

Document:-
A/CN.4/SR.2643

Summary record of the 2643rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

vision could be made for the possibility of injunctions or preventive measures.

80. Lastly, he too thought that article 2, subparagraph (b) should contain a reference to the global commons, thus reflecting the concept of “regions over which no State had sovereignty” adopted by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.

The meeting rose at 1 p.m.

2643rd MEETING

Thursday, 20 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹ (concluded) (A/CN.4/504, sect. D, A/CN.4/509,² A/CN.4/510³)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (concluded)

1. Mr. GALICKI said that the Commission had come to the final stage of its work on the topic. A courageous proposal had been made to adopt the draft articles contained in the annex to the third report of the Special Rapporteur (A/CN.4/510) as a framework convention on the prevention of significant transboundary harm, which seemed fully justified, since the articles were well elaborated and carefully balanced, covering all matters of prevention. One advantage of the draft was its precise scope, which took into account two important factors: the separation of the

topic of prevention from the general subject of liability and recognition of the duality of regimes in relation to liability and responsibility. As a result of that approach, the articles were mainly directed at the management of risk, as part of the prevention of significant transboundary harm. It seemed the right choice. The attempt to avoid imprecise concepts was also clear from the definitions of the terms used, especially “transboundary harm” and the phrase “risk of causing significant transboundary harm”, and the various categories of States engaged in prevention procedures. The precise definitions made it possible to elaborate equally precise rules.

2. The main problem regarding the scope of the proposed draft convention appeared to be whether to retain the reference to “activities not prohibited by international law” in a regime that distinguished the duty of prevention from the broader concept of international liability. Opinions were divided within the Commission. He was in favour of retaining the phrase in article 1, for several reasons. First, it appeared in the title of the draft and, although aware of the differences between the rules governing the duty of prevention and those governing the matter of international liability as a whole, he believed that there should be some link between the two systems. The phrase in question seemed to provide that link. Secondly, as correctly noted in paragraph 31 of the third report, the use of the phrase released a potential victim from any necessity to prove that the loss arose out of wrongful or unlawful conduct. Lastly, the reference to “activities not prohibited by international law” marked a significant dividing line between the topic of State responsibility and that of international liability, of which the principle of prevention was a sub-topic.

3. The duality of regimes for responsibility and liability seemed to be confirmed by international conventions governing various kinds of so-called ultra-hazardous activities, such as space activities. Rather exceptionally, the draft articles might be found to link certain aspects of international liability with aspects of international responsibility. Article VI, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects, for example, provided that no exoneration from absolute liability “shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law”. That conjunction of international responsibility and liability was, however, rather an exception, since it applied to the final stage of the application of rules governing international liability. In that context, conduct “not in conformity with international law”, as an element intensifying the liability, could be justified.

4. On the other hand, any attempt to extend the duty of prevention to activities prohibited by international law would be anomalous. The duty of prevention, as it derived from the draft articles, was of a pre-activity nature. It would be highly unrealistic to demand of a State that intended to commit an internationally wrongful act to comply in advance with all the prevention procedures contained in the articles. It thus seemed that limiting the application of the articles to activities not prohibited by international law was actually an advantage, since their future application would be easier and the tricky issue of responsibility would be avoided.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Ibid.*

5. Similarly, it would be wise to avoid the temptation of including too many new provisions dealing with additional matters, which could spoil the existing balance and proportions, both in form and in substance, of the articles. A further reason for adopting such a realistic approach was that the Commission was operating on the soft terrain of progressive development and not along the lines of well-established customary rules, which might be ready for codification. It would be much more useful for States to have compact but precise and effective articles, in keeping with the principle that “small is beautiful”.

6. The same applied to the preamble, which, of course, could refer almost endlessly to treaties and documents. The choice made by the Special Rapporteur, however, quite sufficiently indicated the most important origins of the articles. Before its final adoption, consideration might be given to reflecting in the preamble some of the leading legal principles on which the draft was based. Some of those principles, such as those of due diligence or sustainable development, had already been suggested by other members.

7. As a member of the Working Group, he was convinced that the articles, although substantially limited, could provide a basis for further development, in the field of both environmental law and the law on international liability in general. He hoped that the Commission would be able to finalize the work at the current session, so that the draft could be submitted to the Sixth Committee at the fifty-fifth session of the General Assembly.

8. Mr. BROWNLIE said that he found himself, unusually, disagreeing with Mr. Galicki. Members of the Commission made supportive statements about the articles but then sought to recruit them to other areas of international law. The most valuable aspect of the articles was that they broke new ground: they did not concern State responsibility or liability—whatever that might be—nor did they constitute soft law. They were functionally specialized to deal with a specific set of problems, namely the management of risk. It was therefore not helpful to draw parallels with standard conventions on liability, compensation or peaceful settlement. The Special Rapporteur had addressed non-dispute, pre-dispute situations. In those circumstances, the mode of settlement naturally had to be different from the normal modalities of arbitration and adjudication, which in most cases were not appropriate. In the environmental context, fact-finding—which was specified in article 19 [17]—would be the most important element.

9. There was perhaps no harm in keeping the phrase “activities not prohibited by international law”; there was an almost total division of views within the Commission on whether to retain it. His concern, however, was that the phrase gave rise to considerable misunderstanding. Many appeared to want it retained because they saw a link between the draft articles and one of the other areas of liability or responsibility. There was no such link. He favoured deleting the phrase, since it was the source of all the misunderstanding.

10. Mr. GALICKI said that he and Mr. Brownlie differed only on the one point: he favoured retaining the phrase “activities not prohibited by international law” and Mr.

Brownlie did not. Otherwise, however, their views coincided. He had specifically pointed to the difference between the draft articles and the issues of responsibility and liability. He had quoted the Convention on International Liability for Damage Caused by Space Objects to show that, by contrast with the draft articles, it contained a relationship between responsibility and liability, albeit only in exceptional cases. He had stressed that the draft articles on prevention dealt with pre-activity situations. It would, however, be wrong to say that there was no link between prevention and liability: prevention derived from the main topic of international liability for injurious consequences arising out of acts not prohibited by international law, after all, and the report also stressed the connection.

11. Mr. GOCO asked for clarification on how the articles could be used by a Government in a situation such as that facing his own country. While the Philippines were nuclear free, there were a number of nuclear power plants on the southern tip of Taiwan, which was very close to the north of the Philippines. It was, of course, a matter of great concern that in the event of an accident the Philippines would be affected. He wondered what course the Philippines Government should pursue when the draft articles were adopted, and whether it should issue any notifications or warnings when, for example, the wind was blowing in a particular direction.

12. Mr. ROSENSTOCK said that the topic had been under consideration by the Commission for well over a decade, graced by three Special Rapporteurs whose reports had clarified the issues and illuminated possible analytical frameworks. The difficulty had always been to transform the many ideas put forward into a concrete result. The Special Rapporteur and the Working Group deserved great credit for producing an excellent text. Eventually, more ambitious results might be possible. In the meantime, he concurred with Mr. Lukashuk in believing that the useful draft on prevention represented the maximum that could be done. It should be sent to the Drafting Committee and adopted at the current session. As far as the form of the instrument was concerned, he believed a convention to be the most appropriate.

13. He was inclined to leave the text as it stood. So long as there was an appropriate commentary to avoid any misunderstanding or misreading of the underlying intent, the phrase “activities not prohibited by international law” could be retained or deleted without undue consequences, although his own preference would be to remove it, for the reasons given by Mr. Hafner (2642nd meeting). There were also, as Mr. Tomka had pointed out, technical problems with the preamble. Indeed, he questioned whether a preamble was useful or necessary. If the Commission decided to include one, he would prefer one less militant than the current version, which gratuitously recalled controversial material, while failing to mention, for example, the seminal United Nations Conference on the Human Environment, held in Stockholm in 1972. Having come thus far with the draft articles, however, it would be tragic if the Commission allowed itself to get bogged down over a preamble. It was not a North-South issue and any attempt to make it so would create unnecessary problems. He trusted that the Commission would not let perfection

be the enemy of the good and would be able to transmit the draft articles to the General Assembly for adoption at its fifty-fifth session.

14. Mr. PELLET said that, although he found them slightly “limp”, he was broadly in favour of the draft articles, because he believed that prevention constituted the only part of the initial draft that was ripe for codification and progressive development. He could not, however, agree with Mr. Rosenstock that they represented the maximum attainable result. On the contrary, it was disappointing that there was hardly a trace of progressive development. Even with regard to codification, the Commission had not gone as far as even a cautious appreciation of positive law would warrant. The draft articles were not intended to be restricted to international environmental law, but the Commission could not escape from the fact that they were principally directed at the prevention of significant environmental damage. There was no need to be a specialist in the fast expanding branch of international environmental law—he certainly did not claim to be one—to realize that the articles followed developments in the field rather than accompanying them, let alone preceding them.

15. As he had said, two years previously, he greatly regretted that article 3 had ultimately been worded less strictly than principle 2 of the Rio Declaration⁴ or even principle 21 of the Stockholm Declaration,⁵ particularly with regard to the territorial application of the obligation of prevention. Article 6 [7], paragraph 1 (a), was no compensation in that regard. He concurred with those who had urged that, at least, explicit mention should be made of the obligation of due diligence. He also regretted that the principle of precaution, even in the incomplete sense accorded to it in principle 15 of the Rio Declaration was absent from the articles. Article 7 [8], too, lagged behind principle 17 of the Rio Declaration, not to mention the Convention on Environmental Impact Assessment in a Transboundary Context. The latter had been adopted as long ago as 1991: ten years in which many changes had taken place and the rules on the obligation of prevention had grown much stricter. The draft articles, by contrast, seemed to move in the other direction.

16. New draft article 16 also seemed to him vitiated by the use of the phrase “where appropriate”, which afforded States an escape clause that was both dangerous and useless. He would therefore favour deletion of the phrase. Moreover, he failed to understand the significance—and even the meaning—of the new sentence that had been added to article 6 [7], paragraph 2. On the other hand, he fully endorsed the general thrust of article 9 [10], paragraph 2, which was a great improvement on the previous version. He also thought it right to have transferred former article 6 to article 18 [6]; it was a wise precaution. In that context, he was no more convinced than Mr. Galicki, Mr. Rodríguez Cedeño, Mr. Tomka and other members that the phrase “activities not prohibited by international law” should be deleted. If it were, the Commission might seem to be legitimizing unlawful activities, putting them in the same basket as activities that were not prohibited. *Pace*

Mr. Brownlie, he believed that no harm would be done by retaining the phrase. He also noted, in regard to textual changes, that the French version of article 6 [7], paragraph 1 (a), and article 8 [9], among others, left much to be desired and he hoped that the Drafting Committee would attend to the matter.

17. As to the more general question of the future of the draft and of the topic as a whole, he wondered whether the time was in fact right to refer the draft articles to the Drafting Committee. The quinquennium was not entirely at an end and he wondered whether the remaining time should not be used in asking the Special Rapporteur to revise and fill out the draft articles, taking into account and incorporating new developments in international environmental law, placing special emphasis on the principle of precaution, on issues relating to impact studies and, perhaps, also on the prevention of disputes. He drew attention to the observations made in that regard by the working group chaired by Mr. Yamada on topics susceptible to the codification and progressive development of environmental law. The aim of his proposal was not simply to improve the existing draft articles, which he found acceptable, even if they would benefit from some additional muscle. He also wished to anticipate the wishes of other members of the Commission who wanted to make some contribution to environmental law. The topic of prevention was best suited to that purpose. It would, however, be absurd to take up the topic from the environmental point of view alone, after the draft articles had been adopted. He therefore suggested giving further consideration of prevention, with a view to making it more specific in the light of developments in environmental law.

18. As for the title of the topic, at the fiftieth session, Mr. Brownlie had urged the Commission to take up a definitive position on the matter of international liability for injurious consequences arising out of acts not prohibited by international law and to decide on the recommendations that it should make. There had been general agreement that a position should be taken, but there the matter still rested. It was essential for the Commission to assume its responsibilities and it should devote at least one meeting, whether in plenary or in the Planning Group, to discussing the matter, perhaps on the basis of a note by the Special Rapporteur and by other members of the Commission. His own position was clear. In his opinion, the topic should not be pursued: it lent itself neither to the codification nor to the progressive development of international law. On the contrary, it should be and could only be the object of negotiations between States. The Commission should not get involved any further. At the legal level, its only firm contribution could be to say that, if a State did not fulfil its obligations with regard to prevention, it was responsible, as opposed to liable; and there was no need to devote a whole set of draft articles to the topic. If it needed saying, an article could be added to the draft articles on prevention. In any event, the Commission should decide one way or the other. If it did not, it would be, if not liable, at least responsible.

19. Mr. KUSUMA-ATMADJA commended the Special Rapporteur for coming up with an excellent set of draft articles, irrespective of what form they would ultimately take, and expressed confidence in Mr. Gaja’s ability, as Chairman of the Drafting Committee, to resolve any

⁴ See 2641st meeting, footnote 9.

⁵ See 2642nd meeting, footnote 7.

remaining problems to the satisfaction of all concerned. He sided with Mr. Galicki in his debate with Mr. Brownlie, albeit with due deference to the latter. He favoured referral of the draft articles to the Drafting Committee, for adoption no later than the next session of the Commission.

20. Mr. AL-BAHARNA said that the Special Rapporteur was to be congratulated on his precise and succinct third report, and should be supported in his desire to finalize work on the subtopic before the end of the quinquennium.

21. The major issues arising in the consideration of the draft articles appeared to be: activities not prohibited by international law (art. 1); the meaning and the nature of significant harm (art. 2); the concept of due diligence (art. 3); other articles relating to obligations of States to cooperate on the question of prevention, and the procedures relating thereto; the question of the relationship between the topic of liability and that of prevention; dispute settlement; and, lastly, the form that the draft articles should ultimately take. That list of contentious issues was by no means exhaustive. However, thanks to the decision taken by the Commission at its forty-ninth session to concentrate on the subtopic of prevention,⁶ and under the able guidance of the Special Rapporteur, good progress had been made in trimming the draft articles, which, in his view, were now ready for finalization on second reading.

22. He took issue with the Special Rapporteur's recommendation that the phrase "not prohibited by international law" should be deleted from article 1. It was essential to retain the phrase, so as to maintain the legal distinction between the topics of State responsibility and of international liability, which, as the Special Rapporteur conceded in paragraph 26 of his third report, the Commission had many years ago recognized the need to separate. Consequently, that unwarranted eleventh-hour proposal was surprising, particularly in view of the Special Rapporteur's categorical statement in paragraph 5 of the report that no State questioned the use of the phrase "acts not prohibited by international law" employed in draft article 1.

23. As for the expression "significant harm", the controversy on that issue appeared—to cite the comment on the matter by the Czech Republic—to have exhausted its potential. Especially in view of the fact that it was now enshrined in the Convention on the Law of the Non-Navigational Uses of International Watercourses, use of the term in the draft articles on prevention was more than justified. As for the expression "risk of causing significant transboundary harm", while he agreed with those States that found the definition in article 2, subparagraph (a), confusing, he could nevertheless live with it. However, in the interests of consistency, the term "disastrous" should be replaced by "significant".

24. As for the applicability of the much debated concept of "due diligence" in the context of article 3, a matter comprehensively discussed in chapter III of the Special Rapporteur's second report,⁷ notably in paragraph 24, some States were of the view that a breach of the duty of due dili-

gence could give rise to consequences only in the field of State responsibility. In that connection, he was impressed by China's argument, as mentioned in paragraph 3 of the second report, that failure to comply with the duty of due diligence in the absence of damage would not entail any liability, but that once damage occurred, State responsibility or civil liability or both might come into play. Where a State complied with its duties of due diligence and damage occurred despite such compliance, the operator must pay and accept the liability.⁸ On the whole, article 3 was acceptable, on the understanding that the duty set forth therein was one of due diligence. There was, however, no need to make specific reference to that concept in article 3.

25. Articles 4 to 17 had also been comprehensively debated and should thus give rise to no further controversy. As to the topic of international liability, he continued to be of the view that, if it was to discharge its mandate to the full, the Commission should revert to that topic as soon as the articles on prevention had passed through the Sixth Committee following their adoption by the Commission on second reading in the form of a framework convention. As the Special Rapporteur rightly pointed out in paragraph 3 of the third report, the Commission had a duty to deal with liability. There was now an abundance of material in State practice and international agreements, as well as a wealth of valuable material bequeathed by the previous Special Rapporteur, Mr. Julio Barboza.

26. Lastly, it was his view that article 19 [17], on settlement of disputes, was incomplete as currently drafted and required some improvement. Arguably, there was in any case no need for a provision on dispute settlement in a framework convention dealing only with the question of prevention. That, however, was without prejudice to possible further consideration of article 19 [17] by the Commission when it reverted to the topic of international liability.

27. Mr. Sreenivasa RAO (Special Rapporteur), summing up the debate, said he would try to resist the temptation to become embroiled in any further ideological or other confrontations. The Commission was faced with a seemingly irreconcilable conflict between environmental idealism and the desire to reap the full benefits of scientific and technological innovations proceeding at break-neck pace. In response to Mr. Pellet, he said he had chosen not to become involved in issues of environmental law, but instead to distil from the draft articles and commentaries he had inherited at the forty-eighth session of the Commission what was most practicable—albeit in the form of what some might dub a "rump" set of draft articles. He took comfort from the fact that, to his great surprise, the draft articles adopted on first reading had proved acceptable to most States. As Special Rapporteur, he had no agenda of his own: whether to go along with Mr. Pellet's proposal, thereby further protracting a process of which States were already tired, or to endorse States' expressed preferences, was entirely a matter for the Commission's own conscience. As Special

⁶ See 2628th meeting, footnote 4.

⁷ See 2641st meeting, footnote 6.

⁸ See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14), and corrigendum, para. 43.

Rapporteur, he recommended that the Commission should reduce the scope of the articles to manageable proportions, for otherwise there was a risk that work on the topic would never be completed.

28. Accordingly, he was not persuaded by the arguments of Mr. Pellet and others that the Commission should look at the precautionary principle. He had dealt with that principle in chapter VI of his first report,⁹ and his conclusion on the question was set forth in paragraph 72 of that report. The principle that, where there were threats of serious or irreversible harm, a lack of full scientific certainty about the causes and effects of environmental harm must not be used as a reason for postponing measures to prevent environmental degradation made good sense. To the extent that guidance was available, he was confident that States would have recourse to it. In his view, the precautionary principle was already included in the principles of prevention and prior authorization, and in the environmental impact assessment, and could not be divorced therefrom.

29. As for settlement of disputes, article 19 [17] had generally met with States' approval in the Sixth Committee. States would have a further opportunity to consider the article following its adoption by the Commission on second reading. Consequently, any decision taken at the current session was not graven in stone. In any case, he saw no need to send article 19 [17] back to the drawing board.

30. There had been a number of other suggestions regarding various articles, and he urged those who had made them to be available to the Drafting Committee. He had been encouraged by Mr. Rosenstock's comment that the draft articles were the best that could be achieved and that the current time was the most opportune to refer them to the Drafting Committee. It was his recommendation that they be so referred and that they should return to the Commission as soon as possible.

31. The question had been raised as to whether direct reference should be made within the terms of article 3 to the concept of due diligence or whether article 3 should be left as it was and an explanation placed in the commentary. While he acknowledged Mr. Al-Baharna's reasoning, he still believed that "all appropriate measures" and "due diligence" were synonymous and that leaving the former was more flexible and less likely to create confusion than inserting a reference to the latter. Explanation in the commentary would be a better way of communicating what was involved to States. It was prudent to follow the guidance provided by tried and tested conventions, and his recommendation was to leave article 3 as it stood, with an explanation in the commentary that "all appropriate measures" was nothing but "due diligence".

32. The division of opinion within the Commission over whether to remove or retain the reference in article 1 to "activities not prohibited by international law" was roughly equal. Many authorities he had consulted over time favoured retaining the phrase, which had come to signify a major dividing line between the topic of State responsibility and the broader topic of international liability, of which the principle of prevention was only a

sub-topic. The ideological debate between liability and responsibility was not going to be solved because of the phrase in question. Whether it was retained or not, the real purpose of the article was risk management and to encourage States of origin and States likely to be affected to come together and engage themselves. Emphasizing the principle of engagement at the earliest possible stage was the main value of the draft.

33. The CHAIRMAN said that, if he heard no objection he would take it that the Commission wished to refer the draft preamble and revised draft articles 1 to 19 to the Drafting Committee.

It was so agreed.

State responsibility¹⁰ (continued)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,¹¹ A/CN.4/L.600)

[Agenda item 3]

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

34. The CHAIRMAN invited members to begin their consideration of chapters II and III of the Special Rapporteur's third report (A/CN.4/507 and Add.1–4).

35. Mr. GAJA said that chapter III was remarkable because of the novelty of the questions addressed therein and the appropriateness of the solutions generally offered. He would confine his remarks to a few problems which, in his view, had not yet been adequately resolved.

36. If the Special Rapporteur's proposal to place the new article 40 bis in Part Two bis was adopted, Part Two would then not contain any indication of the States to which the obligations described in Part Two were owed. The gap created by the removal from Part Two of the only provision concerning injured States needed to be filled if only by a provision making a general reference to Part Two bis. While the draft articles were intended to regulate only inter-State relations, those relations might be affected by the fact that individuals or entities other than States were the beneficiaries of reparation. In that case, there should be some possibility for individuals or entities to have a say as to the choice of the form of reparation. Similarly, with regard to waivers of claims brought for the benefit of individuals or other entities it would be reasonable to assume that they had some kind of role. That concern was obliquely, though somewhat obscurely, reflected in the requirement that the claim be "validly waived", and the commentary might make it less obscure. The text of the articles did not use similar language with regard to election of the form of reparation, despite what was said in paragraph 233 of the third report.

37. Article 40 bis, as proposed by the Special Rapporteur, made a distinction between injured States and States having a legal interest. However, article 40 bis did not say

* Resumed from the 2640th meeting.

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

¹¹ See footnote 2 above.

⁹ See 2628th meeting, footnote 5.

what the implications were for those States that had a legal interest. Article 46 ter made it clear that an injured State might invoke responsibility and choose the form of reparation, but nothing was said about the other States. Although it was plain that they could request what was in chapter I, namely cessation and assurance of non-repetition, that should be stated in article 40 bis. Moreover, the text should also state whether they could do anything about reparation. However, if it was said that the latter category of States could not claim restitution or compensation because they were not injured, that had significant consequences. Article 40, as adopted on first reading, said that, if an obligation concerning human rights was imposed either by a customary rule or by a multilateral treaty, all States in the case of a customary rule and all States parties to the treaty could claim reparation. That might have been excessive—and it would be wise to reconsider it—but there was the risk of going too far in the opposite direction by saying that States which were not injured could not claim reparation. When, in a case of violation of human rights, there would be no specially affected States, obligations relating to human rights could be infringed with remarkably little consequence. The concern was even greater regarding what used to be called international State crimes and were now termed serious breaches of obligations *erga omnes*. There was a need to find some kind of solution whereby the State that had infringed an obligation could not simply argue that, since no one had been injured, it had no obligation to provide reparation.

38. In his view, paragraph 239 seemed to stretch too far the analogy between invoking the invalidity, termination or suspension of the operation of a treaty under article 65 of the 1969 Vienna Convention, on the one hand, and invoking a State's responsibility on the other. In the latter case, there was no reason why a State should first have to make a protest or give notice of its intention to invoke responsibility. It could do so straightaway. There should not be any preliminary requirement of the type envisaged in article 65 of the Convention.

39. The article on a plurality of injured States should be "article 46 quinquies", not "quinque", in the French version of the report, but, on a more serious note, he would find it useful if the text of the article in question said something about the election of the form of reparation when many States were injured. The commentary would no doubt have something to say about it, but guidance could be given to States in the article itself.

40. Article 46 sexies raised some difficulties in that it was not always easy to determine situations in which there was the same internationally wrongful act and there was a plurality of responsible States for that act. The *Corfu Channel* case involved one State responsible for laying mines and another State responsible for not using its powers as a sovereign State to prevent the laying of the mines and to warn passing ships; there had been two different obligations and therefore two wrongful acts. Damage might be caused by a plurality of wrongful acts but there might not be a plurality of States responsible for the same wrongful act. The various cases and questions involved should be discussed in the commentary. Paragraph 2 (b) (i) was correct, but there was no need for a subparagraph going into matters of procedure.

41. Mr. CRAWFORD (Special Rapporteur) said that he agreed with most of what Mr. Gaja had said and was happy to inform him that chapter III, section D, of the report would shortly be available and would contain the deliberately missing provision.

42. Mr. SIMMA said that he and Mr. Gaja shared a special interest in the issue of the implementation and enforcement of obligations *erga omnes*, and he was concerned, after reading paragraph 226, that there might be a danger, even after the issue of a further section of chapter III of the report, of there still being no apportionment of access to remedies in the case of States not directly injured. In general, though, he was in agreement with the philosophy behind the document under discussion and the economy of the draft articles.

43. In paragraph 238, the Special Rapporteur said that, since the normal mode of inter-State communication was in writing, it seemed appropriate to require that the notice of claim be in writing. However, article 46 ter—fortunately—made no mention of a claim having to be in writing. In his view, reference to the 1969 Vienna Convention was of some value but invocation of the right to terminate or suspend a treaty was much narrower and occurred much less frequently than invocation of State responsibility. In any event the Convention dealt only with treaties that were concluded in writing. Again, article 46 ter rightly used the mandatory "shall", not "should", in paragraph 1. It was where the meat of the provision lay and "shall" ought to be used throughout.

44. Paragraph 1, after indicating that an injured State must give notice of its claim, said it "should" specify the form reparation was to take (para. 1 (b)). On the other hand, those actions might take place in two different stages: first notice was given, and later there were discussions on the form of reparation that would be owed. That possibility should be taken into consideration.

45. The content of article 46 ter, paragraph 2 (b), tended to prejudice the decision on which approach would be followed in regard to exhaustion of local remedies: that of former Special Rapporteur Ago, who had seen it as a substantive issue, or that of the current Special Rapporteur, who viewed it as procedural. He himself considered that the provision was without prejudice to the resolution of the question. Similarly, the reference to the nationality of claims rule (para. 2 (a)) seemed to anticipate decisions to be taken in the context of diplomatic protection.

46. The term "waiver", dealt with in paragraphs 250 to 256, seemed out of place in connection with loss of the right to invoke responsibility. It was part of the vocabulary of international trade and implied intentional action, renunciation. Moreover, it was much narrower in meaning than the term "acquiescence" used in the 1969 Vienna Convention, which was preferable.

47. As to paragraphs 257 to 259, on delay, he welcomed the view that a lapse of time as such did not make a claim to reparation inadmissible and that great flexibility had to be applied, as recognized by international courts. The reference in paragraph 258 to the *LaGrand* case—one currently pending before ICJ—was unwelcome, as it placed members of the Commission who were involved in the case in a difficult situation. The last sentence of that para-

graph was inaccurate: Germany had taken legal action, not six and a half years after the breach had occurred, but much later; it had not learned of the breach of the right to counsel until 1992, although the breach had occurred in 1982.

48. He was in full agreement with the commentary to article 46 quater, but thought the wording of subparagraph (b) could be improved. Instead of referring to the responsible State, the guilty party, it should speak of the action taken by the claimant party. He much preferred the way the same idea was expressed in article 45 of the 1969 Vienna Convention, namely, a State “must by reason of its conduct be considered as having acquiesced in the validity of the treaty”. Reference to what the responsible State might or might not have believed, would lead to great difficulties regarding proof.

49. The analysis in paragraphs 267 to 283 of the question of a plurality of responsible States, and the proposed article, article 46 quinquies, appeared somewhat simplistic, especially in view of the involvement of international organizations in the actions of a plurality of States. There was a very complicated interrelationship in NATO, for example, between the responsibilities of the organization itself and the military integration and operations undertaken by States members. Admittedly, the responsibility of international organizations fell outside the scope of the draft, but something should be said about the implications for States members of an organization if they failed to act on the basis of joint and several responsibility.

50. Article 46 sexes, paragraph 2 (a), was of value. It was difficult for someone not involved in the *Monetary Gold* case to understand all the fine points of the principle of the indispensable third party, and it was therefore worth emphasizing that that principle related to the admissibility of proceedings and could not be regarded as a substantive principle.

51. The categorical statement in the first sentence of paragraph 275 about the sources of international law might need to be reconsidered. He would also like to know whether there was any case law relating to the application of the maxim *ex turpi causa non oritur actio* cited in paragraph 276 (d).

52. Lastly, he supported the idea of referring the draft articles under consideration to the Drafting Committee.

53. Mr. CRAWFORD (Special Rapporteur) said the reference to the *LaGrand* case had been included simply because one of the separate opinions had seemed pertinent, and had certainly not been aimed at prejudging the outcome of the case. A corrigendum would be issued to his report to correct the factual errors Mr. Simma had mentioned concerning the *LaGrand* case.

54. Mr. ROSENSTOCK said he thought the basic thrust of Mr. Simma’s comment on the *LaGrand* case was to urge caution in discussing ongoing cases. It would be most appropriate to honour that request.

55. Mr. DUGARD said he agreed that the *sub judice* rule was important, but if it was applied strictly, it could definitively stifle debate. Many cases, particularly ones before ICJ, continued over years and years—witness the *Locker-*

bie case. Certainly, discretion should be exercised, but flexibility should also be used.

56. Mr. KABATSI endorsed those remarks. The *sub judice* rule was important, but some cases were decided in stages, and it should be possible to refer to matters that had already been resolved, even if the case itself was still pending.

57. Mr. TOMKA said the Commission should not be prevented from discussing judgments or orders already rendered. In the *Gab Ž kovo-Nagymaros Project* case, judgment had been handed down, but the case was formally still on the general list, pending an agreement on implementation. Provisional measures and orders had already come out in the *Lockerbie* case. Such materials should be usable, but members of the Commission should refrain from siding with one or another of the parties and from taking positions on current or future proceedings.

58. Mr. ROSENSTOCK said that no one was suggesting that a hard and fast rule should be applied. Rather, an argument was being made for discretion, caution and sensitivity to the problems that could be created.

59. Mr. HAFNER said that chapter III of the report dealt with quite a number of new topics in the field of State responsibility. He endorsed its general structure and philosophy, but a few minor points should be mentioned.

60. He agreed with Mr. Simma’s comments on paragraph 238, for he was not convinced that the claim need be in written form in all circumstances. Paragraph 242 described the nationality of claims rule as a “general” condition for the invocation of responsibility, but was “general” to be understood as permitting exceptions? The subject fell under the topic of diplomatic protection, and a draft article that did not rely on the rule had already been submitted under that topic.

61. He had doubts about whether the *LaGrand* case mentioned in paragraph 258 was appropriate to demonstrate loss of the right to invoke responsibility. The last sentence of that paragraph gave a false impression by saying that Germany had taken legal action literally at the last minute. Action had been taken at the last minute, not before the right was lost, but before the execution was carried out. Accordingly, the phrase referred to loss of a right, not because of the expiry of a time-limit, but because of the impossibility of averting the execution.

62. The Convention on International Liability for Damage Caused by Space Objects, mentioned in paragraph 272, could serve as a practical example, but it had been a unique experiment, had had no successor—nor would it, in his view—and could not be used as evidence of any tendency in international law. He likewise had doubts about whether the “mixed agreements” between the European Union and its member States, referred to in paragraph 274, could serve as an example of joint responsibility. They actually had two parts, a Community part and a national part which fell exclusively within the competence of the member State. Theoretically, responsibility for performance was distributed a priori between the international organizations and the member States. Annex IX to the United Nations Convention on the Law of the Sea was predicated on a division of competences

between Member States and the international organization. The joint and several responsibility mentioned in article 6, paragraph 2, of that annex was an exceptional case and, he thought, was envisaged as some form of sanction for cases where no indication of competence was given. Thus, only in a doubly exceptional situation did that kind of responsibility apply: it could hardly be generalized.

63. It was difficult to understand, in connection with article 46 ter, paragraph 1 (a), why the injured State had to indicate what conduct on the part of the responsible State was required. Would it not be sufficient to say that State A had breached a given article? The current text created the impression that the injured State could decide on the conduct required, but that was not the case. If the injured State proposed conduct different from that required by the rule that had been breached, then the responsible State was fully entitled to object. The reference to article 36 bis seemed to indicate that such a departure from the norm breached was inadmissible; hence there was no need for the definition of that conduct by the injured State. Nor was there any need to go into the details of diplomatic protection, as it would suffice to say that local remedies had to be exhausted in accordance with the applicable rules of international law. The Commission should not create difficulties for itself by dealing with issues covered in the topic of diplomatic protection. Article 46 ter could therefore be kept relatively short.

64. Although very much in favour of the substance of article 46 quater, he thought that subparagraph (a) called for a great deal of clarification in the commentary, since neither “unqualified” nor “unequivocal” was explicated in the text. The wording of subparagraph (b) should be changed, for what was meant was that the injured State could no longer reasonably be expected to pursue or raise a claim. It might be worth considering whether that rule could be subject to certain exceptions—for instance, for egregious acts. Even the 1969 Vienna Convention set out exceptions to article 45. In addition, if the right to invoke responsibility was lost, what happened to the wrongful act itself, and to the duty to cease and make reparation for the wrongful act? Would the wrongful act become legal because nobody could invoke the consequences of its wrongfulness? One consequence could be that the duty to make reparation remained valid, as the wrongful act did not become legal simply because the right to invoke responsibility had been lost. It could become legal only if the waiver of the right amounted to some form of consent *ex post*. The creation of a relevant *opinio juris* could change the relevant norm, but it would not have retroactive effect and the act itself would therefore remain wrongful. If the responsible State performed the act a second time and there had been no change in the relevant norm, the injured State could again consider itself injured and invoke responsibility, despite the fact that it had lost that right earlier. It was something that could give rise to misunderstandings.

65. By and large, he had no problems with article 46 quinquies, but the issue was more complicated than the article indicated. Indeed, the article, if it was to stand alone, could even be deleted, as its result could be derived from other provisions. To illustrate the complexities involved, one could cite the example of foreigners, nationals of a non-European State, whose human rights were

massively violated by a State A, a party to the European Convention on Human Rights. As a consequence, the individuals had the right to invoke responsibility in the form of an individual complaint under the Convention system. At the same time, any other State party also had the right to bring a complaint before the European Court of Human Rights. The home State had the right to invoke the responsibility of State A under the State responsibility regime the Commission was now establishing. Furthermore, any other State also had the right to invoke responsibility in the restricted sense, since a gross and massive violation of an *erga omnes* obligation had been committed. Thus, there were four different types of consequences for one and the same wrongful act. The relationship between State A and the individual’s home State and complaints under the Convention would be discussed further, and he doubted whether a simple reference to a *lex specialis* rule would suffice. What was needed was an analogy to a *lis alibi pendens* situation in a very broad sense. Interestingly enough, reference to such a rule was made in the context of a plurality of responsible States, but not in the context of a plurality of injured States.

66. A second example would be that of a river that crossed several countries. If the upper riparian State built a dam and shut off the water, several lower riparian States were injured, by one and the same act, in their right to use the waters. Substantial problems would arise if they did not agree on the form of reparation—if one wanted restitution, for example, and others compensation. Both forms of reparation could not be given. If restitution was offered by the upper riparian State to the first lower riparian State, it would automatically extend to the next lower riparian State, whether or not the latter preferred that form. Hence, a provision dealing with incompatibility of forms of reparation was needed. One option would be to give priority to restitution unless the injured States agreed otherwise. Another would be to rely on agreement among the injured States, but the problem would arise of what to do if the injured States could not agree on a common form of reparation. Would it amount to a waiver of the right to invoke responsibility, enabling the responsible State to go free? That question needed to be addressed.

67. He supported article 46 sexies insofar as it did not specify any particular kind of common responsibility, but he agreed with Mr. Gaja that the issue was more complex, and that the *Corfu Channel* case was not the most appropriate example. Paragraph 2 (a) might lead to an *argumentum e contrario*, which was certainly not desirable. Why should such a rule apply only in cases of plurality of responsible States, and not in general?

68. On the whole, he was of the view that the draft articles should be referred to the Drafting Committee.

69. Mr. CRAWFORD (Special Rapporteur) said he agreed entirely with Mr. Hafner’s analysis of the Convention on International Liability for Damage Caused by Space Objects and the “mixed agreements” of the European Union. The detailed treatment in the Convention of joint and several liability was extremely unusual, and he had mentioned it because it was the most detailed provision in the field, not because he thought it reflected general international law. True, the process of inferring general principles of international law operated on the

basis of analogy, but one could not leap straight from a national legal system into international law without going through the necessary intermediary of finding a common basis in the different legal systems from which to infer that something was a general principle of law. With regard to “mixed agreements”, annex IX of the United Nations Convention on the Law of the Sea mandated special treatment of a particular situation, but the legal position under all “mixed agreements” was not the same, contrary to the prevailing assumption.

The meeting rose at 1 p.m.

2644th MEETING

Friday, 21 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapters II and III of the Special Rapporteur’s third report (A/CN.4/507 and Add.1–4).

2. Mr. MOMTAZ said it was unfortunate that he had not had more time to study chapters II and III closely, as it dealt for the first time with some very sensitive issues that were of crucial importance to the Commission’s future work. As a general comment, he said that the distinction between a crime and a delict made in article 19 of the draft

articles as adopted on first reading was relevant in respect of a number of the articles proposed, particularly article 46 quater, on loss of the right to invoke responsibility, and article 46 quinquies on a plurality of injured States. In those two cases, the questions raised were quite different if a violation of a fundamental rule of general international law was involved. The validity of that argument was confirmed in paragraph 233 of the report, where the Special Rapporteur said that an injured State might not be able on its own to absolve the responsible State from its continuing obligations. The question was whether that statement implied that, in cases of a violation of fundamental or *erga omnes* rules, the State that was directly injured could not on its own take the decision to absolve the responsible State from its obligations, as the interests of the international community as a whole were at stake. If the answer to that question was yes, it could only be concluded that, once again, the Special Rapporteur’s refusal to take account of the debate on the distinction in article 19 posed a problem for the Commission.

3. As far as the contents of chapters II and III were concerned and with regard to paragraph 237 on the form which an invocation of responsibility should take, he wondered whether the injured State’s claim could not be made in the framework of the political organs of an international or regional organization to which that State had referred the conflict between itself and the State responsible for the wrongful act. In some cases, the injured State had no intention of submitting a claim to those organs, which were anyway not competent to examine it. Nonetheless, the positions taken within those organs, by calling into question the responsibility of the State responsible for the allegedly wrongful act, might be considered as a somewhat informal way to invoke responsibility. The question had been raised in the case concerning the *Aerial Incident of 3 July 1988* without ICJ being called upon to give a decision. On the other hand, in the *Oil Platforms* case, which was still pending before the Court, the quite lengthy period of time between the destruction of the Islamic Republic of Iran’s oil platforms in the Persian Gulf and the referral of the matter to the Court by the Islamic Republic of Iran had not prevented the Court from declaring itself competent. Indeed, in those two cases, the Islamic Republic of Iran had invoked the positions it had taken within the framework of the political organs of international organizations.

4. With regard to paragraph 241, the question of the exhaustion of local remedies should be considered as a rule relating to the admissibility of claims in the area of diplomatic protection and, in any case, the rule did not apply to cases of massive and systematic violations of human rights, including, obviously, those involving aliens living in the territory of the State responsible for the internationally wrongful act.

5. Mr. CRAWFORD (Special Rapporteur) said that paragraph 233 of the report actually referred to a slightly different distinction between peremptory and other norms. Unquestionably, in cases of the continuing violation of a peremptory norm, unless provided for by the norm itself, the injured State could not absolve the responsible State from its continuing obligations, as that was a matter of more general interest. In fact, that paragraph drew attention to the possible consequences of that

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, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).