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Summary record of the 2968th meeting

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Reservations to treaties⁸⁹ (A/CN.4/588, sect. A, A/CN.4/600,⁹⁰ A/CN.4/L.723 and Corr.1,⁹¹ A/CN.4/L.739 and Corr.1,⁹² A/CN.4/L.740⁹³)

[Agenda item 2]

NOTE BY THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the members of the Commission to consider the note prepared by the Special Rapporteur on a draft guideline 2.1.9.⁹⁴

2. Mr. PELLET (Special Rapporteur) explained that, after proposing draft guideline 2.6.10, on statement of reasons for objections,⁹⁵ he had realized that the Guide to Practice lacked a corresponding guideline on statement of reasons for reservations themselves. The note he was presenting sought to rectify that oversight. In fact, it was as useful to give reasons for a reservation as for an objection, to assist all those called upon to assess the scope and validity of the reservation, namely other States parties, treaty monitoring bodies and dispute settlement bodies. A statement of reasons was also useful as a means of enabling the reserving State to demonstrate the merits of its reservation and explain why there were difficulties in applying the treaty in its entirety, as was illustrated by the example the reservation of Barbados to article 14 of the International Covenant on Civil and Political Rights given in paragraph 10 of his note.

3. It should, however, be made clear that while the statement of reasons for a reservation could shed light on those reasons and assist in understanding it, it could not add to or subtract from the reservation itself. Even when a lengthy statement of reasons was provided, a vague reservation would remain vague. Furthermore, while it should be recommended that States give the reasons for their reservations, as well as for their objections, it would nevertheless be going too far to oblige them to do so. The guidelines were simply recommendations, and too rigid a formulation would go well beyond positive law and the spirit of the provisions concerning reservations in the 1969 and 1986 Vienna Conventions, which left States plenty of room for manoeuvre.

4. The idea of including a guideline recommending that reservations should be accompanied by a statement of reasons had already commanded a broad consensus at the Commission's previous session. It would thus seem that draft guideline 2.1.9 could be referred to the Drafting

Committee, which would ensure that it was harmonized with the draft guideline on statement of reasons for objections.

Draft guideline 2.1.9 (Statement of reasons) was referred to the Drafting Committee.

Organization of the work of the session (*continued*)

[Agenda item 1]

5. Mr. CANDIOTI (Chairperson of the Working Group on the responsibility of international organizations) announced that the Working Group would be composed of the following members: Mr. Comissário Afonso, Ms. Escarameia (Rapporteur, *ex officio*), Mr. Gaja (Special Rapporteur), Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada.

The meeting rose at 10.20 a.m.

2968th MEETING

Thursday, 29 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Tribute to the memory of Bernhard Graefrath and Sir Francis Vallat, former members of the Commission

1. The CHAIRPERSON said he had received the sad news that two former members of the Commission had passed away. The Commission had learned only recently of the death of Bernhard Graefrath more than a year previously. Professor Graefrath had been a member of the Commission from 1987 to 1991. The Commission had also been informed of the death of Sir Francis Vallat. He had had the privilege of knowing Sir Francis personally and had had many opportunities to appreciate his outstanding human and professional qualities, as well as his valuable contribution to the work of the Commission. Sir Francis had been a member of the Commission from 1973 to 1981.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

⁸⁹ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *Yearbook ... 2007*, vol. II (Part Two), chap IV.

⁹⁰ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

⁹¹ Mimeographed; available on the Commission's website.

⁹² *Idem*.

⁹³ *Idem*.

⁹⁴ Note by the Special Rapporteur on draft guideline 2.1.9 on the statement of reasons for objections, *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/586.

⁹⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574, para. 111. For the discussion of this draft guideline, see *Yearbook ... 2007*, vol. II (Part Two), paras. 60, 81 and 103.

Effects of armed conflicts on treaties⁹⁶ (A/CN.4/588, sect. D, A/CN.4/589,⁹⁷ A/CN.4/592 and Add.1,⁹⁸ A/CN.4/L.721,⁹⁹ A/CN.4/L.726,¹⁰⁰ A/CN.4/L.727/Rev.1 and Add.1¹⁰¹)

[Agenda item 5]

REPORT OF THE WORKING GROUP

2. Mr. CAFLISCH (Chairperson of the Working Group on effects of armed conflicts on treaties), introducing the report of the Working Group (A/CN.4/L.726), said that the Working Group had been re-established for the purpose of finishing its work, begun at the previous session, of reviewing the draft articles proposed by the Special Rapporteur in his first three reports.¹⁰² That work had, for the most part, been completed at the previous session, and, on the recommendation of the Working Group, a number of draft articles had been referred to the Drafting Committee,¹⁰³ together with a series of recommendations—also prepared by the Working Group—that were intended to guide the work of the Drafting Committee.

3. As indicated in paragraph 3 of its report, the Working Group had had four remaining issues to consider. Those issues were: first, the question of the applicability, in relation to draft article 8, of the procedure set forth in article 65 of the 1969 Vienna Convention for the termination or suspension of treaties; second, the question of the applicability, also in relation to draft article 8, of articles 42 to 45 of the Vienna Convention, and, in particular, of article 44 on the separability of treaty provisions; third, draft article 9, on the resumption (or “revival”) of suspended treaties; and lastly, draft articles 12, 13 and 14, relating to third States as neutrals, the termination or suspension of treaties by operation of the Vienna Convention, and the competence of parties to negotiate a specific agreement regulating the maintenance in force or revival of treaties, respectively. He was pleased to report that in the course of two meetings, the Working Group had concluded its consideration of all four items, prepared a series of revised draft articles and formulated some further general recommendations, to which he would return in due course.

4. With regard to the issue of the procedure for termination or suspension, the Working Group had formulated a new draft article 8, based, in part, on article 65 of the 1969 Vienna Convention, that established a notification scheme whereby a party engaged in an armed conflict and wishing to terminate or withdraw from a

treaty should notify the other State party or parties to the treaty, or the depositary. Such notification would not affect the right of a party to the treaty to object to the notification of withdrawal or suspension of the operation of the treaty or its termination. Under proposed draft article 8 *bis*, such termination, withdrawal or suspension would not affect the obligations of the State under other rules of international law.

5. The Working Group was further of the view that a regime of separability of treaty provisions should be included in the draft articles. Accordingly, it proposed for the consideration of the Commission draft article 8 *ter*, which was based on article 44 of the 1969 Vienna Convention. That draft article established the general rule that where the possibility of termination, withdrawal or suspension was provided for in the treaty, that right had to be exercised with respect to the whole treaty, except either where that treaty expressly provided otherwise or where the three conditions listed in its subparagraphs (a), (b) and (c) were satisfied. Those conditions had been extracted verbatim from the Vienna Convention. The question of the loss of such a right to terminate, withdraw from or suspend the operation of a treaty was the subject matter of draft article 8 *quater*, which reproduced verbatim article 45 of the Vienna Convention.

6. When coming to draft article 9, on the resumption of suspended treaties, the Working Group had decided to retain the core of the text proposed by the Special Rapporteur, while replacing the earlier reference to the intention of the parties with a cross-reference to the criteria indicated in draft article 4. It would be recalled that, at the previous session, the Working Group had proposed a new formulation for draft article 4, which had provided for the following criteria for the determination of the susceptibility of treaties to termination or suspension in the event of an armed conflict: (a) resort to articles 31 and 32 of the 1969 Vienna Convention; and (b) resort to the nature and extent of the armed conflict, the effect of the armed conflict on the treaty, the subject matter of the treaty and the number of parties to the treaty. Accordingly, those same criteria would be applied in determining the resumption of treaties.

7. The Working Group had further decided that draft articles 12 to 14, as proposed by the Special Rapporteur, while largely expository in nature, were useful and should be retained. While no change was proposed with regard to draft article 12, the Working Group suggested a minor adjustment in draft article 13, and had prepared a new version of draft article 14 concerning the practice of States entering into agreements, subsequent to an armed conflict, to regulate the revival of treaties.

8. The new text of draft articles 8, 8 *bis*, 8 *ter*, 8 *quater*, 9 and 14 read:

Article 8 (Notification of termination, withdrawal or suspension)

1. A State engaged in armed conflict wishing to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary.

2. The notification takes effect upon receipt by the other State party or State parties.

⁹⁶ For the Commission’s discussion of the draft articles proposed by the Special Rapporteur, see *Yearbook ... 2007*, vol. II (Part Two), chap. VII, paras. 269–322.

⁹⁷ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

⁹⁸ *Idem*.

⁹⁹ *Idem*.

¹⁰⁰ Mimeographed; available on the Commission’s website. See also paragraphs 8–12 below.

¹⁰¹ Mimeographed; available on the Commission’s website. See also the 2973rd meeting below.

¹⁰² The first report is reproduced in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/552; the second report in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570; and the third in *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/578.

¹⁰³ *Yearbook ... 2007*, vol. II (Part Two), chap. VII, para. 324.

3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to such termination, withdrawal or suspension of the operation of the treaty.

Article 8 bis (Obligations imposed by international law independently of a treaty)

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a result of the application of the present draft articles or of the provisions of the treaty, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 8 ter (Separability of treaty provisions)

The right of a party, provided for in a treaty, to terminate, withdraw from or suspend the operation of the treaty shall, unless the treaty otherwise provides or the parties otherwise agree, be exercised only with respect to the whole treaty except where:

- (a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust.

Article 8 quater (Loss of the right to terminate, withdraw from or suspend the operation of a treaty)

A State may no longer terminate, withdraw from or suspend the operation of a treaty if:

- (a) it has expressly agreed that the treaty remains in force or continues in operation; or
- (b) it can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 9 (The resumption of suspended treaties)

The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the criteria established in draft article 4.

Article 14 (The revival of treaty relations subsequent to an armed conflict)

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate, subsequent to the conflict, the revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

9. In addition, he wished to mention that, in the light of comments and observations received from international organizations (A/CN.4/592 and Add.1), the Working Group reiterated its recommendation, made at the previous session, that the question of including treaties affecting international intergovernmental organizations within the scope of the draft articles should be left in abeyance until a later stage in the consideration of the topic. The Working Group also proposed that the Drafting Committee should, where applicable, be instructed to consider the inclusion of reference to withdrawal from multilateral treaties as another possible result of armed conflict.

10. In conclusion, he wished to thank the Special Rapporteur and the members of the Working Group for the spirit of cooperation they had shown and for the

assistance they had provided to the Chairperson. Thanks were also due to the members of the Secretariat, who had greatly facilitated the task of the Working Group. It was the Working Group's recommendation that the Commission should decide to refer to the Drafting Committee draft articles 8, 8 bis, 8 ter, 8 quater, 9 and 14 as proposed by the Working Group, and draft articles 12 and 13 as proposed by the Special Rapporteur, together with the other recommendations of the Working Group contained in its report.

11. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group.

It was so decided.

12. The CHAIRPERSON said that, if he heard no objection, he would further take it that the Commission wished to refer draft articles 8, 8 bis, 8 ter, 8 quater, 9 and 14, as proposed by the Working Group, and draft articles 12 and 13 as proposed by the Special Rapporteur, together with the recommendations of the Working Group contained in its report, to the Drafting Committee.

It was so decided.

Responsibility of international organizations (continued)* (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

PROGRESS REPORT OF THE WORKING GROUP

13. Mr. CANDIOTI (Chairperson of the Working Group on the responsibility of international organizations) said that, although it had so far met only once, the Working Group had judged it opportune to report to the plenary on the progress it had made after carefully considering the question of the advisability of including in the draft articles a provision on admissibility of claims. Taking into account the views that had been expressed in the plenary, the Special Rapporteur had presented to the Working Group a new draft article, which read:

“Draft article 47 bis (Admissibility of claims)

“1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

“2. An injured State or international organization may not invoke the responsibility of another international organization if the claim is subject to any applicable rule on the exhaustion of local remedies and any available and effective remedy has not been exhausted.”

14. The Working Group had agreed on the advisability of including such a provision in the draft articles.

* Continued from the 2964th meeting.

Some preliminary drafting comments and proposals had been put forward, concerning, in particular, paragraph 2 of the new draft article, mostly aimed at improving its wording. Some members had suggested that paragraph 2 should be divided into two parts, dealing respectively with a claim by an injured State and a claim by an injured international organization. One member had pointed out that the requirement that the remedy should be “available and effective”, while so defined in article 44 of the draft articles on responsibility of States for internationally wrongful acts,¹⁰⁴ had not been replicated in article 14 of the draft articles on diplomatic protection.¹⁰⁵ However, those were merely preliminary comments and the task of considering the draft article in detail was one that fell to the Drafting Committee. Accordingly, the Working Group recommended that additional draft article 47 *bis* should be referred to the Drafting Committee.

15. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft article 47 *bis* to the Drafting Committee.

It was so decided.

Organization of the work of the session (*continued*)

[Agenda item 1]

16. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of the effects of armed conflicts on treaties was composed of Mr. Cafilisch, Mr. Fomba, Mr. Gaja, Mr. Hmoud, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti and Ms. Xue, together with Mr. Brownlie (Special Rapporteur) and Ms. Escarameia (Rapporteur, *ex officio*).

The meeting rose at 10 a.m.

2969th MEETING

Friday, 30 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens¹⁰⁶ (A/CN.4/588, sect. C, A/CN.4/594¹⁰⁷)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPporteur

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the expulsion of aliens (A/CN.4/594).

2. Mr. KAMTO (Special Rapporteur) said that, during the consideration, at the preceding session, of the third report on the expulsion of aliens¹⁰⁸ and, in particular, draft article 4 entitled “Non-expulsion by a State of its nationals”, the Commission had taken the view that the question of the expulsion of persons with two or more nationalities should be studied in more detail and resolved within draft article 4 or in a separate draft article.¹⁰⁹ It had also taken the view that the issue of deprivation of nationality, which was sometimes used as a preliminary to expulsion, deserved thorough study.¹¹⁰

3. In his third report, he had observed that it was not desirable to deal with the issue of dual or multiple nationals in connection with draft article 4, as protection from expulsion should be provided in respect of any State of which a person was a national. That should help strengthen the rule prohibiting the expulsion of nationals, as supported by all members of the Commission.

4. He believed that the issue of nationality—whether it involved one nationality or multiple nationalities—could, in particular, have an impact in the context of diplomatic protection in cases of unlawful expulsion. However, in order to follow up on the Commission’s guidelines in that regard, he had devoted his fourth report to the consideration of that issue, leaving until the next session the preparation of draft articles on restrictions to the right of expulsion, of which some members wished to know the provisions in order to decide on the content of draft article 3. The fourth report was divided into two main parts, one on expulsion in cases of dual or multiple nationality and the other, on loss of nationality, denationalization and expulsion, which should be considered separately.

5. With regard to expulsion in cases of dual or multiple nationality, he questioned whether the principle of non-expulsion was strictly applicable to an individual with two or more nationalities, including that of the expelling State. In other words, could a person liable to expulsion be considered an alien by the expelling State if he or she had not lost any of his or her nationalities? In that regard, he pointed out that some States did, in fact, treat their nationals who also held another nationality as aliens for purposes other than expulsion (paras. 8 and 9 of the report).

¹⁰⁶ For the Commission’s discussion of draft articles 1 to 7, see *Yearbook ... 2007*, vol. II (Part Two), pp. 61–69, paras. 189–265.

¹⁰⁷ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

¹⁰⁸ Reproduced in *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

¹⁰⁹ See *Yearbook ... 2007*, vol. II (Part Two), pp. 65–66, paras. 226–232.

¹¹⁰ *Ibid.*, p. 65, para. 227.

¹⁰⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76, at p. 120.

¹⁰⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 26 *et seq.*, para. 50, at pp. 44–46.