

Document:-
A/CN.4/SR.2829

Summary record of the 2829th meeting

Topic:
Adoption of the report

Extract from the Yearbook of the International Law Commission:-
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Paragraph (32), as amended, was adopted.

Paragraphs (33) to (36)

Paragraphs (33) to (36) were adopted.

Commentaries to principles 5 to 8 (A/CN.4/L.656/Add.3)

Commentary to principle 5 (Response measures)

Paragraph (1)

76. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the sixth sentence should be replaced by the following: "Such a role stems from the general obligation of States to ensure that activities within their jurisdiction and control do not give rise to transboundary harm".

Paragraph (1), as amended, was adopted.

Paragraph (2)

77. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the words "into action" in the first sentence of the English version should be deleted.

Paragraph (2), as amended in English, was adopted.

Paragraph (3)

78. Mr. Sreenivasa RAO (Special Rapporteur) said that the word "envisaged" should be placed between the words "The" and "role".

Paragraph (3), as amended in English, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

79. Mr. Sreenivasa RAO (Special Rapporteur) said that, in the second sentence of the English version, the word "operationalize" should be replaced by the words "put into operation".

Paragraph (6), as amended in English, was adopted.

Commentary to principle 6 (International and domestic remedies)

Paragraph (1)

80. Mr. Sreenivasa RAO (Special Rapporteur) proposed that, in the second sentence, the word "obligation" should be replaced by the word "requirement" and that, in the third sentence, the word "obligations" should be replaced by the word "requirements".

81. Mr. GAJA said that, in order to bring paragraph (1) into line with the paragraphs that followed, the words "each State" should be replaced by the words "State of origin".

Paragraph (1), as amended, was adopted.

Paragraph (2)

82. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the third sentence of the footnote at the end of the third sentence should be amended to read: "The USSR paid C\$ 3 million by way of compensation to Canada following the crash of Cosmos 954 in January 1978, see P. Sands, *op. cit.*, p. 887".

Paragraph (2), as amended, was adopted.

The meeting rose at 1.05 p.m.

2829th MEETING

Thursday, 5 August 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Unilateral acts of States (*concluded*)* (A/CN.4/537, sect. D, A/CN.4/542¹)

[Agenda item 5]

REPORT OF THE WORKING GROUP

1. Mr. PELLET (Chairperson of the Working Group) recalled that, following the discussion of the seventh report of the Special Rapporteur on the topic (A/CN.4/542), the Commission had decided to set up an open-ended Working Group, which had met on a number of occasions. Its task had essentially been to consider how to assist the Special Rapporteur in pursuing his study of State practice. It had drawn up a grid to be used for analysing unilateral acts on a common basis and had put together a sample of cases that might constitute unilateral acts, without prejudging their legal nature.

2. After an exchange of views that had been as full as possible, given the limited time frame available, the Working Group had adopted the grid, which proposed a number of criteria on the basis of which in-depth, systematic studies should be made. The criteria were: date; author or organ; competence of author/organ; form; content; context and circumstances; aim; addressees; reactions of addressees; reactions of third parties; basis; implementation; modification; termination/revocation; legal scope; decision of a judge or arbitrator; comments; and literature. Members of the Working Group and others had been asked, and had agreed, to undertake the studies, which were to be sent to the Special Rapporteur by 30 November 2004 to enable

* Resumed from the 2818th meeting.

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

him to collate the material studied making use of the comparative grid. The Working Group suggested that, in his next report, the Special Rapporteur should draw the necessary conclusions and try to see what lessons could be learned from the comparison.

3. Mr. GAJA said that the operation was truly a novel one; he therefore hoped that all the studies would be made available, not only to the Special Rapporteur, but to all members of the Commission in the form of an informal document.

4. The CHAIRPERSON confirmed that the studies would be circulated to members.

5. Mr. PAMBOU-TCHIVOUNDA said that, as a member of the Working Group, he wished to know whether the recommendations adopted at the previous session,² particularly recommendation 7, would continue to guide the work of the Special Rapporteur or whether he would now chart a new course on the basis of the studies to be made of State practice.

6. Mr. Sreenivasa RAO thanked the Chairperson of the Working Group for the energy and enthusiasm that he had invested in mobilizing the members of the Group to carry out case studies. Regarding the point raised by Mr. Pambou-Tchivounda, it had to be said that some of the instructions regarding methodology given to the Special Rapporteur by the Working Group at the previous session had not proved particularly helpful. The Special Rapporteur should not be burdened with an obligation to follow the past recommendations, but should be given the freedom to use them only to the extent that they pointed the way forward, particularly as the studies to be done would undoubtedly suggest a new framework for future work.

7. Mr. OPERTTI BADAN said that he supported those remarks. The Special Rapporteur should be free to identify broad lines for future work.

8. The CHAIRPERSON said that he would take it that the Commission wished to take note of the oral report of the Working Group presented by its Chairperson.

It was so decided.

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

9. The CHAIRPERSON invited the members to continue their consideration of chapter VII, section C, of the draft report of the Commission.

Chapter VII. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/L.656 and Add.1 to 3)

C. Text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission on first reading (concluded) (A/CN.4/L.656/Add.1 to 3)

2. TEXT OF THE DRAFT PRINCIPLES WITH COMMENTARIES THERETO (concluded)

Commentary to draft principle 1 (Scope of application) (concluded) (A/CN.4/L.656/Add.1)

Paragraph (9) (concluded)

10. Mr. Sreenivasa RAO (Special Rapporteur) proposed an amended version of paragraph (9), which would read:

“The focus of the present principles is on damage caused, irrespective of the fulfilment of duties of due diligence as set out in the draft articles on prevention. However, where there is failure of performance of those due diligence obligations on the part of the State of origin, claims concerning State responsibility for wrongful acts may also be made in addition to claims for compensation envisaged by the present principles.”

Paragraph (9), as amended, was adopted.

The commentary to draft principle 1, as amended, was adopted.

Commentary to draft principle 3 (Objective) (concluded) (A/CN.4/L.656/Add.2)

Paragraph (1) (concluded)

11. Mr. Sreenivasa RAO (Special Rapporteur) said that during the debate on the commentary, the point had been made that the draft principles had several objectives. He therefore suggested that the paragraph should be recast to read:

“The main objective of the present principles is to provide compensation in a manner that is predictable, equitable, expeditious and cost-effective. The present principles also pursue other objectives. Among them are: (a) the provision of incentives to the operator and other relevant persons or entities to prevent transboundary damage from hazardous activities; (b) the promotion of cooperation among States to deal with issues concerning compensation in an amicable manner; and (c) the preservation and promotion of the viability of economic activities that are important to the welfare of States and peoples.”^[...]

^[...] See also L. Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Kluwer, 2001), p. 70, fn. 19, who has identified seven functions relevant to a liability regime, namely compensation, distribution of losses, allocation of risks, punishment, corrective justice, vindication or satisfaction, and deterrence and prevention.”

12. Mr. BROWNLIE asked whether the footnote was necessary.

13. Mr. Sreenivasa RAO (Special Rapporteur) said that he agreed to the deletion of the footnote.

Paragraph (1), as amended and with a minor editorial correction by Mr. Matheson, was adopted.

³ See 2811th meeting, footnote 2.

The commentary to draft principle 3, as amended, was adopted.

Commentary to draft principle 4 (Prompt and adequate compensation) (concluded)

Paragraph (8) *(concluded)*

14. Mr. Sreenivasa RAO (Special Rapporteur) said that the second sentence of the commentary should be reworded to read:

“In the context of the present principles, the responsibility of the State for wrongful acts is not contemplated. This is, however, without prejudice to claims that may be made under the law of State responsibility and other principles of international law.”

Paragraph (8) was adopted.

The commentary to draft principle 4, as amended, was adopted.

Commentary to draft principle 6 (International and domestic remedies) (concluded) (A/CN.4/L.656/Add.3)

Paragraph (3)

15. Mr. MOMTAZ said that, since paragraph 2 of draft principle 6 emphasized that claims settlement procedures should be expeditious and entail minimal expense, it would be wise to highlight the fact that the models mentioned in paragraph (3) of the commentary fulfilled that requirement. To that end, he suggested that, at the end of the sentence, a phrase should be added which would be worded: “since in both cases the victims are authorized to avail themselves of the international procedures which have been put in place, without being obliged to exhaust any domestic remedies, which makes it possible to settle claims more expeditiously”.

16. After further contributions to the discussion from Mr. BROWNLIE and Mr. MATHESON, in which it was pointed out that the Iran–United States Claims Tribunal was not noted for the expeditious nature of its proceedings, Mr. Sreenivasa RAO (Special Rapporteur) suggested that the paragraph should read: “The United Nations Compensation Commission may offer itself as a useful model for some of the procedures envisaged under paragraph 2”. The second footnote to that paragraph should therefore be deleted and the first footnote should be amended so that it referred correctly to the United Nations Compensation Commission.

17. Mr. MOMTAZ said that even if all reference to the Iran–United States Claims Tribunal were removed, it would still be necessary to make it clear that that exemption from the obligation to exhaust domestic remedies was vital if claims were to be settled rapidly through international procedures.

18. The CHAIRPERSON suggested that the sentence proposed by Mr. Momtaz should be added following the amended wording proposed by the Special Rapporteur.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

19. Mr. Sreenivasa RAO (Special Rapporteur) suggested that paragraph (4) should be redrafted to read:

“The Commission is aware of the heavy costs and expenses involved in pursuing claims on an international plane. It is also aware that some international claims take a long time to be resolved. The reference to procedures that are expeditious and involving minimal expense is intended to reflect the desire not to overburden the victim with a lengthy procedure akin to judicial trial procedures which may act as a disincentive. The procedures envisaged hereunder are without prejudice to the right of the individual to pursue other remedies under domestic law.”

20. Mr. GAJA said that the last sentence should be deleted, since the matter covered therein should be left to the discretion of States.

Paragraph (4), as amended and with minor drafting corrections, was adopted.

Paragraph (5)

21. Mr. Sreenivasa RAO (Special Rapporteur) said that the first half of paragraph (5) should be amended to read:

“Paragraph 3 focuses on domestic procedures. The obligation has been particularized to address the State of origin. It is an equal right of access provision. It is based on the presumption that right of access can only be exercised if there is an appropriate system in place for the exercise of the rights. The first sentence of paragraph 3 therefore deals with the need to confer the necessary competence upon both the administrative and judicial mechanisms. Such mechanisms should be able to entertain claims concerning activities falling within the scope of the present principles. The first sentence emphasizes the importance of ensuring effective remedies. It stresses the importance of removing hurdles in order to ensure participation in administrative hearings and proceedings.”

22. The remainder of the paragraph would remain unchanged save that the word “expenses” should be replaced by the word “costs”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

23. Mr. Sreenivasa RAO (Special Rapporteur) suggested that paragraph (6) should be amended to read:

“The access to national procedures to be made available in the case of transboundary damage should be similar to those that a State provides under national law to its own nationals. It may be recalled that article 16 of the draft articles on prevention provides for a similar obligation for States in respect of the claims which may arise during the phase of prevention, a phase in which States are obliged to manage the risk involved in the

hazardous activities with all due diligence. A similar provision covering claims of compensation in respect of injury actually suffered, despite all best efforts to prevent damage, can also be found in article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses.”

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

Paragraph (9) was adopted with a minor editorial correction.

Commentary to draft principle 7 (Development of specific international regimes)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor editorial correction.

Paragraph (3)

24. Mr. GAJA proposed that the second half of the second sentence should be amended to read: “and accordingly it referred not to the consequences of the infringement of an obligation, but rather to the obligation itself”. The remainder of the sentence should be deleted.

25. Mr. Sreenivasa RAO (Special Rapporteur) said that in the penultimate sentence the word “accepted” should be replaced by the word “agreed”.

Paragraph (3), as amended, was adopted.

The commentary to draft principle 7, as amended, was adopted.

Commentary to draft principle 8 (Implementation)

Paragraph (1)

26. Mr. Sreenivasa RAO (Special Rapporteur) said that, in the penultimate sentence, the words “some of the examples” should be replaced by the words “some relevant examples” and the phrase “which are common and relevant as the basis of such discrimination” should be deleted.

27. Mr. BROWNLIE said that the sentence referred to discrimination on grounds of nationality, domicile or residence. Most discrimination tended to involve ethnic origin and its omission from the list seemed strange.

28. Mr. GALICKI said that the statement in the preceding sentence that “discrimination on any ground is not valid” obviated the need for a comprehensive listing of all possible grounds for discrimination. He also drew

attention to the grammatical disparity in the penultimate sentence between the verb “is” and its subject.

29. Mr. Sreenivasa RAO (Special Rapporteur) said that what was at issue in paragraph (1) was the principle of non-discrimination in the context of resolution of claims that might arise from transboundary damage. Individuals who suffered damage were sometimes not nationals of the State of origin and might therefore not get the same treatment as nationals when seeking remedies in the courts of that State. The nationality and residence issue had been raised in article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses and in the draft articles on prevention of transboundary harm from hazardous activities.³³ Discrimination in general was a separate issue, but the transboundary nature of the resolution of claims for transboundary damage made the criteria of nationality, domicile or residence the ones most problematic for individuals.

30. The grammatical problem raised by Mr. Galicki should be resolved by the replacement of the word “references” by the word “reference”.

Paragraph (1) was adopted with the amendments proposed by the Special Rapporteur.

Paragraph (2)

Paragraph (2) was adopted.

Section C, as amended, was adopted.

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.656)

Paragraph 16

31. The CHAIRPERSON invited the Commission to consider the proposed text of a tribute to the Special Rapporteur, to be inserted as paragraph 16 in section B of chapter VII of the report of the Commission, to read:

“At its 2829th meeting, held on 5 August 2004, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft principles on the liability aspect of the topic.”

The paragraph was adopted by acclamation

Section B was adopted.

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

Chapter VIII. Unilateral acts of states (A/CN.4/L.657 and Add.1)

A. Introduction (A/CN.4/L.657)

Paragraphs 1 to 15

⁴ See 2797th meeting, footnote 3.

Paragraphs 1 to 15 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.657/Add.1)

Paragraph 1

32. Mr. PELLET said that the second and third sentences should be relocated to the end of the document, forming a new paragraph.

Paragraph 1, as amended, was adopted.

Paragraph 2

33. Mr. PELLET said that, in the French text of the last sentence, the word “avait” should be replaced with the words “avait été”.

Paragraph 2, as amended in French, was adopted.

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

34. Mr. COMISSÁRIO AFONSO (Rapporteur), replying to a query by Mr. PELLET about the phrase “by virtue of the situation to which it referred”, proposed that the words “by virtue of” should be replaced by the words “varied according to”.

35. Mr. PELLET said that, in the French version, he would prefer the words “en fonction de”, rather than the word “selon”.

Paragraph 4, as amended, was adopted.

Paragraphs 5 to 13

Paragraphs 5 to 13 were adopted.

Paragraph 14

36. Mr. BROWNLIE said that the second and third sentences contradicted one another.

37. The CHAIRPERSON suggested that the word “tacit” in the third sentence should be deleted.

38. Mr. PELLET pointed out that paragraph 14 reflected the words of the Special Rapporteur in his introduction of his seventh report, so it was he who should determine what the wording should be.

39. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said the term “tacit” was a direct reference to the PCIJ decision in the *Free Zones of Upper Savoy and the District of Gex* case. Waiver was not assumed; it was an explicit court decision and a tacit waiver must be the result of unequivocal acts.

40. The CHAIRPERSON suggested that the paragraph should be left in abeyance pending consultations between the Special Rapporteur and Mr. Brownlie.

It was so decided.

Paragraphs 15 to 19

Paragraphs 15 to 19 were adopted.

Paragraph 20

41. Mr. PELLET, referring to recognition of States or Governments, questioned the statement that “the General Assembly did not consider that that sensitive issue was part of the topic of unilateral acts”.

42. Mr. BROWNLIE said that he had been the origin of that statement, but he had phrased it less categorically. Several times during the discussion, he had said that it could not be presumed that the General Assembly had intended the Commission to take up the subject of recognition as part of the topic of unilateral acts because the recognition of States and Governments had been a separate agenda item on the original 1949 list of agenda items for the Commission.⁴

43. The CHAIRPERSON suggested that the phrase “the General Assembly did not consider that” should be deleted and that the word “not” should be inserted between the words “was” and “part of”.

44. Mr. BROWNLIE suggested that the third sentence should be amended to read: “The view was expressed that the recognition of States or Governments should be excluded from the study because it was not to be assumed that the General Assembly regarded that sensitive issue as part of the topic of unilateral acts”. The following sentence should also be added at the end of the paragraph: “In this context, it was pointed out that the recognition of States and Governments formed a separate item in the original list of topics proposed by the Commission in 1949”.

Paragraph 20, as amended, was adopted.

Paragraph 21

45. Mr. ECONOMIDES proposed that the words “the latter concept being much broader” should be added at the end of the first sentence and that, at the beginning of the French text of the second sentence, the words “Il fallait aussi” should be replaced by the words “Il faudrait ainsi”.

Paragraph 21, as amended, was adopted.

Paragraph 22

46. Mr. PELLET said that, at the start of the French text of the third sentence, the words “On aurait dû” should be replaced by the phrase “En outre, il aurait fallu”.

Paragraph 22, as amended in French, was adopted.

Paragraph 23

47. Mr. GAJA said that paragraph 23 incorrectly reflected a comment that he had made and should be redrafted. In the first sentence, the words “some aspects of the classification used could” should be replaced by the words

⁴ See 2791st meeting, footnote 4.

“the way in which the classification was used could sometimes” and the words “qualify some of the cases presented as” by the words “present as unilateral acts *stricto sensu*”. The words “as unilateral acts *stricto sensu*” at the end of the paragraph should be deleted.

48. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he could accept Mr. Gaja’s amendment, but wished to make it clear that he himself had, from the very start of his work on the topic, made a clear distinction between legal unilateral acts in the strict sense of the term, as an express manifestation of will specifically designed to produce legal effects, and conduct of a State that did not, strictly speaking, constitute a manifestation of will. Mr. Gaja seemed to be suggesting that he had confused the two phenomena.

49. Mr. GAJA said that the problem was with the way in which the paragraph was drafted: it seemed to suggest that he himself had been criticizing the classification, but, in fact, he had been criticizing the way in which it was sometimes used.

50. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) suggested that the words “It was pointed out that” at the beginning of the paragraph should be amended to show that it was one member who had expressed the view in question.

51. Mr. Sreenivasa RAO said that, unless members had openly disagreed on a certain issue, it was not customary to refer to “a member” and “other members” in the report.

52. Mr. OPERTTI BADAN suggested that the Spanish text of the paragraph might be acceptable if the words “*Había que señalar*” were replaced by the words “*Se señaló*”.

Paragraph 23, as amended by Mr. Gaja and Mr. Opertti Badan, was adopted.

Paragraph 24

53. Mr. GAJA said that, in the first sentence, the words “full of *de facto* and *de jure* examples and situations taken from practice” were very strange. Something to the effect that the report was full of examples of recognitions *de facto* and *de jure* would make more sense. In the third sentence, the definite article should be replaced by an indefinite article before the words “unilateral commitment”. The last sentence should be amended to read: “Recent examples from proceedings before ICJ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*) showed that the question of the competence of State organs to engage the State through unilateral acts was complex”.

54. Mr. PELLET said that he was quite satisfied with the wording of the first sentence in the original French version. However, he endorsed Mr. Gaja’s suggested amendment for the last sentence, provided that the title of the Court case was spelled out in full. That comment applied to other references to that case appearing elsewhere in chapter VIII.

55. The CHAIRPERSON said he took it that the Commission wished to adopt paragraph 24, on the understanding that the first sentence would be redrafted to meet Mr. Gaja’s concern and with the other amendments suggested by Mr. Gaja and Mr. Pellet.

Paragraph 24, as amended, was adopted.

Paragraph 25

56. Mr. MATHESON said that, since the Commission used the term “unilateral acts” in the sense of acts having legal effects, the words “political unilateral acts” in the first sentence could give rise to confusion. He therefore suggested that the word “unilateral” should be deleted.

57. Mr. OPERTTI BADAN said that he endorsed Mr. Matheson’s suggestion. He further suggested that the words “and this should be one of the Commission’s tasks” should be added at the end of the second sentence.

58. Mr. PELLET said that he also endorsed Mr. Matheson’s suggestion. Referring to the eighth sentence, he wondered what exactly was meant by the word “overview”, which, in isolation, seemed rather odd.

59. Mr. KOLODKIN recalled that the term “expository study” had been used by Mr. Brownlie and other members during the relevant discussion. In the penultimate sentence, which he presumed was intended to reflect his comments, he requested that the last phrase should be amended to read: “since, for example, the concepts of *jus dispositivum* or reciprocity would not play the same role”.

60. Mr. BROWNLIE said that he agreed that “expository study” would be more appropriate than “overview”.

61. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 25 with the amendments suggested by Mr. Matheson, Mr. Opertti Badan and Mr. Kolodkin.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 29

Paragraphs 26 to 29 were adopted.

Paragraph 30

62. Mr. ECONOMIDES suggested that the words “the intention of the author State of the act and” should be added after the words “depended on criteria such as”.

Paragraph 30, as amended, was adopted.

Paragraph 31

63. Mr. MONTAZ, referring to the penultimate sentence, which reflected his comments, suggested that the words, “in some cases”, should be added before the words “they were still a source of international law” in order to avoid a generalization.

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 35

Paragraphs 32 to 35 were adopted.

Paragraph 36

64. Mr. PELLET said that he did not see the point of the words “since their inclusion would lead to the progressive development of international law”.

65. The CHAIRPERSON suggested that those words should be deleted.

Paragraph 36, as amended, was adopted.

Paragraphs 37 to 53

Paragraphs 37 to 53 were adopted.

New paragraph 54

66. Mr. PELLET recalled his earlier proposal that the second and third sentences of paragraph 1 should form new paragraph 54, which would read: “At its 2818th meeting on 16 July 2004, the Commission established an open-ended Working Group on unilateral acts of States, chaired by Mr. Alain Pellet. The Working Group held four meetings”.

67. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the information contained in those sentences did not follow on logically from paragraph 53, which was the last of the Special Rapporteur’s concluding remarks.

68. Mr. PELLET said that the solution would be to add a new heading entitled “4. Conclusions of the Working Group” after paragraph 53.

New paragraph 54 was adopted on that understanding.

New paragraph 55

69. Mr. COMISSÁRIO AFONSO (Rapporteur) read out the following text, which should be inserted as new paragraph 55:

“The Working Group agreed to retain a sample of unilateral acts sufficiently documented to allow for an analysis in depth. It also established a grid which would make it possible to use uniform analytical tools (the grid includes the main features of unilateral acts, such as form, organ, context, reactions, etc.). The members of the Working Group shared a number of studies which would be effected in accordance with the established grid. These studies should be transmitted to the Special Rapporteur by 30 November 2004. It was decided that the synthesis, on the basis of these studies exclusively, would be entrusted to the Special Rapporteur, who would take them into consideration in order to draw the relevant conclusions in his eighth report.”

70. Mr. PELLET suggested that the grid should be reproduced in a footnote and an appropriate reference to it should be inserted at the end of the second sentence.

71. Mr. DAOUDI said that he endorsed that suggestion, on the understanding that only the grid was reproduced.

72. Mr. MOMTAZ, referring to the new paragraph 55, said that it would make more sense for the word “organ” to come first in the list of the main features of unilateral acts to be studied.

73. Mr. KATEKA said that he also endorsed Mr. Pellet’s suggestion.

74. Mr. GAJA said that, in the English text of the grid, the word “arbiter” should be replaced by the word “arbitrator”.

75. The CHAIRPERSON said that he took it that the Commission wished to adopt new paragraph 55, as read out by the Rapporteur, with the amendments suggested by Mr. Pellet, Mr. Momtaz, Mr. Kateka and Mr. Gaja.

New paragraph 55, as amended, was adopted.

New paragraph 56

76. Mr. PELLET proposed the insertion of an additional paragraph, which would read: “At its 2829th meeting, the Commission took note of the report of the Working Group”.

New paragraph 56 was adopted.

Section B, as amended, was adopted.

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

Chapter IX. Reservations to treaties (A/CN.4/L.658 and Corr.1 and Add.1 and 2)

A. Introduction (A/CN.4/L.658)

Paragraphs 1 to 21

Paragraphs 1 to 21 were adopted.

Section A was adopted.

Paragraph 22

77. Mr. PELLET (Special Rapporteur) proposed that, in the second sentence, the phrase “a complementary section to the eighth report on ...” should be replaced by the phrase “a corrigendum to the part of the eighth report dealing with ...”.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 23 bis (A/CN.4/L.658/Corr.1)

Paragraph 23 bis was adopted.

Paragraphs 24 to 26

Paragraphs 24 to 26 were adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (A/CN.4/L.658 and Add.2)

1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.658)

Paragraph 27

Paragraph 27 was adopted.

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-SIXTH SESSION (A/CN.4/L.658/ADD.2)

Commentary to guideline 2.3.5 (Widening of the scope of a reservation)

Paragraph (1)

78. Mr. GAJA said that the word “strengthen” in the last sentence in the English text should be replaced by the word “widen”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

79. Mr. ECONOMIDES said that to replace the words “a minority” by the words “the minority” might be the best way to reflect the fact that a sizeable minority of the Commission had strongly contested the assumptions in question. Secondly, he suggested that the phrase “... who took the view that these rules might unduly encourage States to widen existing reservations” should be replaced by the phrase “... who took the view that these rules ran counter to the 1969 Vienna Convention and might unduly weaken treaty law by encouraging States to widen existing reservations”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

80. Mr. GAJA said that the reference in the footnote to the actions of the depositary of the 1978 Protocol to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL Convention) gave the impression that there could be exceptions to the rules set out in the draft guidelines. In fact, however, the objections to the widening of the reservation by France had been concerned with the merits of the reservation rather than with its lateness. It was important to make the point that, in practice, there was no derogation from the principle of acceptance. He therefore suggested that, in the last sentence of the footnote, the words “the depositary does not appear to have made acceptance of the new wording dependent on the unanimous agreement of the other parties” should be deleted. The words “in this instance” would then be followed by the words “some of the other parties did in fact object to the modified reservation ...”.

81. Mr. PELLET (Special Rapporteur) said that he stood by his wording. The depositary in question—IMO—had taken no action at all. Certainly, it had not circulated information about the widening of the reservation.

82. Mr. GAJA conceded that there was no evidence that the depositary had indicated that the objection was permissible. Instead of the proposed deletion, the sentence could be clarified by the insertion of the words “the substance of” before the words “the modified reservation”.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

83. Mr. GAJA said that, either in the quotation or in the last sentence of the paragraph, it should be specified that the reference was to the Secretary-General of the Council of Europe.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

Paragraph (14)

84. Mr. GAJA said that the statement in the middle of the second sentence that “prior to the late formulation of a reservation, the treaty applied in its entirety as between the contracting parties” was true only if there were no other reservations. The meaning would be clearer if the words “with regard to the provision that is the object of that reservation” were inserted before the words “the treaty”.

85. Mr. PELLET (Special Rapporteur) said that Mr. Gaja’s point, which was a valid one, would be better made by inserting the words “unless other reservations had been made” after the words “the contracting parties”.

Paragraph (14), as amended by the Special Rapporteur, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Commentary to guideline 2.4.9 (Modification of an interpretative declaration)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Commentary to guideline 2.4.10 (Limitation and widening of the scope of a conditional interpretative declaration)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

86. Mr. GAJA said that, in view of the appearance of the word “conditional” in the last sentence, it would be less confusing for the reader if the words “unconditional withdrawal” were replaced by the words “simple withdrawal”.

Paragraph (4), as amended, was adopted.

Commentary to guideline 2.5.12 (Withdrawal of an interpretative declaration)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

87. Mr. GAJA said that the “interpretative declaration” by the Government of Italy concerning the Convention relating to the Status of Refugees had generally been regarded as a reservation. The text should contain some indication that the nature of the declaration had been called into question.

88. Mr. PELLET (Special Rapporteur) suggested that the first sentence of the footnote at the end of the second sentence of the paragraph should be followed by a new sentence that would read: “There are doubts about the nature of the declaration, which has been regarded as a reservation”.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Commentary to guideline 2.5.13 (Withdrawal of a conditional interpretative declaration)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Section C, as amended, was adopted.

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.658 and Corr.1 and Add.1)

1. INTRODUCTION BY THE SPECIAL RAPporteur OF HIS NINTH REPORT

Paragraphs 1 and 2 (A/CN.4/L.658/Add.1)

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted with minor drafting changes.

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

89. Mr. PELLET (Special Rapporteur) said that, in both the French and the English texts, the words “a different institution” should be incorporated into a relative clause—for example, “which constitutes a different institution”—rather than being left in apposition.

Paragraph 5, as amended, was adopted.

2. SUMMARY OF THE DEBATE

Paragraphs 6 to 17

Paragraphs 6 to 17 were adopted.

3. SPECIAL RAPporteur’S CONCLUDING REMARKS

Paragraph 18

Paragraph 18 was adopted with minor drafting changes.

Paragraph 19

90. Mr. PELLET (Special Rapporteur) said that, in subparagraph (c), the words “une question très complexe et délicate” in the French text should be in the plural. In subparagraph (e), the words “auteur de la réserve” in the alternative version of draft guideline 2.6.1 should be replaced by the words “auteur de l’objection”.

Paragraph 19, as amended, was adopted.

Section B, as amended, was adopted.

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

The meeting rose at 12.55 p.m.

2830th MEETING

Friday, 6 August 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Tribute to the memory of Sir Robert Jennings

1. The CHAIRPERSON invited the members of the Commission to observe a minute of silence in tribute to the memory of Sir Robert Jennings, a former Chairperson of the International Law Commission, who had died on 5 August 2004.

The members of the Commission observed a minute of silence.

Draft report of the Commission on the work of its fifty-sixth session (concluded)

Chapter X. Fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.659)

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.