY OF THE DEBATE

28. The CHAIRPERSON announced that consideration of section B.5 would be postponed until the next day to allow members sufficient time to peruse the document.

CHAPTER II. Summary of the work of the Commission at its fifty-ninth session (A/CN.4/L.711)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

29. Mr. PELLET said that paragraph 3 should mention that the Drafting Committee had also considered draft articles 1 and 2. He therefore proposed that the end of the last sentence should read, “... to the Drafting Committee, which considered draft articles 1 and 2, although it was not possible for the Commission to discuss those draft articles in plenary meeting”, or words to that effect.

30. The CHAIRPERSON noted that a progress report had been presented but that the draft articles had not been adopted by the Commission.

31. Mr. PELLET asked why no reference was made to that fact.

32. The CHAIRPERSON said that he would consult the Secretary of the Commission regarding the amendment of paragraph 3.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

33. Ms. ESCARAMEIA asked why the paragraph did not allude to the presentation of the Planning Group’s report to the plenary Commission and to the report’s inclusion in the final chapter of the Commission’s report. She therefore proposed that the first sentence should be supplemented to read: “The Commission set up a Planning Group to consider its programme, procedures and working methods, which presented its report, which is reflected in Chapter X of the Commission’s report.”

34. Ms. ARSANJANI (Secretary to the Commission) explained that the final chapter of the Commission’s report reflected only the fact that the Planning Group had been established. The entire report of the Planning Group was incorporated in the Commission’s report as a Commission decision. It did not therefore form a specific section of the last chapter of the report.

35. Ms. ESCARAMEIA said that, in that case, since the purpose of Chapter II was to guide readers of the report, it should indicate where the substance of the Planning Group’s discussions could be found in the report.

36. The CHAIRPERSON asked the Secretary to investigate ways of improving the narrative clarity of paragraph 7, provided that such action would not be contrary to any established convention.

Paragraph 7 was adopted on the understanding that editorial improvements would be made to the text.

Paragraph 8

37. Ms. ESCARAMEIA said that the Commission’s meetings with treaty-monitoring bodies during the past year had been much more formal than those held in previous years. That being the case, she wondered why there was no reference to the seminar that had been held with representatives of treaty-monitoring bodies and the representative from the Sub-Commission on the Promotion and Protection of Human Rights.

38. Mr. PELLET said that he did not understand what had determined the order in which the various entities were listed. It would be more logical to put them in the order in which their presentations had been heard. It might also be advisable to add a phrase reading “and organized a seminar with United Nations human rights experts” at the end of the paragraph.

39. Mr. SABOIA agreed with Mr. Pellet’s proposal and endorsed Ms. Escarameia’s comments. He also pointed out that it was inappropriate to refer to the persons who had participated in the meetings as “experts” because they had attended in their capacity as representatives of treaty-monitoring bodies.

40. Mr. CAFLISCH concurred with Mr. Saboia and emphasized that not all participants had been United Nations experts, for some had been representatives of the European Court of Human Rights. Moreover, not all of them had been experts on matters concerning reservations to treaties.

41. The CHAIRPERSON said that all the proposals were sound. Mr. Pellet’s suggestions regarding presentation should be adopted and Ms. Escarameia had also made a valid point concerning improvements to the reference to the meetings in question. However, given that it would be impossible to go into great detail in Chapter II, contacts with treaty-monitoring bodies would be chronicled elsewhere in the report. The points made by Mr. Cafflich and Mr. Saboia should be accepted and the paragraph should specify that the individuals in question were members of particular treaty-monitoring bodies. He invited Ms. Escarameia to supply the appropriate wording.

42. Mr. PELLET suggested that it would be wise to abide by the wording used in General Assembly resolution 61/34 of 4 December 2006, on the report of the International Law Commission on the work of its fifty-eighth session.

43. The CHAIRPERSON suggested that even though the Secretary had emphasized that Chapter II was a summary of the Commission's work and that Chapter X was the proper place for a more detailed account, the end of the paragraph should be modified to indicate that the persons in question were members of human rights monitoring bodies and that not all were from the United Nations.

44. Mr. VALENCIA-OSPINA agreed with Mr. Pellet's solution and proposed that the sentence should read: "The Commission convened a meeting with representatives of the United Nations human rights bodies set up under human rights instruments and with regional human rights bodies."

45. The CHAIRPERSON suggested that members should hold consultations with a view to finding more apposite wording.

Paragraph 9

46. Mr. PERERA said that the paragraph should also state that the seminar had been addressed by several members of the Commission. The details could appear in chapter X.

Paragraph 9, as amended, was adopted, subject to minor editorial corrections.

Paragraph 10

Paragraph 10 was adopted.

47. Mr. CANDIOTI, supported by Mr. SABOIA, said that although he had refrained from commenting on each point, he was unhappy with editorial policy. Chapter II always amounted to no more than a shorthand, not to say statistical, account of the Commission's work and left the reader unenlightened on a number of important matters. It was a lacklustre way of describing all the discussions that had taken place. Chapter II should be more user-friendly; it should awaken the reader's curiosity and generate a desire to know what happened next. He therefore suggested that, in future, chapter II should summarize the substantive content of reports and indicate in greater detail what questions had been most hotly debated. Meatier presentation and better "selling" of the Commission's work would influence discussions in the Sixth Committee.

48. Mr. PELLET said that Mr. Candioti had touched on a sore point. He personally disliked chapter II on principle. No attempt should be made to prepare a summary for the lazy—the more interesting chapter II was, the less some members of the Sixth Committee would read the remainder of the report. It would be wiser to highlight the main issues in the separate chapters of the report. If an overview was prepared, it was certain that 90 per cent of delegates to the Sixth Committee would read only that, and no serious discussion could be based on a digest. The better chapter II was, the more harm it would do.

49. The CHAIRPERSON said that while he did not wish to embark on a discussion of the content and structure of the report, he believed that some important issues had been broached. He found Mr. Candioti's proposals persuasive. Chapter II was rather dry, and as a wide public did consult the Commission's publications, editorial policy must be discussed by the Planning Group.

50. Ms. ESCARAMEIA pointed out that chapter II of the Commission's report was indeed on the Planning Group's agenda for the following year. Priority should therefore be given to that subject and a meeting should be held on it at the beginning of the session, since the Secretariat required guidance as early as possible on the drafting of the report. She supported the views of Mr. Candioti and did not feel that a digest would promote laziness. She was sure that Mr. Pellet did not read every article in every international law journal and that he often read abstracts in order to find out if the full article would be of interest to him. An expanded chapter II should summarize the most controversial issues; as it stood, the chapter said nothing of substance.

The meeting rose at 4.20 p.m.

2954th MEETING

Thursday, 9 August 2007, at 10 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, 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 (concluded)* (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 (concluded)* (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 (*concluded*)

Commentary to draft article 45 [44] (Particular consequences of a serious breach of an obligation under this chapter) (*concluded*)

Paragraph (6) (*concluded*)

1. The CHAIRPERSON, recalling that paragraph (6) of document A/CN.4/L.713/Add.2 had been left pending, invited Mr. Gaja to read the proposal which he had prepared together with Mr. Pellet.