

Document:-  
**A/CN.4/3032**

**Summary record of the 3032nd meeting**

Topic:  
**Draft report of the Commission on the work of its sixty-first session**

Extract from the Yearbook of the International Law Commission:-  
**2009, vol. I**

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*Commentary to article 45* (Loss of the right to invoke responsibility)

*The commentary to article 45 was adopted.*

*Commentary to article 46* (Plurality of injured States or international organizations)

*The commentary to article 46 was adopted.*

*Commentary to article 47* (Plurality of responsible States or international organizations)

84. Mr. GAJA (Special Rapporteur) said that in the text of the draft article itself, the word “draft” should be deleted from paragraph 2.

*The correction to the text of article 47 was noted.*

*The commentary to article 47 was adopted.*

*Commentary to article 48* (Invocation of responsibility by a State or an international organization other than an injured State or international organization)

85. Mr. GAJA (Special Rapporteur) said that in paragraph 3 of the text of the draft article itself, the phrase “that is not” should be replaced by “other than” in order to align it with the wording used in paragraphs 1 and 2. In addition, the word “draft” had mistakenly been left in the text in paragraphs 4 (a) and 5 but should be deleted.

*The corrections to the text of article 48 were noted.*

*The commentary to article 48 was adopted.*

*The meeting rose at 6.05 p.m.*

## 3032nd MEETING

*Wednesday, 5 August 2009, at 10.05 a.m.*

*Chairperson:* Mr. Ernest PETRIĆ

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

## Draft report of the Commission on the work of its sixty-first session (*continued*)

**CHAPTER IV. Responsibility of international organizations (*concluded*) (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)**

**C. Text of the draft articles on responsibility of international organizations adopted by the Commission on first reading (*concluded*)**

**2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*concluded*) (A/CN.4/L.748/Add.2 and Corr.1)**

PART FOUR. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION (*concluded*)

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION (*concluded*)

*Commentary to article 49* (Scope of this Part)

*The commentary to article 49 was adopted.*

CHAPTER II. COUNTERMEASURES

*Commentary to article 50* (Object and limits of countermeasures)

*The commentary to article 50 was adopted.*

*Commentary to article 51* (Countermeasures by members of an international organization)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

1. Ms. ESCARAMEIA suggested that, in order to reflect the Commission’s heated debate over the issue of countermeasures, a sentence similar to the one added to the commentary to article 21 (Countermeasures) should be inserted, indicating that some members thought that members of an international organization should never be authorized to take countermeasures against the organization.

2. Mr. VASCIANNIE said that the phrase proposed by Ms. Escarameia should be worded in such a way as to make it clear that the point of view had been expressed by a minority of members.

3. The CHAIRPERSON suggested using the phrase “a view was expressed”.

4. Mr. GAJA (Special Rapporteur) endorsed this proposal and said that the phrase should be inserted at the end of the paragraph. The same wording, “a view was expressed”, should also be used in the commentary to article 21 (Countermeasures).

5. He outlined for members of the Commission the written comments provided to him by Mr. Nolte, who was absent from that meeting. Mr. Nolte had pointed out that the second sentence of paragraph (3) might in some respects appear to contradict what was said later regarding the principle of cooperation. For international organizations, that principle was not merely a general principle or a duty to cooperate, but a specific treaty-based obligation arising from membership of the organization, as the ICJ had pointed out in paragraph 43 of its advisory opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. The advisory opinion stated that “[t]he very fact of Egypt’s membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization.” A reference to that statement might be included in paragraph (3).

6. He himself did not think that there was really a contradiction in paragraph (3), where two distinct points

were made: first, that it was impossible to find a general basis for the exclusion of countermeasures in the relations between an international organization and its members, and secondly, that the principle of cooperation had an impact on whether countermeasures could be taken, but did not totally exclude them. While he was not against a reference to paragraph 43 of the advisory opinion, he thought that it should be included in a footnote, to be placed at the end of the paragraph.

7. The CHAIRPERSON said he took it that the Commission wished to endorse Mr. Gaja's proposals.

*It was so decided.*

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (7)

*Paragraphs (4) to (7) were adopted.*

*The commentary to article 51, as amended, was adopted.*

*Commentary to article 52 (Obligations not affected by countermeasures)*

*The commentary to article 52 was adopted.*

*Commentary to article 53 (Proportionality)*

*The commentary to article 53 was adopted.*

*Commentary to article 54 (Conditions relating to resort to countermeasures)*

*The commentary to article 54 was adopted.*

*Commentary to article 55 (Termination of countermeasures)*

*The commentary to article 55 was adopted.*

*Commentary to article 56 (Measures taken by an entity other than an injured State or international organization)*

*The commentary to article 56 was adopted.*

PART FIVE. RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

*General commentary*

*The general commentary was adopted.*

*Commentary to article 57 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization)*

*The commentary to article 57 was adopted.*

*Commentary to article 58 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization)*

*The commentary to article 58 was adopted.*

*Commentary to article 59 (Coercion of an international organization by a State)*

*The commentary to article 59 was adopted.*

*Commentary to article 60 (Responsibility of a member State seeking to avoid compliance)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

Paragraph (6)

8. Sir Michael WOOD proposed that the second sentence be deleted since it was, to say the least, unclear.

9. Mr. GAJA (Special Rapporteur) said that he had no objection, since the sentence said the same thing as the first, but in a different way.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (9)

*Paragraphs (7) to (9) were adopted.*

*The commentary to article 60, as amended, was adopted.*

*Commentary to article 61 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization)*

Paragraph (1)

10. Mr. Gaja (Special Rapporteur) said that in the first line of the English version, the word "draft" should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (13)

*Paragraphs (2) to (13) were adopted.*

*The commentary to article 61, as amended, was adopted.*

*Commentary to article 62 (Effect of this Part)*

*The commentary to article 62 was adopted.*

PART SIX. GENERAL PROVISIONS

*General commentary*

*The general commentary was adopted.*

*Commentary to article 63 (Lex specialis)*

11. Mr. Gaja said that in the penultimate line of the English text, the words "between an international organization" should be replaced by "between the international organization".

*It was so decided.*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to article 63 was adopted.*

*Commentary to article 64 (Questions of international responsibility not regulated by these articles)*

*The commentary to article 64 was adopted.*

*Commentary to article 65 (Individual responsibility)*

*The commentary to article 65 was adopted.*

*Commentary to article 66 (Charter of the United Nations)*

*The commentary to article 66 was adopted.*

*Section C.2, as reproduced in document A/CN.4/L.748/Add.2 and Corr.1, as a whole, as amended, was adopted.*

1. TEXT OF THE DRAFT ARTICLES [A/CN.4/L.748/Add.1]

12. The CHAIRPERSON invited the members of the Commission to consider the text of the draft articles on responsibility of international organizations adopted by the Commission on first reading, which formed section C.1 of chapter IV of the Commission's draft report and was contained in document A/CN.4/L.748/Add.1.

13. Mr. GAJA (Special Rapporteur) recalled that the Commission had decided to delete the word "draft" in article 47, paragraph 2, article 48, paragraphs 4 and 5, and article 61, paragraph 1; replace the words "that is not" by "other than" in article 48, paragraph 3; replace "an" by "the" after the word "between" in the penultimate line of article 63; and replace "the" by "these" in article 66.

14. Sir Michael WOOD proposed that the title of article 16 should be amended to read "Decisions, authorizations and recommendations addressed to member States and international organizations", to reflect the word order in the article itself.

*It was so decided.*

*Section C.1, as reproduced in document A/CN.4/L.748/Add.1, as a whole, as amended, was adopted.*

*Chapter IV, as a whole, as amended, was adopted.*

**CHAPTER VII. Protection of persons in the event of disasters (A/CN.4/L.751)**

15. The CHAIRPERSON invited the members of the Commission to consider chapter VII of its draft report, contained in document A/CN.4/L.751, paragraph by paragraph.

Paragraphs 1 to 14

*Paragraphs 1 to 14 were adopted.*

Paragraph 15

16. Ms. ESCARAMEIA said that she was one of the members whose views had been recorded in paragraph 15; the end of the first sentence, after the words "each concept", was difficult to understand and did not correspond to what she had said. She proposed that it should be deleted and the first two sentences combined, to read: "Other members disagreed with the equation of 'rights' and 'needs', maintaining that while 'rights' referred to a legal concept, 'needs' implied a reference to particular factual situations."

*Paragraph 15, as amended, was adopted.*

Paragraph 16

17. Mr. GAJA, recalling that the views mentioned in the last two sentences of paragraph 16 were his, said that the words "did not comply with the obligation not to reject" should be replaced by "unreasonably rejected", and that in the final sentence the phrase, "bear in mind" should be replaced by "address".

*It was so decided.*

18. Ms. ESCARAMEIA proposed that the following sentence be inserted at the end of paragraph 16: "Others thought that the rights-based approach did not preclude any of the above-mentioned considerations and merely placed the individual at the centre of the efforts of all those involved."

19. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the arguments put forward in favour of the rights-based approach were set out in paragraph 13; in his view, the sentence proposed by Ms. Escarameia should be inserted in that paragraph, not in paragraph 16, which covered the arguments against that approach.

20. Ms. JACOBSSON (Rapporteur) said that the sentence could be added to paragraph 13, preceded by the words "It was pointed out that".

21. Ms. ESCARAMEIA said that the sentence she was proposing referred to the arguments developed in paragraph 16, as indicated by the words "the above-mentioned considerations", and would therefore be meaningless if separated from that paragraph.

22. Mr. GAJA, supported by Ms. JACOBSSON (Rapporteur), suggested that the sentence be made into a new paragraph 16 bis.

23. Mr. WAKO said that while he endorsed the sentence Ms. Escarameia proposed to add, he would like reference also to be made to collective rights. As paragraph 13 indicated, it was not solely individual rights that were "at the centre of the efforts of all those involved".

24. Mr. VALENCIA-OSPINA (Special Rapporteur), supported by Mr. WISNUMURTI, said that the sentence proposed by Ms. Escarameia should be inserted at the beginning of paragraph 13, rather than at the end.

25. Ms. ESCARAMEIA said that if the sentence were inserted in paragraph 13, it would make no sense. In her view, the best solution would be to adopt a paragraph 16 bis; if that were not possible she would withdraw her proposal.

26. Mr. VALENCIA-OSPINA (Special Rapporteur) said that Ms. Escarameia's suggestion should be taken up: he was in favour of creating a paragraph 16 bis.

27. Mr. WAKO said that while he did not entirely approve of that solution, he was prepared to accept it. Perhaps, however, Ms. Escarameia could agree to refer in her proposal not only to individual rights but also to collective rights.

28. Ms. ESCARAMEIA said that the issue in question was not one of individual rights as opposed to collective rights. Moreover, the issue of collective rights had not been raised during the discussion.

29. Mr. SABOIA said that collective rights were discussed at length in paragraph 13 of the report, and that should satisfy Mr. Wako.

*Paragraph 16, as amended, and paragraph 16 bis, were adopted.*

Paragraph 17

30. Mr. VASCIANNIE said that he was not convinced that the paragraph, as it stood, fully reflected what had been said during the discussion on the possibility of intervention. He therefore put forward the following sentence: “According to some, the rights-based approach did not suggest that forceful intervention to provide humanitarian assistance in disaster situations was lawful.”

31. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, for reasons of consistency, a paragraph 17 bis should be added to accommodate Mr. Vasciannie’s proposal.

32. Sir Michael WOOD said that he was not entirely satisfied with the sentence, since the words “according to some” suggested that others thought that forceful intervention was lawful. That was not at all the case; the proposed wording was extremely problematic.

33. Mr. MELESCANU said that paragraph 17 of the report had been drafted very carefully, and the wording was balanced. The term “non-applicability” meant that one acknowledged the existence of the concept of responsibility to protect, yet agreed that it was not applicable, whereas Mr. Vasciannie’s proposal alluded to the unlawful nature of that approach. In his view, the Commission should incorporate Mr. Vasciannie’s suggestion into the current version of the paragraph, with the necessary editorial changes, rather than add a new paragraph. The important thing was to maintain a balance between the two parts of the sentence, leaving open the option of taking a decision on the concept in the future.

34. Mr. McRAE said that Mr. Vasciannie’s proposal did indeed reflect the actual discussion. He proposed that the expression “according to some” should be replaced by “the view was expressed that”, which simply indicated that the view had been expressed during the discussion.

35. Ms. JACOBSSON (Rapporteur) said that paragraph 17 had been carefully drafted. In reality, it covered a slightly different issue than the one addressed in Mr. Vasciannie’s proposal. While it was true that the view in question had been expressed, it was also true that during the discussion, some other members had not necessarily drawn a link between responsibility to protect and forceful intervention. Associating the two concepts in a single paragraph implied that such a link existed, which was not the case. She urged, therefore, that Mr. Vasciannie’s proposal should be reflected in a different paragraph.

36. Following a discussion in which Sir Michael WOOD, Mr. SABOIA, Mr. VASCIANNIE, Mr. CANDIOTI and Mr. VALENCIA-OSPINA (Special Rapporteur) took part, it was decided to include Mr. Vasciannie’s proposal in a paragraph 17 bis, to read: “The view was also expressed that the rights-based approach did not suggest that forceful intervention to provide humanitarian assistance in disaster situations was lawful.”

*Paragraphs 17 and 17 bis were adopted.*

Paragraphs 18 and 19

*Paragraphs 18 and 19 were adopted.*

Paragraph 20

37. Ms. ESCARAMEIA proposed that the second sentence should be amended to read: “However, several members emphasized the importance of the pre-disaster stage”, in order to stress the importance of disaster prevention.

38. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the addition of the word “however” weakened the paragraph instead of strengthening it: the second sentence did not contradict the first. When the Drafting Committee’s report had been considered in plenary, several members had emphasized the importance of the pre-disaster stage.

39. After an exchange of views in which Ms. JACOBSSON (Rapporteur), Ms. ESCARAMEIA and Mr. MELESCANU took part, Sir Michael WOOD proposed the following wording: “Several members emphasized the importance of addressing the pre-disaster stage.”

*Paragraph 20, as amended, was adopted.*

Paragraphs 21 to 25

*Paragraphs 21 to 25 were adopted.*

Paragraph 26

40. Ms. ESCARAMEIA proposed that a sentence should be inserted at the end of the paragraph in order to reflect a view that she and other members had expressed. It would read: “A view was expressed that a State had a duty to accept international assistance if it could not adequately protect victims of disasters on its territory.”

*Paragraph 26, as amended, was adopted.*

Paragraph 27

*Paragraph 27 was adopted.*

Paragraph 28

41. Ms. ESCARAMEIA proposed that between the second and third sentences, a new sentence should be inserted, to read: “Instead, some members preferred that the expression ‘non-governmental organizations’ be used, as is done in other legal instruments.”

*Paragraph 28, as amended, was adopted, subject to minor drafting changes in the English version.*

Paragraphs 29 to 35

*Paragraphs 29 to 35 were adopted.*

*Chapter VII of the draft report as a whole, as amended, was adopted.*

42. Mr. HMOUD said he strongly hoped that the adoption of a chapter of the draft report not available in all working languages would not set a precedent. He could go along with it as an exception, and on the understanding that it would not happen again.

43. The CHAIRPERSON assured Mr. Hmoud that a precedent had not been set.

#### **CHAPTER VIII. Shared natural resources (A/CN.4/L.752)**

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

44. Sir Michael WOOD said that in the second sentence, the words “including the existence of a practical need” should be replaced by “including whether there was a practical need”.

*Paragraph 6, as amended, was adopted.*

Paragraph 7

45. Ms. ESCARAMEIA proposed that a second sentence should be added at the end of the paragraph, to read: “They also thought that the General Assembly had already considered that oil and gas were going to be part of the topic ‘Shared natural resources’.”

46. Mr. MCRAE said that at the previous session, the Working Group on shared natural resources had questioned whether there was a mandate from the General Assembly for work in the area of oil and gas, and no one had been able to reply.

47. Ms. ESCARAMEIA said that the source of the mandate dated back to when the topic had first been proposed: an annex prepared by Mr. Rosenstock indicating that the subject covered groundwater, oil and gas,<sup>297</sup> of which the General Assembly had taken note in paragraph 8 of its resolution 55/152 of 12 December 2000. She herself had raised the question in the Working Group during the current session, but it was true that she had been the only member to do so. It would therefore be more accurate for the additional sentence she was proposing to start not with “They also thought” but with “The view was expressed”.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

*Chapter VIII of the draft report, as a whole, as amended, was adopted.*

*The meeting rose at 12.30 p.m.*

## **3033rd MEETING**

*Wednesday, 5 August 2009, at 4 p.m.*

*Chairperson: Mr. Ernest PETRIČ*

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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#### **Draft report of the Commission on the work of its sixty-first session (continued)**

**CHAPTER V. Reservations to treaties (continued)\* (A/CN.4/L.749 and Add.1–7)**

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of Chapter V of the draft report and drew attention to section B of the chapter contained in document A/CN.4/L.749/Add.1.

**B. Consideration of the topic at the present session (A/CN.4/L.749/Add.1)**

2. Ms. ESCARAMEIA recalled that the Commission had decided, at its 3031st meeting, that the term “*validité materielle*” and, where appropriate, the term “*validité*” in the French would be rendered as “permissibility” throughout the chapter. Paragraphs could be adopted on that understanding.

Paragraphs 1 to 16

*Paragraphs 1 to 16 were adopted with editorial corrections.*

Paragraph 17

3. Ms. ESCARAMEIA proposed the insertion before the last sentence in the paragraph of a new sentence reading: “Therefore, the need for guidelines addressing the issue of permissibility was questioned.”

4. Mr. PELLET (Special Rapporteur) said that, in the English version of the last sentence, the words in French “*validité substantielle*” should be added in brackets after the word “permissibility”, as a counterpart to the reverse clarification in the French version.

*Paragraph 17, as amended, was adopted.*

Paragraphs 18 to 20

*Paragraphs 18 to 20 were adopted.*

Paragraph 21

*Paragraph 21 was adopted with an editorial correction.*

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<sup>297</sup> Yearbook ... 2000, vol. II (Part Two), annex, p. 141.

\* Resumed from the 3031st meeting.