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Summary record of the 2587th meeting

Topic:
State responsibility

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2587th MEETING

Tuesday, 15 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN extended a warm welcome to the members of the International Law Seminar and invited the Commission to resume its consideration of the topic of State responsibility.

2. Mr. CRAWFORD (Special Rapporteur), introducing chapter I, section C, of his second report on State responsibility (A/CN.4/498 and Add.1-4), dealing with part one, chapter V (Circumstances precluding wrongfulness), of the draft, said that at issue were general "excuses", for want of a better term—which were available to States in respect of conduct which would otherwise constitute a breach of an international obligation. Chapter V must therefore be seen in relation to chapter III (Breach of an international obligation).

3. The report traced the evolution of chapter V from 1930 through to the very important list of "excuses" developed by the Special Rapporteur, Sir Gerald Fitzmaurice, in his work on the law of treaties,[4] an unacknowledged source of the later list by the Special Rapporteur on State responsibility, Mr. Roberto Ago,[5] although Fitzmaurice's list differed from Ago's in that certain items on it were not contained in chapter V, most importantly the question of previous non-performance by another State. The Fitzmaurice list given in chapter I, section C, of his second report referred to two different circumstances dealing with previous non-performance by the other party (Nos. 1 and 6), as well as incompatibility with a peremptory norm (No. 8). That had ultimately led to the Ago list of six circumstances precluding wrongfulness.

4. In commenting on chapter V, in the comments and observations received from Governments (A/CN.4/492),[6] no Government doubted the need for it. France proposed lumping all of chapter V into a single article, but acknowledged that there were important distinctions between different conditions which would be obscured by so doing. The chapter had been very extensively referred to in the literature and in judicial decisions and heavily relied on, for example in the *Rainbow Warrior* arbitration and the *Gabčíkovo-Nagymaros Project* case. Notwithstanding a number of individual suggestions made in his report, chapter V was one of the permanent contributions of the draft articles and a major contribution to international law. The questions which it raised were essentially of formulation, improvement and clarification in some respects, and certainly not of radical change.

5. A general point worth bearing in mind was the very concept of circumstances precluding wrongfulness. The initial proposition was that the draft articles were not concerned with formulating the content of primary rules, but with the framework of secondary rules of responsibility, yet it was of course the primary rules which determined what was wrongful. Hence, a difficulty could arise in distinguishing between the proper content of the primary rules and the notion of circumstances precluding wrongfulness. The commentary on that point went so far as to say that the circumstances precluding wrongfulness actually brought about the temporary or even definitive displacement of the obligation. That notion was difficult to square with the idea of secondary rules or the distinction between an excuse in respect of the performance of an obligation and the continued existence of the obligation. In that regard, ICJ had been very clear in the *Gabčíkovo-Nagymaros Project* case. Hungary had relied on necessity as a ground for termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, signed in Budapest on 16 September 1977; the Court had excluded that possibility, stating that although Hungary might be entitled to rely on necessity as a ground for excusing its non-performance of the treaty, the treaty nonetheless continued to exist. The plea of necessity, even if justified, had not terminated the treaty. As soon as the state of necessity ceased, the duty to comply with the treaty revived. That seemed perfectly correct.

6. It appeared to be the case that, with the excuse of necessity, and probably many of the others, the effect of the excuse was not to displace the obligation, and certainly not definitively; the obligation still existed—there was simply an excuse for non-performance for the time being. That was an important factor, as the obligation still had some weight and was a relevant consideration in the

* Resumed from the 2578th meeting.

[1] 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.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.

[4] See the fourth report of the Special Rapporteur, *Yearbook ... 1959*, vol. II, pp. 44-47 and the commentary to the articles at pp. 63-74, document A/CN.4/120.

[5] See the eighth report of the Special Rapporteur, *Yearbook ... 1979*, vol. II (Part One), pp. 27-66, document A/CN.4/318 and Add.1-4 and *Yearbook ...1980*, vol. II (Part One), pp. 14-70, document A/CN.4/318/Add.5-7.

[6] See 2567th meeting, footnote 5.

application of the excuse, because it represented the norm, i.e. what should have happened. Consequently, in considering whether the excuse of necessity, force majeure or something else should apply, it was important to have regard to the obligation itself. In that respect, it was not accurate to say that the obligation was displaced. Moreover, if the obligation was displaced, it might well be that the circumstances precluding wrongfulness were, so to speak, conditions of the primary obligation. There was plainly a difference between an excuse for non-performance of an obligation and a ground for its termination. That distinction had been drawn in the 1969 Vienna Convention itself, as the Court had pointed out in the *Gabčíkovo-Nagymaros Project* case. The ground of impossibility of performance had been regarded more as an excuse for non-performance than as a basis for termination of a treaty.

7. Another important difference between the question of the continued validity of an obligation and the question of the excuse for non-performance, was that, generally speaking, the former required action by one of the parties to put an end to the treaty or obligation. In other words, the State concerned must elect to take action. However, the circumstances precluding wrongfulness operated more or less automatically with regard to events which might be unforeseen, occurred at a particular time and had to be relied on as at that time. Hence, that difference was one of the reasons justifying his proposed inclusion of an additional circumstance relating to *jus cogens*. To invoke *jus cogens* in relation to a treaty was to strike down the treaty as a whole in future for all purposes, whereas to invoke it in respect of a particular occasional event had quite different implications and consequences in terms of the legal regime.

8. In sum, the notion of circumstances precluding wrongfulness, at least as conceptualized in the commentary, seemed to be too broad, and at issue was in fact a general set of rules of general international law in respect of obligations which provided temporary excuses for non-performance of a subsisting obligation.

9. A third difference between circumstances precluding wrongfulness and the termination of obligations was that the circumstances precluding wrongfulness applied with regard to non-treaty obligations as well as treaty obligations, and it was very difficult for one State to terminate a non-treaty obligation, for example an obligation under customary international law. There might be circumstances in which they could be suspended, although there was very little State practice even in that regard. By and large, the situation under general international law would remain, something that made circumstances precluding wrongfulness as an excuse for non-compliance even more important in the field of general international law than in the field of the law of treaties.

10. However, the Government of the United Kingdom of Great Britain and Northern Ireland, in its comments,[7] had said that there seemed to be a difference among some of the circumstances precluding wrongfulness. Some appeared to make the conduct lawful, as it were, but it was not certain that others did. For example, an action taken in a state of distress or necessity might be excused, but in relation to necessity, in particular, the action was obviously being taken *faute de mieux*, the situation was undesirable and it ought to be terminated as soon as possible. It was different from the situation created in cases of consent or self-defence. In other words, it was the old philosophical distinction between a justification and an excuse. A person who killed someone in a fit of insanity might be excused from criminal responsibility, but the act was not lawful, whereas if someone was killed in self-defence, it was lawful. That was implicit in chapter V and in article 34 (Self-defence). It might be asked whether that ought and could be made explicit by drawing a distinction between circumstances precluding wrongfulness and circumstances precluding responsibility. One could well argue that necessity precluded responsibility for the conduct without in some sense precluding its wrongfulness, whereas self-defence did preclude wrongfulness. Perhaps the Commission need not go so far as to make that distinction in chapter V itself, but the matter had to be discussed in the commentary.

11. It was plain from the commentary to article 29 (Consent),[8] that the article related exclusively to consent given in advance of the act. Consent given after the event to conduct which was unlawful but might have been lawful if the consent had been given beforehand was clearly an example of waiver, which fell within part three (Settlement of disputes), not part one (Origin of international responsibility). A number of States had raised difficulties with the formulation of article 29, including the notion of consent validly given, because it implied a whole body of rules about when the consent was given, by whom, in relation to what, and so on. A more fundamental problem arose, however, namely, whether consent constituted a circumstance precluding wrongfulness at all.

12. It was well established under international law that a civil aircraft could not fly over the territory of another State without its consent; otherwise that State was entitled to take measures to prevent it, although not necessarily to shoot the aircraft down. The draft seemed to conceive of consent in that case as a circumstance precluding wrongfulness and that overflight was thus somehow potentially wrongful. Was that really true? Surely, the position was that the primary rule was properly formulated: an aircraft of another State could not fly in another State's airspace without that State's consent. Hence, the consent requirement was integrated into the particular primary obligation. Where the consent was given, no question of breach of obligation arose—it was simply a question of the application of the primary rule.

13. If that analysis was right, a serious question arose as to whether there was any room for consent as a circumstance precluding wrongfulness. Admittedly, some obligations could not be dispensed with and they applied irrespective of consent, certainly in terms of the consent of other States. One State could not dispense another State from complying with human rights obligations. The same applied to norms of *jus cogens*, although the operation of the norm could sometimes be displaced; for instance, consent to the use of armed force on the territory of the

[7] Ibid.

[8] For the commentaries to articles 28 to 32 see *Yearbook ... 1979*, vol. II (Part Two), pp. 94 et seq.

consenting State would normally be lawful, even though the underlying norm of *jus cogens* continued to exist.

14. For the reasons explained in the report, he believed that there were considerable problems with the formulation of article 29. Was it necessary? It seemed better to conceptualize consent given in advance as something which the primary rule permitted. Again, the nature of the consent and who was able to give it depended on the particular primary rule. Accordingly, it seemed best to regard consent as a specific tailor-made component of each primary rule in respect of those cases where consent could properly be given. To do so had the incidental but considerable advantage of avoiding the difficulties of formulation in article 29. In short, he recommended that article 29 be deleted but that the deletion should be explained in the commentary to chapter V.

15. The analysis he had just made was that of Fitzmaurice, who had proposed another circumstance precluding wrongfulness, namely, acceptance of incompatible conduct at the time of the conduct. One could conceive of a situation in which one State expected another to accept what it intended to do and it performed the act without obtaining formal clearance in advance. One might contend that it was perhaps neither consent given in advance nor waiver after the event, but actually an intermediate case of acceptance of non-performance—a circumstance precluding wrongfulness. That might be true technically, but it tended to confuse the issue. A clear distinction should be drawn between consent given in advance, which might need to be inferred from the circumstances, and which made the conduct lawful, on the one hand, and a waiver of the breach, even if waived immediately, on the other hand. To talk about implied acceptance at the time of the wrongful conduct was to open the door to various forms of abuse. Consequently, the notion of acceptance of non-performance as such should not be included as a circumstance precluding wrongfulness.

16. Article 30 (Countermeasures in respect of an internationally wrongful act) was on countermeasures, which formed a very controversial chapter (chap. III) of part two of the draft. A number of Governments, in the comments and observations received from Governments, for example France and Japan, had pointed to the need to link article 30, to the countermeasures provisions in part two, which had been drafted much later. Clearly, if the part two provisions were retained, that link would need to be made. It had also been said that it was necessary to differentiate between countermeasures which were measures taken by one or more States in response to unlawful conduct but essentially in a decentralized manner, and conduct adopted under the auspices of an international organization that was lawful according to the rules of that organization—most dramatically, of course, sanctions taken under the Charter of the United Nations. Collective responses of that sort were not countermeasures; they were measures authorized by a competent international organization and did not belong in the framework of article 30. As far as the Charter was concerned, they were specifically covered by article 39 (Relationship to the Charter of the United Nations) and in other respects either by the *lex specialis* principle or by the relevant primary rules and the relationship between them.

17. There did appear to be agreement that countermeasures lawfully taken precluded the wrongfulness of the conduct as far as the target State was concerned and hence it was evident that chapter V should deal with countermeasures, or at least refer to them. On the other hand, within the present scheme of the draft, countermeasures were dealt with in detail in part two as a consequence of the wrongful conduct of another State. Thus, article 30 was in a sense a subsidiary, and not the primary, reference to countermeasures. The Commission might well prefer not to deal with countermeasures in part two, but nonetheless to retain the reference in chapter V. If so, he thought it essential to mention the conditions and qualifications that existed in international law as a basis for lawful countermeasures. His proposal was to maintain article 30 in square brackets for the moment, with an explanation that the Commission had no doubt whatever that countermeasures lawfully taken could constitute a circumstance precluding wrongfulness. If the Commission retained the regime of countermeasures in part two, then article 30 would be drafted quite simply. It would suffice to mention countermeasures and put in a cross-reference to the regime of countermeasures in part two. If the regime was removed from part two, the position would be quite different and the case for a more elaborate treatment of countermeasures in article 30 would be much stronger.

18. Article 31 brought together force majeure and fortuitous event. Force majeure was not quite the same as fortuitous event, which was more like impossibility of performance. Force majeure was a case in which someone was, by external events, prevented from doing something, and that could include cases of coercion, as already discussed in the context of chapter IV. It was well established in jurisprudence that the plea of force majeure existed in international law. For example, it was referred to in passing by the arbitral tribunal in the *Rainbow Warrior* case[9] and again by the Court in the *Gabčíkovo-Nagymaros Project* case, as well as in a number of international treaties. At the time of the first reading of the draft, the Secretariat had produced a very useful and comprehensive study[10] of the jurisprudence on force majeure, and no State had proposed that the exception for force majeure be deleted. However, a number of drafting problems did arise. The first was the rather odd reference to knowledge of wrongfulness in paragraph 1, because there was no general requirement in international law for a State to know that its conduct was not in conformity with an obligation. A State might need to be aware of a certain factual situation. It had been necessary for Albania to be on notice that there were mines in the North Corfu Channel. But it had not been necessary for it to know that failure to warn was wrongful: that was an obligation imposed by international law on States and ignorance of the law was not an excuse. Hence, the reference to knowledge of wrongfulness was confusing and subjective and should be deleted. He had proposed a version of article 31 which dealt with the problem in the conclusions as to chapter V of the draft contained in chapter I, section C, of his second

[9] See 2567th meeting, footnote 7.

[10] "*Force majeure* and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

report. The example given in the notes to the proposal was the case of an aircraft which strayed into the territory of another State because of an unforeseen error in the navigational system. Assuming that that was a case of a circumstance precluding wrongfulness, it could be resolved in the drafting of article 31.

19. Secondly, force majeure did not apply under article 31 where a State had contributed to a situation of material impossibility. The problem was that States often so contributed simply as part of a chain of events and without necessarily acting unlawfully. The exclusion was therefore unduly broad and he had formulated a narrower version of the same exception, based on article 61 of the 1969 Vienna Convention, to meet the case.

20. Thirdly and most importantly, article 31 made no allowance for voluntary assumption of risk although it was perfectly clear that, where a State voluntarily assumed the risk of a force majeure situation, the occurrence of such a situation did not preclude wrongfulness. He had therefore provided for that exception.

21. He agreed with the French Government's comment, in the comments and observations received from Governments, that there was no need to mention the case of fortuitous event. If such events amounted to force majeure, they precluded wrongfulness. If not, they did not need to be dealt with in chapter V. The study prepared by the Secretariat presented no case in which a fortuitous event that should have precluded wrongfulness fell outside a proper understanding of the notion of force majeure.

22. As to article 32 (Distress), it was important to note the difference between distress, on the one hand, and force majeure and necessity, on the other. Distress concerned a situation where a person was responsible for the lives of other persons in his or her care, for example, the captain of an aircraft which was forced to land on foreign territory in an emergency. It was the kind of situation covered by many international instruments, including the United Nations Convention on the Law of the Sea, and in that context formed part of the primary rules relating to jurisdiction over ships. Yet the issue of distress could also arise in the framework of the secondary rules of State responsibility, despite the argument that the primary rules covered such situations. In practice, although the primary rules might provide a defence for the individual captain of a ship or bar the receiving State from exercising jurisdiction, they were not applicable to the issue of responsibility. Where the captain was a State official, his or her conduct was attributable to the State and raised the question of responsibility. Hence the need for a draft article on distress.

23. A novel feature of article 32 was that its scope had been extended beyond the narrow historical context of navigation to cover all cases in which a person responsible for the lives of others took emergency action to save life. That aspect of article 32 had been generally accepted as a case of progressive development, for example by the tribunal in the *Rainbow Warrior* arbitration, which had involved potential medical complications for the individuals concerned. The broader scope of the article should therefore be maintained.

24. He was suggesting a number of changes of wording to the article, in the conclusions as to chapter V contained in chapter I, section C, of his second report. As situations of distress were necessarily emergency situations, distress should logically qualify as a circumstance precluding wrongfulness provided the person acting under distress reasonably believed that life was at risk. Even if it turned out subsequently to have been a false alarm, the agent's reasonable assessment of the situation at the time should constitute a sufficient basis for action.

25. The United Kingdom, in the comments and observations received from Governments, had raised the question of whether the notion of distress should be extended to cover cases of humanitarian intervention to protect human life, even where the intervening State had no particular responsibility for the persons concerned. It had mentioned the case of police officers crossing a boundary to rescue a person from mob violence. In his view, that was not a situation of distress as normally conceived and ought to be covered instead by the defence of necessity.

26. Article 33 (State of necessity), perhaps the most controversial of the draft articles, dealt with the state of necessity, which had not been envisaged by Fitzmaurice and had been criticized in the literature. However, he saw it as a clear case of consolidation of international law through progressive development. A state of necessity, as defined in article 33, could be invoked only in extreme cases and as such it was comparable to the notion of a "fundamental change of circumstances" in the law of treaties. Dire predictions of massive instability in the law as a result of the latter notion had failed to materialize. Whenever courts were confronted with arguments based on a fundamental change of circumstances, they exercised extreme caution and in most cases rejected them. Nevertheless, there had been some cases in which a fundamental change in circumstances had been acknowledged as a ground for the termination of a treaty. Similarly, there were cases in which the necessity of action was so compelling that it justified a particular form of conduct, for example in relation to the urgent conservation of a species in the case of *Fur seal fisheries off the Russian coast*,[11] an argument taken up by both parties in the *Gabčíkovo-Nagymaros Project* case. ICJ could have decided in the latter case that, whether or not article 33 reflected customary international law, Hungary had not proved that it was in a situation of necessity. But it had gone further and expressly endorsed article 33 as a statement of general international law. In his opinion, it had been right to do so and also right in adopting a cautious approach to the application of the doctrine at the level of principle. Given the Court's endorsement, it would be unwise for the Commission to delete article 33, especially since the United Kingdom was the only Government calling for deletion, an argument that seemed to contradict its plea for a more developed doctrine of humanitarian intervention under the auspices of distress. Despite the doubts expressed in the *Rainbow Warrior* arbitration, the doctrine of necessity had been broadly endorsed, was relied on by States from time to time and provided a useful escape valve. He therefore proposed that it should be retained.

[11] See the award rendered by the Tribunal of Arbitration at Paris, under the treaty between the United States and Great Britain, concluded at Washington, February 29, 1892; text in H. La Fontaine, *Pasicrisie internationale, 1794-1900* (The Hague, Martinus Nijhoff, 1997), p. 426.

27. However, there were two important issues to be addressed in connection with necessity. The first was whether necessity as defined in article 33 was the appropriate framework within which to resolve the problem of humanitarian intervention involving the use of force, i.e. action on the territory of another State contrary to Article 2, paragraph 4, of the Charter of the United Nations. Clearly, the defence of necessity could never be invoked to excuse a breach of a *jus cogens* norm, and article 33 so provided. But it was generally agreed that the rules governing the use of force in the Charter were *jus cogens*, so that article 33, as it stood, did not cover humanitarian intervention involving the use of force on the territory of another State. Yet the commentary to article 33[12] argued for a refined version of *jus cogens* to allow for such intervention and was thus, in his view, inconsistent with the text. The rules on humanitarian intervention were primary rules that formed part of the regime governing the use of force, a regime referred to—though not exhaustively stated—in the Charter. They were not part of the secondary rules of State responsibility. It followed that the secondary rules should not seek to resolve that problem and that article 33 should remain unchanged in that regard.

28. The second issue, of scientific uncertainty, arose whenever necessity was relied on to justify action for the conservation of a species or the destruction of a large structure such as a dam that was purportedly in danger of collapse. Prior to the occurrence of the catastrophe, no infallible prediction could be made. The question was whether article 33 made sufficient provision for scientific uncertainty and the precautionary principle, embodied, for example, in the Rio Declaration on Environment and Development (Rio Declaration)[13] as principle 15 and in the Agreement on the Application of Sanitary and Phytosanitary Measures[14] as article 5, paragraph 7. In the *Gabčíkovo-Nagymaros Project* case, both parties had recognized the existence of scientific uncertainties but had disagreed about their seriousness. ICJ had rightly stated that the mere existence of uncertainty was not sufficient to trigger necessity. The WTO Appellate Body had taken a similar view in the *Beef Hormones* case,[15] stating that the precautionary principle and the associated notion of uncertainty were not sufficient to trigger the relevant exception. On the other hand, article 33 should not be formulated so stringently that the party relying on it would have to prove beyond the shadow of a doubt that the apprehended event would occur.

29. After some vacillation, he had, on balance, decided against expressly including the precautionary principle in the article, firstly because ICJ had endorsed article 33 and secondly because necessity stood at the outer edge of the tolerance of international law for wrongful conduct. However, the Drafting Committee might wish to consider whether article 33 could be made somewhat more sensitive to the serious problems of scientific uncertainty.

30. He was proposing a minor alteration to article 33 to cope with situations in which the balance of interests was not merely bilateral but concerned compliance with an *erga omnes* obligation. For example, in the *South West Africa* cases, the implicit argument that the adoption of the policy of apartheid in South West Africa was necessary for good governance did not affect the individual interests of Ethiopia or Liberia but the interests of the people of South West Africa. That idea should be reflected in article 33. With those provisos, he proposed that article 33 should be retained in its present form.

31. Self-defence, the subject matter of article 34, had never been omitted from a list of circumstances precluding wrongfulness. In the comments and observations received from Governments, the only minor argument against article 34 concerned the exact formulation by reference to the principles of the Charter of the United Nations. In his view, the notion of self-defence in international law was that which was stated but not comprehensively defined in Article 51 of the Charter. The exact terms in which the Commission referred to it were a matter for the Drafting Committee.

32. However, article 34 failed to mention the fact that certain obligations, such as international humanitarian law or non-derogable human rights, were unbreachable even in self-defence. That point should be made in an additional subparagraph. Fortunately, ICJ had dealt with the problem in the context of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. It had been argued that nuclear weapons could not be used if their effect was to violate environmental obligations. The Court had drawn a distinction between general environmental obligations and environmental obligations specifically intended as a condition of total restraint in time of armed conflict. It was only in the latter case that self-defence could not be invoked as a justification. He had therefore proposed a paragraph (article 29 ter, paragraph 2) embodying that idea.

33. One question was whether article 34 should deal specifically with injury to third States. The assumption underlying the article was that it was concerned with circumstances precluding wrongfulness as between States acting in self-defence and aggressor States. However, a State acting in self-defence might be entitled to take action against third States. He felt there was no need to make an explicit reference to that circumstance, which was adequately covered by the relevant primary rules.

34. A circumstance that had not been covered by the draft articles was that of performance in conflict with a peremptory norm. It had been expressly proposed by Fitzmaurice in his fourth report[16] and referred to in the literature. The problem stemmed partly from the way in which the system established by the 1969 Vienna Convention operated in cases of *jus cogens.* The invocation of *jus cogens* invalidated the treaty as a whole. The 1938 treaty between the Third Reich and Czechoslovakia[17] was

[12] For the commentaries to articles 33 to 35, see *Yearbook ... 1980*, vol. II (Part Two), pp. 34 et seq.

[13] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[14] See 2570th meeting, footnote 4.

[15] World Trade Organization, *EC Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, 16 January 1998 (WT/DS26/AB/R-WT/DS48/AB/R), para. 194.

[16] See footnote 4 above.

[17] Agreement concerning the Sudeten German Territory (Munich, 29 September 1938) (M. O. Hudson, *International Legislation* (Washington (D.C.), 1949), vol. VIII (1938-1941), p. 131, No. 528).

a case in point, but such cases were very rare. Usually, breaches of *jus cogens* occurred through the continued performance of a perfectly normal treaty in the event of, for example, a proposed planned aggression or the supply of aid to a regime that became genocidal. Vis-à-vis the normal operation of the treaty, such breaches were occasional or incidental.

35. Another peculiarity of the Vienna Convention regime was that responsibility for invoking the inconsistency of a treaty with *jus cogens* lay with the parties themselves, the implication being that the parties had the choice of electing in favour of the treaty and against the norm. That problem could also arise in connection with obligations under general international law. For example, the obligation to allow transit passage through a strait might in certain exceptional circumstances be incompatible with a norm of *jus cogens*. Unless such cases of occasional inconsistency were recognized, the potential invalidating effects of *jus cogens* on the underlying obligation seemed excessive. He was proposing a provision to that effect (article 29 bis). The Commission had agreed, when addressing the issue in the context of article 18 (Requirement that the international obligation be in force for the State), paragraph 2, in chapter III, that it would be necessary to revert to the question of the supervening norm of *jus cogens* if it was not satisfactorily resolved in chapter V. Nevertheless, article 18, paragraph 2, was concerned only with the unusual case of a new norm of *jus cogens*. A new and unforeseen conflict was more likely to arise than a new peremptory norm. Chapter V was the natural place for the article and had the additional advantage of resolving the problem raised in article 18, paragraph 2.

36. A second new proposal related to the maxim *exceptio inadimplenti non est adimplendum*, which he would refer to as "the *exceptio*". It was well established in the traditional sources of international law. PCIJ had ruled in the case concerning the *Factory at Chorzów* that "one Party cannot avail himself of the fact that the other has not fulfilled some obligation … , if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question" [see p. 31]. That principle had been applied in a variety of contexts. The Court had avoided applying it in the case concerning the *Diversion of Water from the Meuse*, but its very avoidance was a tribute to the principle involved since it was incorporated as a principle of interpretation. ICJ had applied it in the context of loss of the right to invoke a ground for terminating a treaty in the *Gabčíkovo-Nagymaros Project* case.

37. The *exceptio* had substantial comparative law underpinnings and had been broadly accepted by Fitzmaurice as a ground for excusing non-performance of treaties. The Special Rapporteur on State responsibility, Mr. Willem Riphagen, had proposed to deal with it in the framework of what he called reciprocal countermeasures.[18] He had drawn a distinction between general countermeasures, taken in response to a wrongful act where the countermeasure bore no relationship to the wrongful act, and reciprocal countermeasures. An example of the former would be the freezing by State A of State B's bank account in its territory as a countermeasure for a breach of human rights by State B. An example of a reciprocal countermeasure would be the placement by State A of State B's ambassador in close confinement as a countermeasure to identical action against its ambassador in State B. Whether or not the particular case would be envisaged, there were obviously cases in which reciprocal countermeasures were a reasonable reaction to the breach of a synallagmatic obligation. Such cases should be accommodated in the draft articles.

38. A clear distinction needed to be drawn between the broad and narrow forms of the *exceptio*. Fitzmaurice had formulated it broadly in respect of any synallagmatic obligation. But the formulation in the case concerning the *Factory at Chorzów* was much narrower: there was a causal link between State A's violation of the obligation and State B's violation. Article 80 of the United Nations Convention on Contracts for the International Sale of Goods also stated the narrow version: "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission". The broader approach was to be found in Fitzmaurice's reports and in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts,[19] which stipulated that where the parties were to perform simultaneously, either party could withhold performance if the other was not willing and able to perform. The causal relationship was thus dispensed with. For the reasons stated in chapter I, section C, of his second report, the narrow version of the *exceptio* should be separately recognized. It was not enough to deal with it under the law relating to the suspension of treaties because that law required a material breach, which was narrowly defined. Secondly, the narrow version of the *exceptio* applied automatically by operation of law. It was an excuse if the circumstance arose because it was a separate form of impossibility that ought to be recognized. The generic form of the *exceptio* had been sufficiently resolved by the law of treaties in respect of treaty obligations and the law of countermeasures in respect of all obligations. There was no need to recognize Riphagen's reciprocal countermeasures, in the law on countermeasures, but it was necessary to recognize the *Chorzów Factory* form of the *inadimplenti* doctrine as an automatic and temporary excuse for non-compliance with an obligation. He had formulated a proposal to that effect.

39. The so-called "clean hands" doctrine, if it existed at all, corresponded in his view to the doctrine of inadmissibility in proceedings and was not a circumstance precluding wrongfulness.

40. The question of procedural and other incidents for invoking circumstances precluding wrongfulness included the question of article 35 (Reservation as to compensation for damage). Some States had criticized article 5 for envisaging no-fault liability. Actually, it would have done so only if it had stated that there was no element of fault in a situation in which a State was excused from performance, something which was, a priori, unlikely. With no element of fault, as in the case of self-defence, there was no room for compensation save as provided by the primary rules in respect of incidental injury

[18] See the sixth report of the Special Rapporteur, *Yearbook ... 1985*, vol. II (Part One), pp. 10-11, document A/CN.4/389.

[19] International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (Rome, UNIDROIT, 1994).

to third parties. In cases such as necessity, however, it seemed desirable to envisage compensation. By definition, cases of necessity were not the fault of any party, so why should the party whose expectations of performance had been thwarted be left to carry the loss? If a State agent acting under distress put a ship into a harbour and, as a result of the distress, caused pollution to that harbour, the receiving State should not be left to bear the loss. There was no case for upholding such a position. Furthermore, to do so would be to disincline States to assist in saving life in situations of distress.

41. As for state of necessity, the case was even more compelling, because, by definition, in such situations a State acted in its own interests or in other interests of concern to it and ought therefore to bear the financial consequences, at least to the extent that was equitable or appropriate. He would therefore argue very strongly that, at least in cases where circumstances precluding wrongfulness were an excuse rather than a justification, i.e. those which might be classified as cases of circumstances precluding responsibility, the draft articles should expressly envisage the possibility of compensation. In the *Gabčíkovo-Nagymaros Project* case, Hungary had expressly envisaged that its reliance on necessity carried with it the obligation to compensate Czechoslovakia. In his view it would have been intolerable for Hungary to plead inability to sustain the environmental and other costs of the Project and at the same time to impose severe costs on the other party resulting from its non-compliance. The Court had expressly recorded that position in its judgment. He personally would favour a rather strong formulation of article 35 in the context of circumstances precluding responsibility. The Drafting Committee could decide, in the light of the general debate, just how strong that formulation should be.

42. It was clear that where a State relied on a circumstance precluding wrongfulness, that reliance had a temporary effect only. The Court had made that clear in the *Gabčíkovo-Nagymaros Project* case; it should also be made clear in the draft articles and the commentary. On balance, he thought it was now sufficiently clear in the new versions of articles 34 and 35 (Consequences of invoking a circumstance precluding wrongfulness) proposed in the conclusions as to chapter V of the draft contained in chapter I, section C, of his second report. However, he was proposing a new article 34 bis (Procedure for invoking a circumstance precluding wrongfulness) dealing in a rudimentary way with the procedure for invoking a circumstance precluding wrongfulness. The key point to note was that by and large the circumstances precluding wrongfulness operated automatically: a situation of distress or force majeure arose in relation to performance due at that time. So it was not necessarily a case of giving notice of the circumstance, although notice should be given if possible. Article 34 bis was drafted having regard to that constraint.

43. Proposed new article 34 bis also contained, in paragraph 2, a rather rudimentary dispute settlement provision, serving merely as a reminder and enclosed within square brackets. When dealing with the question of grounds for invoking invalidity or termination of a treaty, States had insisted on including a reference to dispute settlement. Accordingly, there should be at least some linkage between dispute settlement and invocation of a circumstance precluding wrongfulness. Elements of such a linkage were to be found in the *Rainbow Warrior* arbitration in respect of distress. On the other hand, the Commission should not enter into the detail of article 34 bis, paragraph 2, until it turned to the question of dispute settlement generally and decided on the status it would propose for the draft as a whole. The substantive provision of article 34 bis for present purposes, namely paragraph 1, proposed an information and consultation procedure whereby the State invoking circumstances precluding wrongfulness was required, as a minimum, to inform the other State that it was doing so.

44. In proposed new article 35, in addition to financial compensation in cases of distress and necessity, he had also included a provision, subparagraph (*a*), expressly dealing with cessation, reflecting the Court's findings on that subject in the *Gabčíkovo-Nagymaros Project* case. He had not, however, envisaged compensation in cases of force majeure, still less in cases of consent. It had seemed rather anomalous to say that consent made the act lawful but that nonetheless compensation must be paid. States might of course require compensation to be paid in advance as a condition of consenting and they would be free to do so. However, it was odd that article 35 should seek to intervene in negotiations intended to secure that end, even if consent was retained in chapter V.

45. Finally, the Commission should note a slight change in the order in which the circumstances precluding wrongfulness were presented in chapter V. Because of its importance, the chapter now began with article 29 bis (Compliance with a peremptory norm (*jus cogens*)). Article 29 ter (Self-defence) (paragraph 1 of which was former article 34), which might be said to be cognate with *jus cogens*, followed. Thereafter came article 30 on countermeasures, and article 30 bis (Non-compliance caused by prior non-compliance by another State), the *exceptio*, on non-compliance, which was at least analogous to countermeasures. Lastly came the three special cases of force majeure, distress and state of necessity—which seemed to him more akin to circumstances precluding responsibility—and the two procedural provisions.

46. Chapter V might seem on a superficial reading to have been fundamentally recast, but in fact he had simply tried to resolve some particular problems and to reorganize the chapter so as to make its underlying conceptual structure clearer. Again, chapter V was, in his opinion, a permanent contribution to general international law.

47. The CHAIRMAN invited members to take the floor in the general debate on chapter V.

48. Mr. ROSENSTOCK said he found himself in general agreement with virtually everything contained in chapter I, section C, of the second report concerning chapter V and in the Special Rapporteur's introduction. The proposal to delete article 29 was acceptable, for the reasons given by the Special Rapporteur, inter alia, that consent given in advance could be seen as a primary rule, while consent given after the event involved waiver. Of course, to exclude consent because it was a primary rule was to take a very broad view of primary rules. Such an approach might nonetheless prove useful.

49. However, he was extremely concerned at the proposal not to deal with article 30 at the current session. The Commission was already a year behind schedule in its work on the topic. To judge from the degree of acceptance article 30 had commanded on first reading, it might not be too difficult to obtain a comparable degree of acceptance on second reading. Moreover, the task of resolving outstanding difficulties in relating to part two at the next session would not be made any easier if the Commission had simultaneously to consider article 30. Of course, matters would be more straightforward if the Special Rapporteur were to endorse the view taken by the United Kingdom, that consent, countermeasures and, perhaps, self-defence comprised a different category. Such, however, was clearly not the Special Rapporteur's intention.

50. He did not wish to insist on a debate on article 30 at the present juncture. However, if the Commission were to try to work through the other provisions of chapter V as rapidly as possible, it could then use the time gained to make some progress on article 30 at the current session, thereby greatly improving its prospects of concluding its work on the topic in a timely manner.

51. Mr. KATEKA said it had been his impression that the Chairman envisaged dealing with chapter V by clusters of draft articles. He noted, however, that the Chairman had just given the floor to Mr. Rosenstock in a general debate on chapter V. Yet another option would be to consider chapter V on an article-by-article basis.

52. After a procedural discussion in which Messrs CRAWFORD (Special Rapporteur), KATEKA, SIMMA, and TOMKA participated, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to consider chapter V article by article, in the order proposed by the Special Rapporteur in the conclusions as to chapter V, contained in chapter I, section C, of his second report.

It was so agreed.

ARTICLE 29

53. Mr. GAJA said he favoured retaining article 29. Many activities which a State might wish to undertake in the territory of a foreign State were permitted under international law only if the latter State consented thereto. Examples included construction of military bases and exercise of consular or investigative extrajudicial functions. Most such activities took place only after consent had been given in the form of an agreement between the two States concerned. Should such an agreement be concluded, the rules of international law prohibiting that activity would be superseded by the new agreement, obviating the need to deal with such situations in the draft articles.

54. However, there might be cases in which no such general agreement was concluded, in which case the rule would hold, and the territorial State might exceptionally consent to a specific activity. In such cases, wrongfulness would surely be excluded. To take the Special Rapporteur's example of overflight, the Convention on International Civil Aviation conferred on all States parties the right to have their civil aircraft overfly the territories of other States parties on scheduled flights. There was thus a derogation from the rule of general international law prohibiting overflights. But in the case of military aircraft no such general derogation existed, although an exception to prohibition existed when consent was given either, in a cluster of cases or in individual cases. In paragraph (20) of its commentary to article 29 adopted on first reading, the Commission had viewed specific consent as an agreement. Like many commentators, he considered that that was not necessarily the case: consent might often be given by means of a unilateral act of the territorial State. Hence it could not be assumed that in all those cases there was a special agreement derogating from the prohibitive rule in an individual case. Admittedly, one could go along with the Special Rapporteur and say that the rule of international law prohibiting overflights was one that prohibited them but for consent. In the same vein one could say—although the Special Rapporteur would probably disagree—that a rule prohibited overflights save in the case of distress, or of self-defence, both of which were circumstances generally precluding wrongfulness.

55. In chapter I, section C, of his second report, in his review of article 31, the Special Rapporteur drew a distinction between those cases, because in the latter instances some kind of explanation or justification was required, whereas that was not necessary in the case of consent. However, that was not because the circumstances were intrinsically different. Obviously, when a State had consented it did not need to be persuaded, while in other cases persuasion was necessary.

56. As the Special Rapporteur had noted in paragraph 35 of his second report, no State had objected to the principle embodied in article 29. That was surely an additional reason for retaining it. Lastly, regarding the issue of the validity of consent, a problematic area to which attention had been drawn by some Governments, if special consent took the form of an agreement, then there would be no call to deal with validity of consent, because the 1969 Vienna Convention applied. He did not see why the Commission should not adopt an analogous solution in the case of unilateral acts and simply refer in its commentary to the provisions it was to adopt when it came to consider unilateral acts of States.

57. Mr. KATEKA said that he was inclined to support the Special Rapporteur's suggestion that article 29 should be deleted. Too many abuses had been committed, be it in Europe during the Second World War or in the Congo in 1960, in the name of prior consent validly given. The need to protect weaker States against abuses by more powerful ones was universally recognized. The Machiavellian principle of the end justifying the means could not be allowed to serve as an excuse for intervention in the internal affairs of States or for the violation of peremptory norms such as the right to self-determination. For those reasons, as well as in the light of arguments advanced by the Special Rapporteur when introducing chapter V, he supported the deletion of consent (art. 29) from the draft articles.

58. Mr. LUKASHUK, after commending the excellent professional quality of the section of the report currently under consideration, said that the distinction drawn by the Special Rapporteur between two different kinds of consent to breaching a treaty—consent given, respectively,

before and after the event—was perfectly correct, but the consequences were different in each case. So far as prior consent was concerned, the law of treaties recognized that parties had the right, by mutual agreement, to suspend the operation of a treaty as a whole or of specific provisions thereof. Therefore, insofar as it dealt with prior consent, article 29 clearly fell within the scope of the general scheme of circumstances precluding wrongfulness and could usefully be maintained in the draft articles. As for ex post facto consent, he entirely shared the Special Rapporteur's view. The Drafting Committee might perhaps consider changing the title of the article to "Prior consent" and amending the text of the article accordingly.

59. Mr. HAFNER said that he agreed with most of Mr. Gaja's comments. While not opposed to the general tendency to cut down the number of provisions governing State responsibility, he did not think that it should extend to the article under consideration. Dropping the idea of consent from the list of circumstances precluding wrongfulness could be interpreted as the abrogation of an important principle. Moreover, he was not convinced that all primary rules provided for the possibility of valid consent to an act not in conformity with an obligation. There were two possible ways of considering a wrongful act. From the point of view of the victim, it was clear that no wrongful act could occur where valid consent had been given; but from the point of view of third States, the act could still be wrongful unless it was established that consent had been given. That aspect of the problem had to be taken into consideration in view of the growing importance of the multilateral dimension of international norms. In that connection, he was surprised at the commentary to article 29. He was not convinced, as asserted in paragraph (20) of the commentary, that a wrongful act whereby a neutral "victim" State gave its consent to allow foreign troops into its territory actually remained wrongful vis-à-vis third States. In conclusion, he concurred with Mr. Lukashuk's suggestion that the title of article 29 should be changed to "Prior consent".

60. Mr. CRAWFORD (Special Rapporteur), responding to Mr. Hafner's comments, said that the example of neutrality demonstrated why, as a matter of logic, it was preferable to conceive of consent as being part of the primary rule. A State which had, in its own interest, unilaterally proclaimed itself to be neutral could waive its neutrality in a given case and, if it did so, the waiver was effective vis-à-vis the world at large. But where neutrality had, in effect, been imposed on or accepted by a State in the general interest—the case of Antarctica came to mind—consent would obviously operate in quite a different manner. It was therefore best to see the whole issue as an aspect of the particular primary rule rather than attempt to provide a blanket rule. In proposing deletion of the rule, he was not trying to abrogate an important principle but only to conceptualize the circumstances precluding wrongfulness in slightly narrower terms.

61. Mr. KAMTO said that, before deciding to delete or maintain the article, the Commission should give serious attention to the question of the validity of the consent given. In some cases, two rival Governments within one and the same State might both claim to have taken a valid decision, possibly with opposite effects. Who was to decide which of the two decisions was valid? The rule in article 29 might be used to intervene unacceptably in the internal affairs of States. In a more general sense, could not the concept of consent as a circumstance precluding wrongfulness allow two States, by mutual consent, to violate a rule of international law and avoid responsibility for their conduct? Would such a possibility not be prejudicial to the whole system of international law obligations, whether objective or *erga omnes*? He said it seemed to him that the prior consent of State A voided the wrongfulness of the act of State B that would otherwise have been wrongful; it "legalized" the act in some way and thereby placed it within the normal framework of cooperation among States. For those reasons, he would suggest that article 29 should be reformulated by the Drafting Committee or deleted altogether.

62. Mr. MELESCANU joined other members in congratulating the Special Rapporteur on an excellent report, and particularly welcomed the clarity of the proposals and the notes accompanying them in the conclusions as to each chapter of the draft articles. He seriously doubted whether article 29 was properly placed in chapter V or, indeed, whether it had a place anywhere in the draft. Consent was not a circumstance precluding wrongfulness; it rendered an obligation non-existent or, to use the language of article 53 of the 1969 Vienna Convention, void. While fully recognizing the value of the points raised by Mr. Gaja and Mr. Hafner, he believed that they could be covered by appropriate explanations somewhere in the commentary.

63. Mr. CRAWFORD (Special Rapporteur) said that there were cases of the displacement of obligations, but also of the operation of the primary rule. Under article 22, paragraph 1, of the Vienna Convention on Diplomatic Relations agents of the receiving State could not enter the premises of a mission except with the consent of the head of the mission. With such consent, the fact of their entering the mission was not even potentially unlawful.

64. Mr. SIMMA remarked that a distinction should be drawn between obligations of a peremptory nature which continued to be binding upon States whether or not consent to waive those obligations had been given, and obligations of the kind referred to by Mr. Melescanu, which consent rendered void.

65. Mr. Sreenivasa RAO said that he appreciated the arguments advanced by Mr. Kamto and Mr. Kateka but agreed with Mr. Gaja and Mr. Hafner that the article should be maintained with some redrafting. It should be made clear in the commentary that consent could not serve as the basis for any incidental or ancillary wrongdoing. The specific object and purpose of consent to abrogate an obligation had to be spelled out precisely in each case.

66. Mr. GOCO said that he accepted the Special Rapporteur's recommendation to delete article 29, but wondered whether there could be situations in which consent had retroactive effect.

67. Mr. CRAWFORD (Special Rapporteur) said that cases of valid retrospective consent which did not merely constitute a waiver could indeed arise. In his view, however, such cases should properly be dealt with in part three of the draft, where he intended to propose an article on the question of waiver and the elimination of breach.

The meeting rose at 1 p.m.

2588th MEETING

Wednesday, 16 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 29 (*concluded*)

1. Mr. KABATSI said that the question before the Commission was whether to retain article 29 (Consent) in chapter V (Circumstances precluding wrongfulness) of part one of the draft articles on State responsibility. In favour of its being retained was the fact that it had not given rise to formal opposition by the Governments which had formulated comments on chapter V, in the comments and observations received from Governments (A/CN.4/492).[4] As rightly pointed out by Mr. Gaja (2587th meeting), it was perhaps not appropriate on second reading to delete a provision which had not been challenged on first reading because that involved the risk of reopening the substantive debate.

2. However, if the article was retained and referred to the Drafting Committee, obviously the latter would have to devote considerable effort and time to it, given the variety of problems posed, for example, by the validity or limits of consent, the status of natural or juridical persons empowered to give consent or the value of consent vis-à-vis peremptory norms.

3. Another point which the Special Rapporteur had stressed was whether article 29 really belonged in chapter V. Unlike force majeure, distress or state of necessity, which could be invoked by a State committing a wrongful act to justify it, consent was by no means a "circumstance" and still less a "circumstance precluding wrongfulness" because, as rightfully noted by the Special Rapporteur, the fact that consent had been validly given implied that the conduct in question had been perfectly legal at the time of its occurrence.

4. In view of the problem of relevance to chapter V, together with all the related problems referred to earlier, the redrafting of article 29 would require the Drafting Committee to make an effort that was disproportionate to the importance of the article and he was therefore in favour of its deletion.

5. Mr. TOMKA noted that the Special Rapporteur was reviewing article 29 in the light of both comments and observations received from Governments and recent jurisprudence.

6. He was somewhat surprised by the proposal that the article should simply be deleted, whereas the comments of Governments had focused less on the content of the article than on its wording. Did that mean that there was no place in the draft articles on State responsibility for the principle, recognized in many legal systems, of *volenti non fit injuria*?

7. It seemed that, for the Special Rapporteur, to treat prior consent as a circumstance precluding wrongfulness was to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility. He therefore wondered whether it might not be better to incorporate the element of consent in the primary rules. However, the examples which the Special Rapporteur gave in support of his line of reasoning did not seem very relevant. In his own view, commissions of inquiry working in the territory of another State or the exercise of jurisdiction over forces stationed abroad were, rather, cases of derogation from the rules of general international law according to which each State exercised exclusive jurisdiction over its own territory. The rules which were derogated from were not part of *jus cogens* and it was possible to derogate from them by mutual agreement. In paragraph (2) of its commentary to article 29 adopted on first reading,[5] the Commission had emphasized that it had not had in mind the case "of a treaty or agreement intended to suspend in general the rule establishing the obligation, and still less of a treaty or agreement intended to modify or abrogate the rule in question". The fact that there had been consent did not mean that the rule from which the obligation derived ceased to exist or even that it had been suspended. The Commission had stressed that the State

[1] 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.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.

[4] See 2567th meeting, footnote 5.

[5] See 2587th meeting, footnote 8.