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Summary record of the 2998th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-FIRST SESSION

Held at Geneva from 4 May to 5 June 2009

2998th MEETING

Monday, 4 May 2009, at 3.20 p.m.

Acting Chairperson:

Mr. Edmundo VARGAS CARREÑO

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caflich, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Opening of the session

1. The ACTING CHAIRPERSON declared open the sixty-first session of the International Law Commission.

Statement by the Acting Chairperson

2. The ACTING CHAIRPERSON reported briefly on the discussion held in the Sixth Committee of the General Assembly on the Commission's report on the work of its sixtieth session,¹ including the topical summary contained in document A/CN.4/606 and Add.1.² The International Law Week had provided an opportunity for delegations to engage in dialogue with members of the Commission and special rapporteurs present in New York, as they had been encouraged to do by the General Assembly in paragraph 12 of its resolution 59/313 of 12 September 2005. The dialogue had focused on the topics of immunity of State officials from foreign criminal jurisdiction, responsibility of international organizations and the most-favoured-nation clause. The dialogue had been continued at the meetings of legal advisers. On the basis of the report of the Sixth Committee on the work of its sixtieth session,

the General Assembly had adopted resolution 63/123 of 11 December 2008, on the report of the Commission, paragraph 9 of which requested the Secretary-General to submit to the General Assembly, in accordance with established procedures and bearing in mind its resolution 56/272 of 27 March 2002, a report on the assistance currently provided to special rapporteurs and options regarding additional support of the work of special rapporteurs. That request related to paragraph 358 of the Commission's report, on the question of honoraria. The General Assembly had also adopted resolution 63/124 of 11 December 2008, on the law of transboundary aquifers, which contained in annex the draft articles adopted by the Commission.

Election of officers

Mr. Petrič was elected Chairperson by acclamation.

Mr. Petrič took the Chair.

3. The CHAIRPERSON paid a tribute to Ms. Mahnouch H. Arsanjani, who had been Secretary to the Commission for many years before becoming Director of the Codification Division and who had retired in March 2009. He welcomed back the new Secretary to the Commission, Mr. Václav Mikulka, who thus resumed his earlier functions. He also welcomed the new member of the Commission, Sir Michael Wood, who had been elected following the resignation of Mr. Ian Brownlie.

Mr. Wisnumurti was elected first Vice-Chairperson by acclamation.

Mr. Fomba was elected second Vice-Chairperson by acclamation.

Ms. Jacobsson was elected Rapporteur of the Commission by acclamation.

Mr. Vázquez-Bermúdez was elected Chairperson of the Drafting Committee by acclamation.

Adoption of the agenda

4. The CHAIRPERSON suggested that a new item 2, entitled "Filling of a casual vacancy in the Commission (article 11 of the Statute)", should be added to the

¹ *Yearbook ... 2008*, vol. II (Part Two), document A/63/10.

² Mimeographed; available on the Commission's website.

provisional agenda in order to fill the vacancy created by the resignation of Mr. Chusei Yamada and that the agenda of the sixty-first session, as amended, should be adopted without prejudice to the order in which the topics would be considered.

The provisional agenda (A/CN.4/605), as amended, was adopted.

Tribute to the memory of Nicholas Jotcham

5. The CHAIRPERSON informed the Commission of the death in 2008 of Nicholas Jotcham, reviser of the summary records of the Commission, and recalled his jovial personality, expertise, valuable knowledge and tremendous sense of responsibility.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence in memory of Nicholas Jotcham.

The meeting was suspended at 3.50 p.m. and resumed at 4.30 p.m.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew attention to the programme of work for the following two weeks, which had just been circulated. The Commission would begin with consideration of the topic of responsibility of international organizations at the current meeting, following the election of a new member in accordance with the new item 2 of the agenda ("Filling of a casual vacancy in the Commission (article 11 of the Statute)"). It would then consider the fifth report on expulsion of aliens. The Drafting Committee would begin its work on reservations to treaties, several draft guidelines having been referred to it at the previous session after the consideration of the thirteenth report of the Special Rapporteur, Mr. Pellet. It would also take up a number of draft articles on expulsion of aliens. Members who were interested in participating in the Drafting Committee on those two topics were invited to contact the Chairperson of the Drafting Committee. The Commission would also have a meeting with the United Nations Legal Counsel and another with legal advisers of international organizations within the United Nations system, as recommended at the previous session.³

The programme of work for the first two weeks of the session was adopted.

The meeting was suspended at 4.35 p.m. and resumed at 4.50 p.m.

Filling of a casual vacancy in the Commission (Article 11 of the statute)

[Agenda item 2]

7. The CHAIRPERSON announced that Mr. Shinya Murase (Japan) had been elected to fill the vacancy resulting from the resignation of Mr. Chusei Yamada.

Responsibility of international organizations⁴ (A/CN.4/606 and Add.1, sect. D,⁵ A/CN.4/609,⁶ A/CN.4/610,⁷ A/CN.4/L.743 and Add.1⁸)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

8. The CHAIRPERSON invited the Special Rapporteur, Mr. Gaja, to introduce his seventh report on responsibility of international organizations (A/CN.4/610).

9. Mr. GAJA (Special Rapporteur) said it was unfortunate that his report had only just become available in all official languages, even though he had submitted it two months earlier. Delays in the translation and editing of documents affected the quality of the Commission's work.

10. The seventh report on responsibility of international organizations contained a survey of comments made by States and international organizations as well as new elements that had emerged in practice and the views of a number of authors. The time had come to analyse them and to make some amendments to the draft articles, not only to show States that their comments were taken into consideration in a reasonable period of time, but also because the points they made were often relevant. The Commission should recall that, with the exception of the chapter on countermeasures, States and international organizations had been able to consider the draft articles only once they had been provisionally adopted. The Commission should take the opportunity afforded by the meeting planned with the legal advisers of the United Nations system to hear additional views. He hoped that Commission members would focus on the points he had singled out as requiring consideration and on his proposals thereon. It would not be possible at the current stage to reopen a discussion in plenary on all the draft articles without risking a premature second reading. By concentrating on points that posed problems, the Commission ought to be able to adopt the draft articles in first reading at the current session. That way there would be a complete text that was easier to read, because provisions that might seem problematic when viewed in isolation were often easier to understand when taken as a whole.

11. He proposed reorganizing the draft articles in the following manner: the first two articles, on scope and use of terms, should form a new Part One entitled "Introduction", since both concerned responsibility of international organizations and those aspects of State responsibility covered by the draft, i.e. the responsibility of a State arising in connection with the act of an international organization. Part Two would follow and could keep the title currently used for Part One (The internationally wrongful act of an international organization); it would consist of all the articles dealing with the incurring of responsibility by an international organization: one chapter containing a single article on

⁴ For the draft articles provisionally adopted by the Commission so far, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.

⁵ Mimeographed; available on the Commission's website.

⁶ Reproduced in *Yearbook ... 2009*, vol. II (Part One).

⁷ *Idem*.

⁸ Mimeographed; available on the Commission's website.

³ *Yearbook ... 2008*, vol. II (Part Two), p. 148, para. 355.

general principles followed by all the remaining chapters up to, but not including, the chapter on the responsibility of a State in connection with the act of an international organization. In order to maintain continuity in the provisions relating to the responsibility of international organizations, the current Part Two and Part Three, concerning the content and invocation of responsibility, would follow immediately and would become Part Three and Part Four. Chapter (x), on responsibility of a State in connection with the act of an international organization, would become Part Five. The draft articles would then be concluded by a Part Six, containing general provisions which, like the first two articles, applied to the international responsibility of both international organizations and States.

12. He then turned to his proposals for changes to the draft articles. On chapter II (Attribution of conduct), he suggested that the definition of the term “rules of the organization” should be moved from article 4, paragraph 4, to article 2 (Use of terms) and made more general, so that it would refer to the purposes of all the draft articles and not only, as it currently read, to those of article 4.

13. Questions of attribution were discussed at length in the seventh report, chiefly in the light of decisions by the European Court of Human Rights and the House of Lords, which referred extensively to the draft articles adopted by the Commission. Those decisions did not make any direct criticism of the draft articles or the commentaries thereto, but the European Court had used a different criterion from the one that the Commission had suggested. In his opinion, the solution adopted by the Court in *Saramati v. France, Germany and Norway* was somewhat strange, and he was not persuaded by the idea of attributing to the United Nations conduct that had not been specifically authorized by the Security Council, especially since the United Nations had little knowledge of the conduct of national contingents.

14. The only change that he proposed on attribution concerned the definition of the term “agent” of an international organization in article 4, paragraph 2. Given the concerns expressed by the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), he had tried to make the criteria of attribution more precise by borrowing from the advisory opinion of the International Court of Justice (ICJ) on *Reparation for Injuries*. The new wording in paragraph 23 of the report would read: “2. For the purposes of paragraph 1, the term ‘agent’ includes officials and other persons or entities through whom the international organization acts, when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions.”

15. The main question raised by chapter III (Breach of an international obligation) concerned the definition of obligations under international law as applied to an international organization. In their comments, a number of international organizations had proposed that the subject matter of the rules of the organization (for example, those governing the employment of officials) should be taken into account in order to exclude them from the category of rules of international law. However, although the subject matter might give some indication of the legal nature of

the rules of the organization, it could not be taken as decisive. He therefore proposed that article 8, paragraph 2, should be rephrased to read: “The breach of an international obligation by an international organization includes in principle the breach of an obligation under the rules of that organization” (para. 42 of the report).

16. With regard to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization), he observed that the comments of States and international organizations had related mainly to draft article 15, which was designed to prevent an international organization from successfully circumventing one of its international obligations by availing itself of the separate legal personality of its members. On the whole, that article had been well received, in spite of its novelty. However, in order to take account of the comments and suggestions made, it might be useful to restrict responsibility in paragraph 2 by using slightly different wording, namely by replacing the phrase “in reliance on” with the words “as the result of”. Thus rephrased, article 15, paragraph 2 (b), would read: “that State or international organization commits the act in question as the result of that authorization or recommendation.” He also proposed the inclusion of a new draft article in view of the fact that chapter IV currently contained no provision contemplating the possibility that an international organization might incur responsibility as a member of another international organization. The conditions set out in articles 28 and 29 in relation to a member State of an international organization should be the same for an international organization that was a member of another international organization. The new text, provisionally to be called article 15 *bis*, would read: “Responsibility of an international organization that is a member of another international organization may arise in relation to an act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization” (para. 53 of the report).

17. With regard to chapter V (Circumstances precluding wrongfulness), he proposed two changes. First, in view of the many critical comments made by States and international organizations, he suggested that article 18 on self-defence be deleted, without prejudice to the general question of inviolability of self-defence. Secondly, since the Working Group on responsibility of international organizations had decided at the previous session⁹ that there should be articles on countermeasures taken against an international organization, he was submitting draft article 19. The inclusion in this article of a reference to countermeasures taken against States was justified since, while countermeasures could be taken by international organizations against another international organization, it was more likely that they would be taken by an international organization against a State that engaged in a wrongful act. It was difficult to take a different approach to the matter from the one followed in the draft articles on responsibility of States for internationally wrongful acts.¹⁰ In principle, the same rules should be applied; there was, however, the additional problem that a reference to those rules could only be stated

⁹ *Yearbook ... 2008*, vol. II (Part Two), chap. VII, paras. 130–134.

¹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

in general terms, because of the undefined status of the draft articles on State responsibility. Paragraph 1 of draft article 19 (Countermeasures) would thus read: "Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a lawful countermeasure on the part of the former international organization." The commentary would clarify what was intended by "lawful countermeasure".

18. He had drafted a separate paragraph addressing the possibility that an international organization might take countermeasures against States or international organizations that were its members. The following text, which was modelled on article 55 of the draft article on State responsibility, was proposed for draft article 19, paragraph 2: "An international organization is not entitled to take countermeasures against a responsible member State or international organization if, in accordance with the rules of the organization, reasonable means are available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation."

19. Turning to the section of his report dealing with chapter (x) (Responsibility of a State in connection with the act of an international organization), he noted that the reception given to draft articles 28 and 29 had been remarkably positive. That was particularly true for article 28. The idea underlying those articles was that a State could not escape responsibility when it circumvented one of its obligations by availing itself of the separate legal personality of an international organization of which it was a member. Various proposals had been made, such as to replace the word "circumvention" with a reference to "some element of bad faith, specific knowledge or deliberate intent" or "misuse". He was not entirely persuaded by that idea, since it would be difficult to determine whether there was intent or not. It would be better to refer to a set of objective circumstances from which one could make a reasonable assumption about intention.

20. It was important to clarify that it was not the time when the transfer of competence to an international organization took place that was relevant, but rather the time when the competence in question was exercised. The transfer of competence could well have taken place in good faith, but what mattered was how the member State took advantage of that competence, under circumstances that perhaps had not been foreseen.

21. He therefore suggested that article 28, paragraph 1, should be reworded to read:

"A State member of an international organization incurs international responsibility if:

"(a) it purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation, and

"(b) the organization commits an act that, if committed by the State, would have constituted a breach of the obligation."

22. The new wording did not abandon the original idea, but made it more defensible.

23. He was making no proposal with regard to article 29, except for the one formulated in paragraph 92 of the report. This article had received only limited criticism and reflected the compromise reached within the Commission.

24. In general, and although he was aware that the commentaries could be improved, he had not made any proposals concerning them, for he believed that it would be better to resubmit them as a whole, indicating the passages where changes had been made or ought to be made.

25. The CHAIRPERSON thanked the Special Rapporteur for introducing his seventh report and invited members of the Commission to comment on it.

26. Mr. PELLET said that he had read the seventh report with interest, although he regretted that it was not easier to consult. At the end of each section, the Special Rapporteur neatly summarized his proposals, but the reader was obliged to refer back to the original articles to see what changes were being made; it would have been more useful to have a short passage reproducing them. As to the content of the report, there were few points on which he disagreed, save two of a general nature.

27. First, despite the explanations just given by the Special Rapporteur, he himself was not persuaded by the approach that the latter had taken: it seemed to challenge the traditional division of work into first and second readings, which had the advantage of allowing States to draw informed conclusions about a comprehensive first draft to which the Commission, drawing on its expertise, provided logical and analytical coherence as it saw fit, without concerning itself unduly with the possible reaction of States. Attempting to follow the reasoning of States while elaborating a draft tended to detract from the Commission's uniqueness in its capacity as a body of independent experts; the Commission had to come up with drafts on first reading that did not necessarily gain the approval of States. It was the second reading that was designed to take account of the political concerns of States and the Sixth Committee and, where necessary, translate them into a final draft that would be more acceptable, all the while endeavouring to ensure that it retained a degree of coherence. That was why the hybrid exercise in which the Special Rapporteur was inviting the members of the Commission to engage was so disturbing: it was not a true second reading but a sort of "first reading *bis*" that was not essentially aimed at improving the draft but instead sought to address the comments and suggestions made by States and international organizations.

28. Secondly, he had on several occasions objected to the Special Rapporteur's highly restrictive interpretation of his topic whereby he limited it to the responsibility incurred by international organizations, an interpretation that was consistent, it was true, with the wording of the topic but not with the overall logic that had led to its adoption. When the topic had been included in the agenda, the idea had been to be done with issues of responsibility associated with the activities of international organizations

once and for all, irrespective of whether such activities incurred the responsibility of an organization or that of States. Like the States who intervened during the Sixth Committee cited in the second footnote to paragraph 8 of the report, he continued to think that the draft should also cover the invocation by an international organization of the international responsibility of a State. The Special Rapporteur's reply was not really a reply at all since he maintained that the matter lay outside the scope as defined in article 1. Yet it was precisely that definition that needed changing, and he regretted the fact that the opportunity offered by the "first reading *bis*" to revise the draft had been missed once again.

29. Moreover, it was entirely unrealistic to proceed as the Special Rapporteur proposed to do in paragraph 8 of his report, in which he wrote: "Various articles of Part Three on State responsibility, such as articles 42, 43, 45 to 50, 52 and 54, could conceivably be extended to cover also the invocation of responsibility by international organizations." At the present stage, it was wrong to think that the draft articles on responsibility of States could be rewritten. The next two years should be used to complete the current draft without trying to "play ping-pong" with the draft articles on State responsibility. It would be more reasonable, then, to amend article 1, paragraph 2, of the text under consideration to read: "The present draft articles apply also to the international responsibility of a State for a wrongful act by an international organization or against an international organization." Since the Commission was still at the first reading stage, even if it was a first reading *bis*, that was a formal proposal that should obviously be discussed, not by the Drafting Committee but by the Commission in plenary meeting. Of course, if it was adopted, then either the Special Rapporteur should be asked to prepare a number of additional draft articles to expand the topic accordingly, or a working group should be established for that purpose. The texts in question included, but were not limited to, article 16 and, in particular, the explanation given by the Special Rapporteur in paragraph 45 of his report. Otherwise, he had no profound disagreements with the Special Rapporteur; at a subsequent meeting he would merely raise a few minor points.

The meeting rose at 6 p.m.

2999th MEETING

Tuesday, 5 May 2009, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

Responsibility of international organizations (*continued*) (A/CN.4/606 and Add.1, sect. D, A/CN.4/609, A/CN.4/610, A/CN.4/L.743 and Add.1)

[Agenda item 4]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the seventh report on responsibility of international organizations (A/CN.4/610).

2. Mr. PELLET recalled that at the previous meeting he had voiced general criticisms both of the Special Rapporteur's methodology and of what seemed to him an unduly narrow conception of the topic, and he had put forward a formal proposal to amend article 1. With the exception of the extremely perplexing article 19, he was generally in favour of all the other draft articles and wished only to touch on a number of details.

3. First, although he was a firm believer in the objective personality of international organizations, for which recognition of an organization was not a precondition, he also saw the rules of an organization as flowing from the legal order of organizations, which itself fell within the realm of international law, *pace* the judgement of the Court of Justice of the European Communities in the *Costa v. ENEL* case. Thus, the inclusion in article 2 of a definition of the "rules of the organization" was not problematic for him, nor was the proposed reorganization of the articles. If, however, article 3 was placed by itself in a new Part Two, to be entitled "General principles", then he wondered what the title of the article would become. Perhaps the Special Rapporteur could explain whether he wished to send the draft articles back to the Drafting Committee or to have the plenary ratify his thinking.

4. As to the contents of article 3, unlike the Special Rapporteur, he did not disagree with the argument by the International Monetary Fund (IMF) set out in the footnote to paragraph 20 of the report. The responsibility of international organizations came into play in different ways, depending on whether a member State or a third State was implicated in an allegedly wrongful act. If the organization was acting in compliance with its constituent agreement, it could not incur responsibility in respect of one of its members: it was covered in advance by that agreement. On the other hand, it might incur responsibility in relation to non-member States even while complying with its constituent agreement. The issues raised by IMF thus deserved to be considered in greater depth, and perhaps an article 3 *bis* setting out the relevant principles could be included in the draft.

5. On a related point, he said that he did not agree with the new approach to attribution of conduct elaborated by the Special Rapporteur in paragraph 18—the idea that an international organization that coerced another international organization or a State to commit an internationally wrongful act incurred responsibility even if the conduct was not attributable to it. That seemed odd to him, since if the organization bore responsibility without having committed the act, it was precisely because the act was or became attributable to it. The very definition of