Document:-
A/CN.4/SR.2558

Summary record of the 2558th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

41. Mr. SIMMA (Chairman of the Drafting Committee) asked Mr. Al-Khasawneh if he would agree to the inclusion of explanatory notes to draft guidelines 1.1.1 and 1.1.3 stating that the Commission would take those guidelines up again at its next session.

42. Mr. AL-KHASAWNEH said he was prepared to accept any proposal that would make it clear that a problem remained and that the draft guideline would be re-examined at a later date.

43. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the last proposal made by the Chairman of the Drafting Committee.

44. Mr. PELLET (Special Rapporteur) said he would agree to having a vote taken, whatever the result might be, but in principle, he considered it irregular for a member of the Commission to keep insisting until he got his way when he did not really have grounds for making a judgement. However, he would ensure that the commentary reflected all the positions that had been expressed.

45. Mr. ROSENSTOCK said he questioned the usefulness of an explanatory note on draft guideline 1.1.3. He supported the Special Rapporteur, and felt that the problem raised by draft guideline 1.1.3 was different from the problem raised by draft guideline 1.1.1; in the latter case, the Commission might wish to reserve its position because its future work would help clarify the matter further.

46. Mr. SIMMA (Chairman of the Drafting Committee) explained that his proposal was not intended to address only the concern expressed by Mr. Al-Khasawneh. The question whether reservations could apply to treaties as a whole or only to some of their provisions had been raised by several members of the Commission, and concerned several draft guidelines, particularly draft guidelines 1.1.1 and 1.1.3. In draft guideline 1.1.3, the expression "purports to exclude the application of a treaty"—which was understood to refer to a treaty as a whole—referred to a problem which was quite similar, although not identical, to the one raised by draft guideline 1.1.1. It would therefore be reasonable for the Commission to re-examine that important question at its next session.

47. Mr. PELLET (Special Rapporteur) said that if the Commission intended the position taken on draft guideline 1.1.1 to extend to the entire set of draft guidelines, including draft guideline 1.1.3, he would be willing to accept the proposal of the Chairman of the Drafting Committee. He would also include the relevant explanations in the commentary.

The meeting rose at 1.18 p.m.

2558th MEETING

Friday, 7 August 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

1. The CHAIRMAN invited the Observer for the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe to brief the Commission on the work of the Council, and more particularly on the work of CAHDI.

2. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) summarized and commented on the main points of a document that had been prepared and circulated exclusively for the use of the members of the Commission. He drew the Commission's attention in particular to the appendices to the document, especially appendix 3, which contained the text of a recommendation of the Committee of Ministers of the Council of Europe to member States on debts of diplomatic missions and permanent missions, as well as those of their members;[1] and appendix 4, with the text of a recommendation on the classification of documents concerning State practice in the field of public international law.[2] The Secretary General of the Council of Europe had transmitted the two recommendations to the Secretary-General of the United Nations, in the context of the United Nations Decade of International Law.[3]

3. The Second Summit of Heads of State and Government of the Council of Europe had adopted a declaration

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* Resumed from the 2554th meeting.

[1] Council of Europe, Committee of Ministers, 595th meeting of the Ministers' Deputies, recommendation No. R (97) 10 (12 June 1997).

[2] Ibid., recommendation No. R (97) 11 (12 June 1997).

[3] Proclaimed by the General Assembly in its resolution 44/23.

and an action plan.[4] The latter included the establishment of a permanent court of human rights by the end of 1998 that would replace the European Commission of Human Rights and the European Court of Human Rights. Several members of CAHDI had been elected judges of the new court.

4. During the most recent meeting of CAHDI, in March 1998, there had been an in-depth discussion of that Committee's role. Some members believed that the Committee was above all a body where Governments could coordinate their positions, while others wished to place greater emphasis on its practical contribution to the development and codification of international law. In that regard, two current activities deserved mention.

5. The first activity concerned reservations to treaties. At the request of CAHDI, the Committee of Ministers of the Council of Europe had authorized the establishment of a group of specialists on reservations to international treaties under the Committee's auspices. The 1st meeting of the Group of Specialists on Reservations to International Treaties was held in Paris on 26 and 27 February 1998. It had decided to focus its future work on the following issues: whether the 1969 Vienna Convention met the requirements of all treaties, particularly, human rights treaties; who should determine the admissibility of reservations to international treaties; what the legal effects of illicit reservations to international treaties were; and whether there was a distinct regime or practice of the Council of Europe's member States regarding reservations to international treaties. The Group agreed on a pilot project that would assign to CAHDI the role of monitoring reservations to multilateral treaties, which meant that it would be responsible for examining all reservations in the sphere of universal treaties, especially those relating to human rights, and for advising the Council of Europe about any reservations that appeared problematic. In the case of reservations, CAHDI would be careful to avoid duplicating the Commission's activities; it believed it could make a practical contribution to the Commission's work, which would be focused more on the legal aspects of reservations.

6. The second activity was a pilot project initiated by the Council of Europe in 1994 on State practice relating to State succession and issues of recognition. A report would be prepared, in cooperation with several research institutes, on the basis of 16 contributions received from member States; it would be a further contribution to the United Nations Decade of International Law.

7. CAHDI was determined to continue and strengthen its cooperation with the Commission, in view of the usefulness of interaction between experts and Government delegations. However, it wondered if such relations should be of a formal nature or not. Under the 1971 agreement between the Secretariats of the United Nations and the Council of Europe, the United Nations and its agencies and bodies could take part in the work of all the intergovernmental committees of the Council of Europe. In the case of the Commission, the question was whether it should be formally represented at the meetings of CAHDI and its subsidiary organs or whether Commission members should be invited on a personal basis. Some CAHDI members saw clear advantages to both formal and informal cooperation, but the majority believed that cooperation should be informal. Thus, at the most recent meeting, the Chairman had been authorized to extend invitations to members of the Commission on an individual basis, as had already been done in the case of the invitation to the Special Rapporteur on reservations to treaties, Mr. Pellet, who had taken part in the work of CAHDI on reservations. The Committee considered the Commission to be an important collaborator and was determined to strengthen cooperation between the two bodies.

8. Mr. MELESCANU said that there were two differences between CAHDI and the Commission. First, the former was part of a regional organization that concentrated its actions in one region, Europe, while the latter was an international body concerned with international law. Secondly, and above all, unlike CAHDI, the Commission was poor. Mutual benefit might be obtained from the second difference.

9. It was regrettable that two bodies were simultaneously working on almost identical topics, especially as the Commission had a large number of European members. A structural, formal relationship between the Commission and CAHDI should be established as soon as possible, at least for legal issues. Nothing prevented a member of the Commission who took part in the work of CAHDI from presenting the latter's official position and adding personal comments and opinions.

10. Such a structural relationship would have two components. First, the exchange of information, especially regarding planning of work in order to avoid duplication and optimize the contribution of the Council of Europe and CAHDI to the work of the Commission, which had at least a dozen European "representatives". Since Europe had many universities and experts in public international law, CAHDI might be able to call increasingly on central European universities and experts. Secondly, the contribution of the States members of the Council of Europe to the work of the Sixth Committee of the General Assembly and the Commission, which would be informed of their opinions and comments (harmonized, if possible) on certain relevant issues. The practice of the European countries and the European school of public international law should be given greater importance in the Commission's work.

11. Mr. LUKASHUK said that the document presented by the Observer for CAHDI could form the basis for closer relations between the Commission and the Council of Europe and CAHDI. The Council of Europe played a very important role in the progressive development of public international law and was not afraid to set aside certain traditional approaches. The same could be said of the principle of democracy, which was a principle of domestic and international law that the Commission could perhaps consider including in its agenda. The Council of Europe was to be commended for its initiative of classifying information on State practice; despite technological advances, such information was still relatively

[4] *2nd Summit of Heads of State and Government of the Council of Europe: An action plan for a united Europe, Strasbourg, 10-11 October 1997* (Council of Europe Publishing).

unknown, and that hindered the progressive development of public international law.

12. The Council of Europe should perhaps accord more importance to the teaching and dissemination of international law: in civil society, even among statesmen, knowledge of international law was very incomplete, and at the same time international law was incorporated into the domestic law of a great number of countries. That gave rise to problems with respect to training for and the preparation of jurists, for which adequate provision was unfortunately not made in most countries. Perhaps a convention on the teaching of international law should be drawn up.

13. Lastly, the Commission should establish more specific and more structured cooperation with CAHDI.

14. Mr. CRAWFORD welcomed the initiative of CAHDI of inviting Commission members on an individual basis and suggested that similar invitations could be sent to the Special Rapporteurs when the subject of their specific expertise was under discussion. He said that any opinions expressed by members were purely personal, however.

15. The amended model plan for the classification of documents concerning State practice in the field of public international law[5] mentioned in appendix 4 of the document circulated by the Observer for CAHDI, was very useful. The same could not be said of the disastrous classification adopted by the Congress of the United States of America.[6]

16. Mr. ECONOMIDES said that CAHDI also differed from the Commission in that it was an intergovernmental body and that its mandate focused on the exchange of views and coordination; the Commission was a body of independent experts with a mandate for study and reflection. Duplication of the work of the two bodies would presumably not occur because the Commission considered matters from a global perspective, and the regional practice of CAHDI could make a very useful contribution to the Commission's work. Lastly, CAHDI by no means neglected the issue of the teaching of law, and its classification of State practice was very useful for the rational study of that subject.

17. Mr. GOCO, noting that the members of CAHDI had agreed to establish informal links with the Commission, wondered what kind of formal arrangement could be envisaged. He said that it was very important for Commission members to know the reactions of States to Commission drafts, so they would like to know if, in that context, CAHDI could help to collect and summarize the comments made by the States in the region. Regional practice should contribute to defining an international perspective, but the particular concerns of the different regions also had to be considered. It was therefore necessary to determine the optimum linkage between the two dimensions.

18. Mr. FERRARI BRAVO said that, except for the special status granted to the United States and Canada, CAHDI had for a long time been a coordinating body for the action of the Governments of Western Europe alone, and there might have been some duplication with the corresponding bodies of the European Union. Today, the Council of Europe and the European Court covered a territory that stretched from Lisbon to Vladivostok and the size of the area posed some adjustment problems.

19. Regarding the activities of CAHDI, he said that public international law had taken shape in Europe before it had extended to the rest of the world. Europe had most of the relevant experience, but it needed direct links with the experience of other continents. CAHDI should consider inviting members of the Commission from other regions, as observers, if it wished to have an influence on the work carried out within the framework of the United Nations.

20. Mr. HAFNER said that the amended model plan for the classification of documents concerning State practice in the field of public international law was based on the 1968 plan,[7] which had been updated to take into account the subsequent development of public international law and a review of the use of the original plan by different countries. Although no classification was above criticism, it was essential that a plan should be able to stand the test of time, as had been the case with the 1968 plan. It therefore did not seem wise to already be considering updating the new plan with which there was no experience.

21. Mr. Sreenivasa RAO said that legal bodies from other regions were closely following the work of CAHDI. The model plan for the classification of documents concerning State practice in the field of public international law proposed by CAHDI was interesting but had a surprising omission—it made no mention of environmental law—and he wondered whether other European bodies would look at the issue.

22. Mr. MIKULKA, recalling the topics covered by the Commission and CAHDI, said he was surprised that the topic for which he had been appointed Special Rapporteur, that of nationality in relation to the succession of States, was absent from the programme of work of CAHDI. Some members of the Commission had considered the subject too "European"; perhaps CAHDI felt that it was too "East European".

23. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) replied that the report that CAHDI was preparing on the Council of Europe pilot project on the collection and diffusion of documentation on State practice relating to State succession and issues of recognition contained a chapter on State succession and nationality. However, member States had provided relatively few comments on that aspect; which was all the more surprising because it was that type of concern that was at the origin of the elaboration of the European Convention on Nationality. The European Commission for Democracy through Law (Venice Commission) had prepared a report on the consequences of State succession for nationality.[8]

[5] Recommendation No. R (97) 11 (see footnote 2 above), appendix.

[6] See M. Nash (Leich), "Contemporary practice of the United States relating to international law", *American Journal of International Law* (Washington, D.C.), vol. 90, No. 2 (April 1996), pp. 265-267.

[7] See Council of Europe, Committee of Ministers, resolution (68) 17 (28 June 1968).

It therefore could not be said that the Council of Europe did not take an interest in the topic.

24. As to environmental law, part 19 of the model plan for the classification of documents concerning State practice in the field of public international law, on the legal aspects of international relations and cooperation in specific matters, contained a section on the environment; the subject might merit a separate chapter, however. As the 1968 model classification plan had not been updated for 30 years, CAHDI would probably not embark on updating the new plan in the near future.

25. The Council of Europe had undergone important changes, and CAHDI, which was still a body of government experts responsible for coordinating the views of its members with regard to the United Nations and the Commission, was currently also trying to make a specific contribution to the work of the Commission, while avoiding overlapping and interference, and also dissipation of effort. Moreover, CAHDI essentially considered the political aspects of problems while the Commission concentrated its action on the legal aspects. CAHDI was increasingly requesting the opinions of non-member Governments, which was why there were currently 15 States with observer status, including three permanent observers (United States, Canada and Japan).

26. Members of the Commission invited to take part in the work of CAHDI on an individual basis were supposed to contribute in their personal capacity, even though they might give an account of the Commission's discussions.

27. CAHDI was very aware of the need to develop the teaching of public international law, especially for government officials. The Council of Europe had adopted various cooperation and assistance programmes, such as the programmes Demodroit and Themis devoted to the dissemination of legal doctrine and to law training. The programmes had been only for central and eastern Europe, but recently it had been decided to extend them to all the Council's member States.

28. In reply to Mr. Melescanu's comments on the financial implications of cooperation between the Commission and CAHDI, he said that, following discussion of the question, all the members of CAHDI had recognized the need for links between the two bodies. The CAHDI secretariat had informed its members of the financial implications of participation in its meetings of a member of the Commission and said that it could not bear the cost of such participation. In the specific case of reservations, CAHDI had been fortunate to benefit from the presence of Mr. Pellet, at no cost. Mr. Pellet had not been invited because he was European: someone from another region of the world could equally well have been invited; however, in that case, CAHDI would have had to assume the cost of that person's participation because there was no provision for such expenses in the Council of Europe's budget. Contrary to what had been said, the Council of Europe was not rich. It had adopted a zero-growth budget for 1998, and there was little likelihood that things would change in 1999. Nevertheless, the members of CAHDI had agreed that collaboration with the Commission was very useful and had decided to discuss it at their next meeting.

29. With regard to the structural relationship between the two bodies, the Commission needed to decide on the type of links that it wished to maintain with CAHDI. Under CAHDI rules, a representative of the Commission could participate in an official capacity; however, the Commission must decide if it wished to be represented officially and assume the corresponding financial obligations. The Commission could inform CAHDI once it had reached a decision, and CAHDI would discuss the matter.

30. During discussions on the Commission's long-term programme of work, a member had proposed the subject of the legal effects of corruption. The Council of Europe had been working on the topic since 1992. The Committee of Ministers of the Council of Europe had concluded the Agreement establishing the "Group of States against Corruption—GRECO",[9] which authorized participation on an equal footing by both member and non-member States of the Council of Europe (including some members of OECD). GRECO had the mandate to evaluate to what extent States members of the Council of Europe applied their contractual obligations to combating corruption. Its work would initially be based on a resolution adopted by the Committee of Ministers setting out 20 guidelines on combating corruption.

31. The Multidisciplinary Group on Corruption was negotiating a draft criminal law convention on corruption[10] with a much greater scope than the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, already adopted by OECD, since both passive and active corruption on the part of officials in the public administration, in the judiciary and the executive and in elective bodies, as well as corruption in the private sector and in international organizations, were qualified as a criminal offence. Important discussions were also under way with regard to reservations to that Convention. Lastly, another convention was being negotiated on liability for crimes of corruption, and a model code of conduct for public officials was also being drawn up. CAHDI was ready to contribute to any related work the Commission might carry out.

32. Mr. GALICKI said that, on the basis of his long experience with the Council of Europe, he wished to add some comments on the topic of nationality to those made by the Observer for CAHDI. He assured the Commission that the topic, in particular in the context of succession, received all due attention in the Council of Europe, not only in general, through the European Convention on Nationality, opened for ratification in 1997, but also in the context of the work of the Committee of experts on nationality, of which he was Vice-Chairman.

33. Draft recommendations would be submitted to the Committee of Ministers, including one on the reduction of cases of statelessness and another on improper appeals against legislative provisions on nationality. There had also been numerous studies on the topic of succession.

[8] Council of Europe (Strasbourg, 10 February 1997), document CDL-INF (97) 1.

[9] Ibid., Committee of Ministers, resolution (98) 7 (5 May 1998).

[10] Ibid., Parliamentary Assembly, document 8114, appendix II.

Furthermore, a conference on nationality was programmed for 1999, to mark the fiftieth anniversary of the Council of Europe.

34. However, the Council of Europe's statutory position with regard to cooperation and coordination with other bodies should be clarified; in particular, with its former sponsors, such as the European Committee on Legal Cooperation, in order to avoid any duplication of efforts. That being understood, cooperation between CAHDI and the Commission should be encouraged because it was mutually beneficial.

35. Mr. MIKULKA said that he felt that the Observer for CAHDI and Mr. Galicki had not replied to his question. He knew that the Council of Europe was working on the topic of nationality and was also aware of the work that had just been described, particularly with respect to the European Convention on Nationality, article 18 of which contained three or four paragraphs on State succession, whereas the Commission had produced a whole declaration on the topic.

36. What he wanted to know was whether there was ongoing communication between the Council of Europe and the Commission. He still did not know the position of CAHDI on his third report on nationality in relation to the succession of States[11] because, to date, there had been no response to it in the Council of Europe. It had been mentioned that a theoretical study would be carried out on the topic of nationality, but the study would take years, while the Council already had a plethora of documents on the topic, especially his third report, expanded by footnotes. References had been made to a mutually beneficial dialogue, but the Council remained silent. He therefore asked the Observer for CAHDI to transmit his remarks to the Committee at its next meeting so as to encourage its members to send him their comments.

37. Mr. LUKASHUK informed the Observer for CAHDI that the Commission was considering the topic of corruption and would find it most useful to receive documentation on the work that the Committee was carrying out on the topic, in the context of exchanges of information between the two bodies.

38. Mr. SIMMA said that, contrary to what Mr. Lukashuk appeared to believe, the Commission was not considering the issue of corruption. It was merely one of the topics that the Commission might study at a later date.

39. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that if he had not replied adequately to Mr. Mikulka's question, it was because he had misunderstood it. Mr. Goco had wanted to know whether CAHDI had adopted a common position with regard to comments on the Commission's texts. The Committee had not yet considered the report in question, at least not formally. Normally, it tried to meet before the session of the Sixth Committee in order to be able to make a worthwhile contribution to its discussions. Previously, Mr. Eiriksson's presence on the Commission and in CAHDI had ensured liaison between the two bodies. As Mr. Goco had said, States members of the Council of Europe, who were also members of CAHDI, received information on all the Commission's work, but CAHDI tended to focus its discussions on the work of the special rapporteurs of the Commission, who provided information on all its activities. CAHDI would consider Mr. Simma's report at its next meeting, at which he (Mr. Benítez) would also transmit Mr. Mikulka's views.

Reservations to treaties (*concluded*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,[12] A/CN.4/L.563 and Corr.1)

[Agenda item 4]

CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION (*concluded*)

40. Mr. SIMMA (Chairman of the Drafting Committee) proposed that the Commission should adopt the report of the Drafting Committee (A/CN.4/L.563 and Corr.1), subject to the following conditions: a footnote would be added to guideline 1.1 indicating that it would be reviewed in the light of discussions on interpretative statements, and that guideline 1.1 could be reworded, if necessary, following such a review; guidelines 1.1.5 and 1.1.6 would be referred to the Drafting Committee to be reviewed in the light of the opinions expressed by Commission members; lastly, guideline 1.1.3 would be reviewed in parallel to guideline 1.1.1 at the Commission's next session, and a footnote would be added to that effect.

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Drafting Committee.

It was so agreed.

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

[Agenda item 1]

42. Mr. SIMMA (Chairman of the Drafting Committee) reported on the status of the Commission's work.

43. Messrs BROWNLIE, CANDIOTI, ECONOMIDES, LUKASHUK, PELLET, Sreenivasa RAO and ROSENSTOCK discussed how to ensure that the report of the Commission to the General Assembly covered everything that the Commission had achieved during its current session.

44. The CHAIRMAN suggested setting up a working group which, with the assistance of the secretariat, would help the Special Rapporteur on the prevention of transboundary damage from hazardous activities to finalize his commentary, for submission to the General Assembly.

[11] *Yearbook . . . 1997*, vol. II (Part One), document A/CN.4/480 and Add.1.

*Resumed from the 2534th meeting.

[12] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

It was so agreed.

State responsibility[13] (*continued*)* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[14] A/CN.4/490 and Add.1-7,[15] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

ARTICLES 9 AND 11 TO 15 *BIS* (*concluded*)*

45. Mr. ECONOMIDES, referring to article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State) proposed by the Special Rapporteur in paragraph 284 of his first report on State responsibility (A/CN.4/490 and Add.1-7), said that the provision was of no great interest and was the least pertinent of all the draft articles. Perhaps it could be eliminated, especially as the Special Rapporteur himself had said that the situation that it dealt with was extremely rare. Also, as had been observed, the idea of an organ placed at the disposal of a State by another State had connotations that were, if not exactly colonial, at least humiliating from the point of view of national sovereignty. One thing was certain, no State would like to find itself in the situation contemplated in the article. Lastly, the provision would have been acceptable if, as previously, it had been a question of international organizations as well as States. The elimination of the former was an additional reason to delete the article.

46. Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) proposed by the Special Rapporteur in paragraph 284 of his first report was acceptable on condition that, in the French version and as suggested by Mr. Pellet (2556th meeting), the term *compétence* was used rather than *pouvoir*. He also approved of the deletion of articles 11 to 14 because it improved the text.

47. Article 15 (Conduct of organs of an insurrectional movement), as proposed by the Special Rapporteur in paragraph 284 of his first report, was the trickiest article that the Commission had had before it at the current session, since it had to cover three different situations with regard to the attribution of responsibility. The first was the situation explicitly targeted by the provision, where an insurrectional movement became the new Government and assumed responsibility for wrongful acts that had occurred before it took power. Everyone agreed on that. The second was the situation that arose at the point where the insurrectional movement was "established", to use the word employed in paragraph 1; that was to say, at the point where the movement controlled part of the territory of the State. Appreciation of that situation, on the basis of the principle of the "effectiveness" of power, did not cause any problems either; the insurrectional movement was responsible until the end of the insurrection, whether or not it was successful. The third situation was much more difficult to discern in the draft article: it was the situation that existed until the insurrectional movement that opposed the Government was "established", that was to say, up to the point where the movement controlled part of the territory, and it was ambiguous from the point of view of government responsibility. That situation remained implicit in the text and needed to be re-examined.

48. As to article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State), proposed in paragraph 284 of the first report, he believed it to be an indispensable provision, as did the majority of the members. However, it would be appropriate to say that the conduct was "adopted and acknowledged" by a State, rather than "adopted or acknowledged". It was better to strengthen a single condition than to set two weaker conditions. The Drafting Committee could perhaps review that aspect of the text.

49. Mr. CRAWFORD (Special Rapporteur) said that he was pleased that draft articles 9 and 11 to 15 *bis* that he had proposed had generally been well received. Article 15 had even been the subject of an exemplary mini-debate. The Commission's discussion made it clear in any event that the issue of the responsibility of international organizations and States for wrongful acts committed by such organizations should be dealt with separately, as a different topic. Accordingly, no reference should be made to it in the draft articles. All Commission members seemed to agree that a saving clause should be kept, although they had not agreed on its wording. That was one of the matters which the Drafting Committee could deal with.

50. There had been no objection to the elimination of the case of international organizations in article 9. It was evident that the situation contemplated in that article was extremely rare. Although some members considered that the provision reeked of colonialism, as had been mentioned, in particular with regard to the reference to the United Kingdom Privy Council, in paragraph 220 of his first report, the Special Rapporteur had in mind much more recent situations that had nothing to do with colonialism, situations in which the State in question agreed that another State should place organs at its disposal. Article 9 thus did have its usefulness and it would be advisable to keep it. Its presence would cause fewer problems than its absence.

51. All the members of the Commission had agreed that articles 11 to 14 should be eliminated. Mr. Pellet had made a very pertinent comment about article 12 on a point which should be given further thought. However, that issue was peripheral to the problem of attribution that the draft before the Commission sought to settle, and it was evidently too soon for the Commission to deal with it. Although some members wished to delete the negative provisions of the draft, they had rightly recommended that the most pertinent passages of the commentary should be retained.

* Resumed from the 2556th meeting.

[13] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[14] See footnote 12 above.

[15] Ibid.

52. The Commission had also agreed that articles 14 and 15 should be merged. The Drafting Committee could consider whether the new article 15 should be formulated in a positive or negative form. It could also consider the relationship between articles 15 and 5 (Attribution to the State of the conduct of its organs), namely, the relationship between the organs of "insurrectional movements" and "territorial governmental entities" of States. Any risk of confusion between the two should obviously be avoided.

53. Numerous questions had been raised about the wording used in new article 15. For example, the word "established" in paragraph 1 indicated that there really was an international practice with regard to insurrectional movements and that there was a threshold at which movements acquired a certain international status. As to whether they should be referred to as "insurrectional movements" or "national liberation movements", the Drafting Committee could choose between the two terms or even use both, but it would be reminded that there were no longer many national liberation movements in the world today. Anyway, it was not for the Commission to analyse the international status of insurrectional movements. Similarly, the Commission was not called on to consider the issue of the responsibility of such movements in depth, even though they obviously bore responsibility.

54. The Commission had also accepted the principle underlying article 15 *bis*, regarding events that a State subsequently adopted or acknowledged. In view of the situations prevalent in the world today, that provision was absolutely necessary. Mr. Economides had proposed a modification which would be taken into consideration, and Mr. Bennouna had noted that the provision actually covered two different situations, depending on the point at which the State decided that the responsibility that it assumed should begin. However, it did not appear entirely necessary to emphasize the differentiation in the article, which was only supposed to settle the problem of attribution of responsibility.

55. Mr. PELLET said that the Special Rapporteur seemed to be using the term "attribution" in a much narrower sense than usual.

56. Mr. BENNOUNA said that it should be clearly stated that the status of insurrectional movements and national liberation movements was not one of the points that the Commission had studied, despite the personal political and historical sensitivities of its members. The issue was a matter of legal personality. It did not refer to a simple problem of terminology, even though one might hesitate to use the word "insurrectional".

57. Mr. CRAWFORD (Special Rapporteur) replied that he was using the term "attribution" in the sense used in article 3 (Elements of an internationally wrongful act of a State). As to Mr. Bennouna's comments, he endorsed them without reservation.

58. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 9 and 11 to 15 *bis* to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

2559th MEETING

Wednesday, 12 August 1998, at 12.15 p.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Draft report of the Commission on the work of its fiftieth session (*continued*)*

CHAPTER IX. *Reservations to treaties* (A/CN.4/L.562 and Corr.1 and Add.1 and 2 and A/CN.4/L.564)

A. Introduction (A/CN.4/L.562)

B. Consideration of the topic at the present session (A/CN.4/L.562 and Corr.1 and Add.1 and 2)

1. Mr. DUGARD (Rapporteur), introducing chapter IX of the draft report on reservations to treaties, said that the draft was an accurate reflection of the introduction by the Special Rapporteur on reservations to treaties and the debate in the Commission. Therefore, he urged its adoption.

2. Mr. PELLET (Special Rapporteur) said that he would point out to the secretariat some editorial changes to the draft which would not affect the substance. His only substantive suggestion was that footnote 1 in A/CN.4/L.562/Add.1 should be deleted, as the reference to Japan was inappropriate.

Sections A and B, as amended, were adopted.

3. Mr. ROSENSTOCK said that the Special Rapporteur might wish to look at footnote 6 in A/CN.4/L.562/Add.1 to see if it was optimally phrased.

The meeting rose at 12.30 p.m.

* Resumed from the 2546th meeting.