

Document:-
A/CN.4/SR.2651

Summary record of the 2651st 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/>)*

75. Mr. CRAWFORD (Special Rapporteur) said that article 51, paragraph 4, used the word “penal” in all possible connotations because the Commission could not exclude the possibility and the contingency of decades of the development of international law.

76. With regard to the submission of the draft articles to the Sixth Committee, it would be desirable for the Committee to have an integrated text so that it could see how the various articles related to each other and for the Commission, in its report to the General Assembly on the work of the current session, to distinguish between the aspects of the report on which substantive comments had been made by Governments and were representative of many years of work and those which were essentially new.

77. Mr. SIMMA noted that, when he had said that the text of article 51 should be brought closer to that of article 19, he had not been referring to article 19 as a whole, but only to article 19, paragraph 2, describing the obligations article 19 had in mind, and that he certainly had no intention of proposing that the word “crime” should be added as part of that approximation.

78. Mr. BROWNLIE said that the exercise the Commission was engaged in involved the codification of State responsibility, which was a long-established part of customary law that would survive regardless of the outcome of the Commission’s work. The Commission was also ambitiously trying to construct a system of multilateral public order by merely normative means. For that and other reasons, it must look at State practice, which would show, for example, that it was not only Western States that had gone in for multilateral sanctions.

79. Referring to article 19, he did not agree with the approach of saying that the fact that the Commission was setting aside article 19 would in a way amount to abandoning the concept of international crime. Indeed, some members of the Commission held the view that article 19 was a weak version of the international crime concept and was in the wrong place. It was an inappropriate article that did not belong in the draft in any event.

80. For the time being, the Commission’s concern should be to transmit an integrated draft to the Sixth Committee in order to obtain feedback.

81. With regard to more specific aspects of the report, the references to State practice could be developed and rounded out. As to terminology, he took the view that the concept of collective countermeasures might give rise to misunderstandings, not least because of its association with bilateral countermeasures. Collective countermeasures were essentially collective sanctions and they were often parallel rather than collective. Although it was difficult to find an alternative, he would prefer the term “multilateral sanctions”.

82. It was inaccurate to say, as the Special Rapporteur did, that the obligation of non-recognition referred to in article 51 was in the sphere of progressive development. There again, the Commission must be scrupulously careful to establish a link between its work and what had existed for decades. The principle of non-recognition had first been affirmed by the Assembly of the League of Nations in the early 1930s, and that should be acknowledged in the

commentary. The report should also at least mention the problem of invalidity because, apart from being a political sanction in some cases, non-recognition was, in a more legal context, a reaction to the invalidity of an act.

83. He did not think that the term “serious and manifest breach by a State of an obligation” in article 51 was as objective as it seemed, since breaches committed by permanent members of the Security Council usually tended not to be seen as manifest.

The meeting rose at 1.10 p.m.

2651st MEETING

Thursday, 3 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda, 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. Mr. GOCO said that, during his period of office as his country’s Solicitor-General, he had handled a number of cases with international ingredients. He was, however, rooted in the study and analysis of national law and in advocacy. He had therefore found the Special Rapporteur’s third report (A/CN.4/507 and Add. 1–4) particularly illuminating. Any doubts he had had about certain issues were largely dispelled.

2. The use of the expression “legal interest” in paragraphs 375 and 376 of the report raised the important

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).

question of how it should be understood. He wondered whether it was the kind of legal interest that was recognized in a judicial forum or could pass the test of judicial scrutiny. Legal interest was, after all, a real and existing interest that was legally protected. The requirement of *locus standi*, moreover, could serve as a preclusion when a party failed to show legal interest in the suit or lacked legal personality. ICJ had heard several cases on the issue, including the *South West Africa* cases, in which Ethiopia and Liberia had made applications to the Court asking it to affirm the status of South Africa as a territory under mandate. The Court had taken an empirical view of legal interest as a general issue and refused to restrict the concept, as a matter of general principle, to provisions relating to a material or tangible object. It had held that such rights or interests, in order to exist, must be clearly vested in those who claimed them, whether by some text or instrument or rule of law. A similar issue had been raised by the *Northern Cameroons* case, in which the Court had been requested to declare that the United Kingdom, as administering authority for the Cameroons, had failed to fulfil its obligations under the relevant trusteeship agreement.

3. Another possible procedural point was that of the proper joinder of parties. The existence of the legal interest of the parties to be joined was, of course, fundamental. Yet another issue was that of the existence of a valid cause of action, or whether a legal demand was being asserted, as opposed to a mere remonstrance or request for reparation. The justification for the involvement of other States, or the whole international community, was a serious breach of obligations. Hence a pre-emptory issue would be the kind of breach committed that would warrant the participation of other States. Once the breach had been committed, the necessary legal interest for other States to join the victim State was instantly achieved, but, of course, the latter must first give consent. If such consent was lacking, other States willing to join might not be able to do so. The question still remained, however, whether—aside from the nature of the breach, which was the yardstick to be used in cases of assistance to a victim State—alliances, treaties or regional groupings, of which there were many, were sufficient to provide a legal interest.

4. The examples of countermeasures cited in paragraph 391 were not collective countermeasures in the strict sense, inasmuch as the States taking those measures could not claim to be injured. Indeed, some had merely decided to suspend treaty rights, alleging a fundamental change of circumstances. Moreover, paragraph 396 contained the admission that State practice was dominated by a particular group of Western States. There were few instances of States from Africa and Asia taking collective countermeasures, as was confirmed in paragraph 290 of the report, relating to the fact that countermeasures favoured the most powerful States. The matter required serious consideration, given current realities among developed, developing and underdeveloped countries. The rich and industrialized countries were grouped together in alliances, while other nations had weak links with each other and relied on support from some powerful State. Although sovereign and independent, they were economically dependent. The result was that, for all the care taken in their elaboration, the likelihood of collective countermeasures being taken was small. There were powerful reasons preventing States from joining a victim State. In that con-

text, an independent panel assembled by OAU had blamed some States and institutions for the genocide in Rwanda in 1994. It was worth asking why no State had intervened to support a concept in which they claimed to believe, following such a serious breach of obligations to the international community as genocide.

5. He would comment on the wording of the proposed articles in the Drafting Committee.

6. Mr. MOMTAZ said that chapter IV of the third report had the great advantage of enabling the Commission to extend its discussion of responsibility in the context of the bilateral relations between States. The shadow of article 19 adopted on first reading, dealing with a most controversial topic, lay over the whole of the chapter. Without wishing to reopen the debate on the distinction between international crimes and international delicts, he merely observed that the distinction unavoidably existed and some time should be given over to serious consideration of it. He had taken careful note of the proposal in that regard by Mr. Dugard (2650th meeting).

7. As to the report itself, he fully shared the concern expressed by the Special Rapporteur in paragraph 372, concern that the Security Council had also expressed, about the harmful effects of some of its resolutions on the innocent civilian population of targeted States. The President of the Council had made several statements concerning the need to ensure that sanctions conformed with international humanitarian law. An independent group of experts was to be set up by the Council to consider the matter.

8. With regard to paragraph 391, he agreed with Mr. Dugard that the taking of collective countermeasures was not confined to Western States and drew attention to the measures taken by certain Arab countries against Egypt after the Camp David accords³ and also to those taken by the member States of the Gulf Cooperation Council against Iraq after the invasion of Kuwait.

9. As to paragraph 393, it was somewhat surprising that the Special Rapporteur, although using the word “invasion”—which undoubtedly had a negative connotation in international law—to describe the action of the Union of Soviet Socialist Republics in Afghanistan, seemed nonetheless to have doubts as to the unlawfulness of that action.

10. Paragraph 374, revealed some confusion between the category of norms that ICJ characterized as *erga omnes* in its ruling on the *Barcelona Traction* case and the peremptory norms of general international law. That confusion was, perhaps, due to the fact that all the examples given concerned peremptory norms of general international law or *jus cogens*.

11. He shared Mr. Brownlie’s reservations about the term “collective countermeasures” and was wholly in favour of his suggestion of the alternative “multilateral sanctions”. His own main concern, however, was that the

³ Framework for peace in the Middle East agreed at Camp David, signed at Washington on 17 September 1978 (United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39).

Special Rapporteur's reasoning was based on the right of not-directly-affected States to come to the assistance of a State injured by a gross breach of obligations to the international community. That right was brought out in articles 50 A and 50 B. That approach, however, did not take account of the obligation on member States of the international community to react to breaches of international humanitarian law, an obligation that was clear from article 1 of all four of the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which laid down that States parties should respect and "ensure respect" for the Conventions in all circumstances. Legal opinion overwhelmingly held that the expression "ensure respect" placed an obligation on States to react to any breach of international humanitarian law. ICJ had been quite explicit on the matter when considering the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In paragraph 220 of its judgment in that case, the Court had stated that the United States is under the obligation according to "the terms of article 1 of the Geneva Conventions, to 'respect' the Conventions and even to 'ensure respect' for them in all circumstances". It had also added that such an obligation derives "from the general principles of humanitarian law to which the Conventions merely give specific expression".

12. The question was, therefore, how best to deal with the matter. He would suggest—at what was admittedly a late stage—inserting a reference in new article 51, paragraph 3, to the requirement to ensure respect for international humanitarian law. As for paragraph 3 (c), it clearly related to cooperation with a view to bringing to an end the breach of a due obligation. In other words, not-directly-injured States could not claim compensation, for the simple reason that the harm suffered by such States was non-material or moral in character.

13. Paragraph 4, was not useful as it stood. It went without saying that, even if the draft articles were adopted in the form of a convention, they could not be an obstacle to the development of either customary or treaty law.

14. With regard to article 39 as adopted on first reading, he was grateful for the reference in a footnote to paragraph 426 to the extremely stimulating article by Mr. Arangio-Ruiz, which he had found totally convincing. He suspected that the Special Rapporteur had also been impressed, which would explain the drastic revision of the wording and, indeed, the proposal to delete the draft article altogether. Ever since the decision of ICJ in connection with the *Lockerbie* case, Article 103 of the Charter of the United Nations, had been extensively interpreted. Yet it was clear that Article 103 related only to the provisions of the Charter itself; it did not relate to decisions taken by United Nations bodies, including the Security Council. On the other hand, it gave the provisions of the Charter priority over those contained in other legal instruments, thus excluding rules with a purely customary basis. Hence, the question obviously arose as to whether, once adopted, the draft articles would lose their customary character simply because they had been codified. He doubted it. The Court had been quite clear in that respect with regard to Article 51 of the Charter and the notion of self-defence, when handing down its judgment in the case concerning

Military and Paramilitary Activities in and against Nicaragua. In paragraph 176 of its judgment it had stated that customary law continued to exist side by side with treaty law and that Article 51 could not supplant customary international law.

15. The same argument could be applied to the draft articles now before the Commission. Their provisions were sometimes founded on general international law. Those with a customary basis would not come under the scope of application of Article 103 of the Charter of the United Nations. He believed that article 39 added nothing and therefore doubted its validity. The same question had arisen during the drafting of the Rome Statute of the International Criminal Court. Article 16 of the Statute, which gave the Security Council the possibility of indefinitely suspending a case before the Court, had been strongly criticized by many representatives of current legal opinion. He would therefore gladly accede to the Special Rapporteur's proposal in a footnote to paragraph 426 that article 39 should simply be deleted altogether.

16. Mr. HAFNER said that the Special Rapporteur was to be congratulated for completing, with his submission of chapter IV of his third report, the enormous task of preparing the draft articles on State responsibility for second reading. Chapter IV had far-reaching political consequences and political implications, and also raised extremely complex issues with regard to ongoing developments in international law and international relations.

17. The first part related to *erga omnes* obligations and obligations to protect the collective interests of States. In that context, the vexed question of international crimes needed to be settled. He shared the view that international crimes as such should not be included in the draft articles. Always assuming it could be agreed that such a category even existed, the time was not yet ripe to deal with them in detail, and the task of defining them in any case belonged to the field of the primary rather than the secondary rules. Since the primary rules had not yet established the extent, scope and content of such crimes, it would be premature to deal with the secondary rules or consequences that followed from the existence of primary rules. It could, of course, be claimed that the same situation arose with regard to *jus cogens* in the 1969 Vienna Convention, which contained no definition of the content of that concept. It must be borne in mind, however, that crimes were a much more sensitive area, and that the Convention had deliberately provided for a mandatory judicial procedure before ICJ where issues involving *jus cogens* were concerned—a situation that would not arise in the field of State responsibility. He thus supported the Special Rapporteur's decision to deal only with delicts possessing particular features indicating their gravity.

18. In that regard, it must also be borne in mind that the draft articles already identified different categories of obligations. Obligations could be bilateral or they could be multilateral, a category which included obligations owed to a group of States, or those owed to the international community as a whole; while both of these groups included further subcategories such as those affecting the enjoyment of the rights of other States, and those designed to protect a collective interest. But that categorization was to be distinguished from the category of

different kinds of breaches, which could apply to all types of obligations, such as those of a continuing character. A particular kind of breach was one that was serious and manifest. New article 51 addressed all obligations owed to the international community as a whole, but only with respect to certain types of breaches. Hence, there was a substantial difference between crimes according to the original definition under article 19, and the kind of breaches addressed in article 51. Consequently, crimes—if they existed—were not dealt with in article 51, and he thus concurred with the view expressed by Mr. Dugard, that it might be a good idea to place that item on the future agenda of the Commission. On the other hand, Mr. Dugard's other proposal, namely, to include the definition of crimes under article 19 in article 51, would entirely change the scope of that article. In his view, in the draft articles proposed for second reading, crimes were considered to be covered by the *lex specialis* rule alone. To deal with that issue at the current juncture could seriously jeopardize the entire exercise.

19. The view expressed by the Special Rapporteur in his oral introduction concerning the relationship between State responsibility and individual responsibility was correct. Although classical doctrine considered State responsibility to be unfettered by individual responsibility, nonetheless the function of the latter was undoubtedly to release the population from the status of hostage in which it was placed by State responsibility. He very much concurred with such a philosophy, which also underlay the creation of the International Criminal Court.

20. Likewise, the imposition of punitive damages was not confirmed as a practice in existing international law. The case of article 228 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam), referred to by the Special Rapporteur in paragraph 382 of his report, was a special one, reflecting the high degree of integration achieved since the signing of the Treaty on European Union, and questions still remained with regard to its application. It should also be noted that there was still no power to enforce a decision on pecuniary penalties—a fact which merely confirmed that the Commission was dealing with the progressive development of international law. As the Special Rapporteur had rightly pointed out, the first decision in that regard had been taken by the Court of Justice of the European Communities as recently as July 2000, although the procedure had been initiated by the European Commission on earlier occasions. It was interesting to note, however, that the procedure had been activated with regard to environmental matters, where *erga omnes* obligations were involved and there was possibly no injured State. Thus, on the one hand, it was not possible to generalize on the basis of that power of the Court of Justice of the European Communities, and on the other, that power was limited in practice to cases of a certain type.

21. As to the draft articles themselves, for the reasons he had already given, he favoured retention of the second bracketed text in new article 51, paragraph 2, and consequent deletion of the reference to “punitive damages”. The commentary should include a discussion of the extent to which the issue of validity, raised by Mr. Brownlie, was involved in paragraph 3 (a). Although the statements by Mr. Gaja and Mr. Simma (2650th meeting) concerning the

relationship of paragraph 3 (b) to article 27 seemed convincing, he nevertheless tended to support the view expressed by the Special Rapporteur in his response to Mr. Gaja, concerning the difference between the two provisions. Consequently, he saw paragraph 3 (b) as having a certain merit.

22. The main problem lay with paragraph 3 (c), which, along with paragraph 3 (b) was certainly inspired by Article 2, paragraph 5, of the Charter of the United Nations. Both provisions generalized the obligation, and extended it beyond the United Nations, to any States that took such measures and to which the obligation was due. He had already said, during the Commission's consideration of article 29 bis, on peremptory norms, that the articles seemed to affect the law of neutrality. That was particularly true of subparagraph (c), which, if applied, would change the very purpose of neutrality, namely, impartiality. According to that principle, a neutral State would be obliged to render the same assistance to the responsible State as it was required to render to the other States addressed in subparagraph (c). That, however, would contradict the obligation under subparagraph (b). Of course, one could argue that neutrality was now no longer governed by the rule of equidistance. That, however, remained a debatable assertion. The *lex specialis* rule could be invoked to solve the problem, but he doubted whether the law of neutrality could be considered a *lex specialis* in relation to State responsibility. Hence, it could only be argued that the responsible State was obliged to tolerate such cooperation by the neutral State with the other States, since it would also be bound by the rules on State responsibility—a situation similar to that of neutral States participating in the United Nations. But then it must be recognized that the law of neutrality was undergoing substantial change and that the article would thus constitute development of international law—though whether that development was “progressive” was a moot point. He questioned whether it was possible to go so far, and thus joined those who had expressed doubts regarding the provision.

23. Other considerations also cast doubt on paragraph 3 (c). Thus, the Security Council in paragraph 2 of resolution 678 (1990) of 29 November 1990, adopted under Chapter VII of the Charter of the United Nations, had authorized Member States to use all necessary means to restore international peace and security in Kuwait. By paragraph 3 of the same resolution it had requested all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2. The fact that the resolution did not use the word “decides” meant that the Council had not imposed a clear obligation of cooperation on States not participating in the collective measures under paragraph 2. Clearly, the Council had not been sure whether such an obligation would be in accordance with international law or accepted by States. Nor was it possible to draw the conclusion from Article 2, paragraph 5, of the Charter that there was any duty to cooperate with the States taking the collective measures. The only obligation that could be inferred from the linkage between the Council resolution and Article 2, paragraph 5, of the Charter (and also, perhaps, Article 25) was that States simply had a duty not to obstruct those measures.

24. A further problem with paragraph 3 (c) was the expression “cooperate in the application of measures designed to bring the breach to an end”. While it could of course be inferred that such measures must be lawful, that was nowhere stated. The first condition to be imposed on the measures was thus that they must be in accordance with international law. Only then could a duty of cooperation be established.

25. As to paragraph 4, the reference to “penal” consequences was superfluous, since it was vitiated by the presence of the words “or other consequences”. However, the provisions appearing in a footnote to paragraph 413 of the report was a necessary addition, though it should form a separate article, as proposed by Mr. Simma. A reference to non-repetition should be inserted in subparagraph (a) proposed in that footnote, as non-repetition went hand in hand with cessation. Then there was the important question whether the State should be entitled to claim restitution and additional damages and to take countermeasures in order to induce the responsible State to comply. Subparagraph (c) proposed in the footnote raised various questions in that regard: for subparagraph (c) (i) used the expression “in the interests of the injured person or entity”, which would require communication between the invoking State and the victim, whereas subparagraph (c) (ii) seemed not to require such communication, although damages were to be used for the benefit of the victims of the breach. While that proposal was supported by a certain moral conviction, he doubted whether there were instances in which that had happened. Clearly both articles must be read in conjunction with article 51, which failed to indicate the State entitled to refer to the obligation of the responsible State. The proposal in the footnote was thus a necessary corollary to article 51.

26. He could support the proposed new formulation for article 37, including the words “to the extent”. Presumably, the intention was that article 37 should place the entire draft on State responsibility under the *lex specialis* regime. The article referred, however, only to “the conditions for ... an internationally wrongful act”, and he thus wondered whether that also included the definition of such an act, or, in terms of the headings of the different Parts, the general principles, the act of the State under international law and the breach itself. If the text was to be retained, some clarification should be provided in the commentary, a matter that could be taken up by the Drafting Committee. A legal solution certainly needed to be found to the question of the relationship between *lex specialis* regimes and the general regime of State responsibility. Could a State not bound by a special regime act under the general regime where it was also entitled to invoke State responsibility? In his commentary the Special Rapporteur had referred to a solution by interpretation. At the current late stage in the proceedings, it seemed that the Commission would have to concur with that view whether or not it offered a plausible solution. Nevertheless, very complex issues were involved.

27. The wording of new article 39 posed no problems, although it could be argued that the provision was redundant, as it already flowed from Article 103 of the Charter of the United Nations. Nevertheless, bearing in mind the comments by Mr. Momtaz, whose concerns he to some extent shared, the consequences of the eventual legal sta-

tus of the draft needed to be considered. If the articles were eventually to take the form of a resolution reflecting customary international law, it could then be argued that they would prevail over the Charter, since Article 103 covered treaty obligations but not customary law. New article 39 was thus particularly important, as it should be interpreted in such a way as to ensure that Article 103 of the Charter prevailed over the instrument in which the draft articles were to be embodied.

28. Mr. ECONOMIDES said he would deal only with the compromise solution the Commission was seeking with regard to articles 19 and 51 to 53 of the draft articles adopted on first reading.

29. The compromise solution proposed by the Special Rapporteur was not, in his view, and could not, a priori, be satisfactory. The Special Rapporteur had eliminated the term “international crime”, a term which was nevertheless well established in law at the current time: the terms “crime of aggression” and “crime of genocide” had universal currency. Furthermore, that term alone had a considerable deterrent effect where the most serious breaches were concerned. The Special Rapporteur had deleted article 19 in its entirety, article 40, paragraph 3, and article 52 of the articles adopted on first reading and proposed a new article 51 in exchange for those excisions.

30. New article 51, paragraph 1, should constitute a separate article, as had already been proposed by Mr. Simma and Mr. Tomka, and should also be considerably expanded. The article must contain a definition of a serious breach, as currently set forth in article 19, paragraph 2. That definition should be worded: “The breach by a State of an international obligation essential for the protection of fundamental interests of the international community as a whole constitutes a serious breach within the meaning of this chapter.”

31. He supported the idea of mentioning that the breach must be duly established or manifest, as was the case with any internationally wrongful act, particularly when a State was moved to take countermeasures in connection therewith. The article must also contain an enumeration of most, even if not all, of the serious breaches mentioned in article 19, paragraph 3, and, in particular, of aggression. Needless to say, the enumeration would not be exhaustive, but it was nevertheless essential, for everyone must be aware of what was understood by the words “serious breach”.

32. Paragraph 2 of article 51, which constituted the only proposal of substance offered by the Special Rapporteur, should also take the form of a separate article. In his view, punitive damages should be retained solely in the case of serious breaches. As for the two expressions currently contained in square brackets, he would prefer to combine them in an expression worded “punitive damages reflecting the gravity of the breach”.

33. Paragraph 3 could also be divided into two articles. The first might be worded: “A serious breach entails, for each other State individually”—the word “individually” was important—“the obligations:”, followed by subparagraphs (a) and (b) as currently worded. The second article might read: “A serious breach also entails, for all the States, the obligations to cooperate with the injured State:

(a) in the performance of the obligations set forth in the previous article; (b) in the application of measures designed to eliminate the consequences of the serious breach.” Needless to say those measures must be in accordance with international law.

34. Paragraph 4 could comprise the final article of the chapter. Naturally, it needed to be substantially improved by the Drafting Committee.

35. Another factor to consider was whether the vacuum left by the deletion of article 40, paragraph 3, could be filled by article 40 bis, paragraph 2, and articles 50 A and 50 B. It was not an easy question to answer. The new provisions were complex and needed careful study, which he hoped could take place not only in plenary but also, especially, in the Drafting Committee. However, it appeared that, to implement the provision in article 50 bis and avoid possible abuses, it would be necessary to comply with the duty of non-intervention in matters falling within States’ national jurisdiction in accordance with the Charter, a duty spelled out in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁴ His proposals contained nothing new. They were based on the article 51 proposed by the Special Rapporteur and on article 51 adopted on first reading, and also drew to some extent on article 19.

36. His conclusion with regard to the compromise solution proposed by the Special Rapporteur was that the Commission’s immediate task should be to try and improve the text as much as possible and that it should revert to the question at the next session. Lastly, he wished to congratulate the Special Rapporteur for his report on a topic of crucial importance and to thank him for the efforts he had made to produce a fair and honest compromise.

37. Mr. KABATSI said that, thanks to the Special Rapporteur’s endeavours, it now seemed the Commission was about to present to the General Assembly and to the international community as a whole a complete package of draft articles on the topic of State responsibility. In chapter IV of his third report, the Special Rapporteur had tried to tie up any loose ends and had provided compromise solutions on controversial provisions, realigning the pieces of the jigsaw so that the resulting picture was less confusing.

38. In general he welcomed the Special Rapporteur’s consideration and elaboration of the notion of the right of every State to invoke responsibility for breaches of obligations to the international community as a whole and particularly welcomed the very useful limitations imposed on that right if exercised on behalf of another State. He was less comfortable with the step the Special Rapporteur had—with commendable reluctance—taken with respect to the notion of punitive damages. The Special Rapporteur might, however, be correct in saying that the new path mapped out by the European Union could in time, perhaps in the not too distant future, prove attractive to other States or regional groupings.

39. He also supported the Special Rapporteur’s treatment of the subject of collective countermeasures, even

though, uncharacteristically for the Special Rapporteur, the examples of State practice provided were confined almost exclusively to Western States. Mr. Dugard and Mr. Kateka had provided additional examples from among African States, including what had once been termed the “front-line States” and States of eastern Africa and the Great Lakes region. Other examples that sprang to mind were the collective actions taken in recent years by Commonwealth States against errant States such as Nigeria. All those examples should reassure the Commission that widespread State practice did exist as far as collective countermeasures were concerned. Although those examples did not always necessarily amount to countermeasures within the meaning of chapter II of Part Two bis, elements thereof were nevertheless discernible in those States’ practice.

40. It might therefore be supposed that he had finally become reconciled to the notion of unilateral countermeasures. That was not the case. He could live with collective countermeasures, or sanctions, as Mr. Brownlie preferred to call them, because, unlike the case of unilateral countermeasures by individual States, in the case of collective countermeasures the scope for error and abuse was reduced by the wisdom and good faith of the other States involved. That situation was different from the “self-help” situation of unilateral judgement covered by chapter II of Part Two bis.

41. He welcomed the Special Rapporteur’s treatment of the issue of “gross breaches” of obligations to the international community as a whole, and the proposed recommendations. Unlike a number of other members, he did not adhere to the notion of State criminality. States could commit grave or serious breaches of international law to the prejudice of other States, which would also invariably be to the detriment of the international community as a whole. Such States should, accordingly, expect commensurate consequences by way of reparation. But that was where matters should end. There was no commonly accepted understanding of the expression “State crime”, for no light was cast upon it even in the context of national penal provisions—reason enough to refrain from using it. The derogatory connotations of the word “crime” could stigmatize the innocent populations of States temporarily governed by tyrannical regimes. Such had been the case in Uganda under the regime of Idi Amin, and although the United States had perhaps been justified in imposing trade sanctions upon Uganda, it had been a population already suffering under Amin’s genocidal policies, not Amin and his cohorts, who had borne the brunt of the sanctions imposed.

42. He agreed that chapter III of Part Two, on serious breaches of international obligations, was not the proper place for provisions containing the principle embodied in article 19; they belonged more in Part Two, chapter II, dealing with the legal consequences of the international responsibility of a State.

43. As to new article 51, paragraph 2, he preferred the wording “damages reflecting the gravity of the breach”, as the idea of punishing States was unpalatable. The words “as lawful” should be deleted from paragraph 3 (a), because a situation created by a breach could not be lawful. Perhaps “lawful” could be replaced by “acceptable”.

⁴ See 2617th meeting, footnote 19.

He shared the doubts already expressed about the obligation to cooperate referred to in paragraph 3 (c) and concurred with Mr. Hafner that there could be no such obligation in all cases. He approved of articles 50 A and 50 B and the principles contained in Part Four.

44. Mr. LUKASHUK said that he agreed with most of the points made in the report, but wondered whether the Commission would be able to tame the lions and tigers to which Mr. Kabatsi had referred at an earlier meeting.

45. Paragraph 376 suggested that obligations to the international community as a whole generated the right to act in the general interest. Did the enforcement of those obligations demand State action in defence of general interests? Did that signify recognition of something similar to *actio popularis* in Roman law? ICJ had found in the *South West Africa* cases that no such institution yet existed in international law and the Special Rapporteur also appeared to have adopted that position.

46. In paragraph 391, the Special Rapporteur indicated that, because of scruples concerning the lawfulness of NATO strikes against Yugoslavia, member States had relied not on legal, but on moral and political grounds. Perhaps it should be stipulated that countermeasures could not be predicated on either moral or political considerations—a point that could be of practical significance.

47. The Special Rapporteur's mention, in paragraph 394, of retortion in the event of a breach of obligations of a general nature was a reminder that, unless something was said on that subject in the draft articles, it would be a dilemma constantly encountered in theory and in practice.

48. He had some qualms about the title of chapter III, because it gave the impression that the chapter discussed the concept of serious breaches or enumerated such breaches. It would be an appropriate title for a section of a criminal code, but it was unsuited to a text on procedural law. Since the chapter was concerned with responsibility, it should be entitled "Responsibility for serious breaches of obligations ...". Similarly, with regard to article 51, the consequence of serious breaches of obligations was responsibility and indeed the article talked about responsibility. Its title should therefore reflect its content and read "Responsibility for serious breaches ...". Paragraph 2 might then be worded "Such responsibility entails for the State responsible for that breach all the legal consequences of any other internationally wrongful act and, in addition, punitive damages." Punitive damages were very important in that context.

49. He had real doubts about paragraph 3 (a) of new article 51, since it seemed that the obligation not to recognize as lawful the situation created by the breach, had nothing to do with the specific characteristics of the breach, but could apply to any breach. It was true, however, that no unlawful consequence could be recognized.

50. The idea of responsibility had also been omitted in paragraph 3 (b). It would be much more accurate to formulate that subparagraph "not to render aid or assistance to the State which is responsible for the commission of the breach ...". He was not convinced of the need to completely delete article 19 and in that respect he broadly agreed with Mr. Economides.

51. It was necessary to emphasize the importance of the provisions contained in article 50 A, for their absence could give rise to the practice of police States enforcing the observance of international law on behalf of other States and thus making the latter dependent on them. The title of article 50 B had again forgotten the term "responsibility".

52. As to article 50 B, paragraph 1, when *erga omnes* obligations were concerned, any State could be regarded as injured and hence there was no neutral State. For that reason the clause should be formulated "In cases referred to in article 50, where no individual State is directly or particularly injured by the breach ...". Plurality of responsibility raised quite serious issues, which had been ignored by the Special Rapporteur, in other words the delimitation of the category of directly injured States and States with a legal interest. Such difficulties had often occurred in practice and would continue to appear.

53. With regard to new article 39, he had doubts about referring solely to Article 103 of the Charter of the United Nations, one that conferred a particular status on the Charter as a whole. Therefore, the reference should be to the Charter as a whole, with a final mention of Article 103. An acceptable provision based on that article could indubitably be drawn up by the Drafting Committee.

Reservations to treaties⁵ (concluded)* (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,⁶ A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)**

54. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his fifth report on reservations to treaties (A/CN.4/508 and Add.1–4).

55. Mr. PELLET (Special Rapporteur) said he first wished to inform members that the Commission on Human Rights had postponed its consideration of reservations to human rights treaties for a further year, since Ms. Hampson had not prepared a document for the current session of the Sub-Commission on the Promotion and Protection of Human Rights.

56. The issue discussed in chapter III—prepared in French, and not, as the Secretariat persisted in indicating, in French and English—was the moment of formulation of reservations and interpretative declarations. It was not an entirely new question for the Commission, since it had been discussed in connection with the definition of reservations adopted in draft guideline 1.1, which reproduced the definition in the 1969 Vienna Convention. That definition specified that reservations were unilateral statements made by a State or international organization when

* Resumed from the 2640th meeting.

** Resumed from the 2633rd meeting.

⁵ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), p. 91, para. 470.

⁶ See footnote 2 above.

signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty. The definition had been further clarified, particularly in draft guideline 1.1.2, stating that the instances in which reservations might be formulated included all the means of expressing consent to be bound mentioned in article 11 of the 1969 and 1986 Vienna Conventions. Nevertheless, those clarifications had not entirely resolved all the difficulties pertaining to the moment at which a reservation could or must be formulated and those were questions addressed in chapter III. They were broached from the angle of the formulation of reservations, which constituted section one of chapter III of the fifth report, entitled "Formulation, modification and withdrawal of reservations and interpretative declarations".

57. He had abided strictly by the plan of work adopted when the first report⁷ had been considered and had therefore investigated solely the procedure for formulating reservations. He had not examined the potential consequences of incorrect procedure, which could be considered only when the problems caused by impermissible reservations were scrutinized. He had looked into the formulation of reservations, but not the correctness or incorrectness of that formulation. He had, however, noted a curious feature of the vocabulary used in the 1969 Vienna Convention when it defined reservations. Article 2 spoke of a unilateral statement "made" at a given time by a State, yet articles 19 to 23 generally employed the verb "to formulate". Article 19, subparagraph (b), referred, however, to reservations provided for by a treaty which could be "made" and not "formulated". That difference was not accidental, but the result of a careful choice. "Made" had to be used when reservations were sufficient in themselves to produce effects, without having to be either confirmed or accepted. "Formulated" had to be employed when the reservation was proposed by the State in question but when it did not, by itself, produce the effects normally associated with a reservation. In his opinion, the word "made" was employed erroneously in article 2, but it was probably not worth amending draft guideline 1.1. The Convention could not be rewritten. In the draft guidelines the Commission was going to consider or adopt, however, care would have to be taken to use the two verbs correctly.

58. He wished to draw the Commission's attention to a point not discussed in the report, namely the moment at which a reservation could be modified. Clearly there were links between the formulation and the modification of a reservation. Nevertheless, modification could not be separated from the withdrawal of a reservation, for modification was a diluted form of withdrawal. He would examine it in his next report which the Commission could consider at its fifty-third session.

59. The questions examined in his report were of a very dry, technical nature, but their practical importance was not inconsiderable. Draft guideline 2.2.1, entitled "Reservations formulated when signing and final confirmation", might appear complicated at first glance, but it merely reproduced article 23, paragraph 2, of the 1986 Vienna Convention, which included rules on the participation of

international organizations. That was reflected in the reference to acts of confirmation, which were equivalent to ratification by States. He proposed that the Commission should simply follow the method it had used when it had adopted draft guideline 1.1, in other words to include in the Guide to Practice a provision that was common to both the 1969 and 1986 Vienna Conventions. It was necessary in order to make the Guide as complete and easy to use as possible.

60. He had asked himself whether the rule in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions was justified, recalling that there had to be good reasons for proposing its modification, in view of the fact that the decision had been taken in principle, with the approval of the Sixth Committee, not to call into question the Vienna Convention rules, unless it was absolutely necessary to do so. In the case of draft guideline 2.2.1, he saw no such necessity. That did not mean that article 23, paragraph 2, did not have any disadvantages. It probably went beyond mere codification and, when it had been adopted, it had been more akin to progressive development. Since then, the rule had become generally accepted and it reflected prevailing, if not consistent, practice. If the Commission were to question the rule, it would also call into question the practice followed.

61. The advantages of the rule embodied in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions had been explained in the reports of the Commission to the General Assembly on the work of its fourteenth session (1962)⁸ and the second part of its seventeenth session and of its eighteenth session (1966)⁹, as well as in the fourth and fifth reports by the Special Rapporteur, Paul Reuter, on the question of treaties concluded between States and international organizations or between two or more international organizations.¹⁰ Nevertheless, the main disadvantage of the rule was that by demanding that reservations be confirmed when expressing final consent to be bound, States would probably be discouraged from indicating the reservations they intended to make when a text was adopted, i.e. at the moment of signature. The practice of indicating intentions made for greater predictability regarding the future commitments or undertakings of the parties. The disadvantages did not, however, outweigh the advantages to such an extent that it was worth calling into question article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions.

62. The second question was whether it would not be a good idea to reformulate the terms of article 23, paragraph 2, of the 1969 Vienna Convention, the text of which was not entirely satisfactory. It was not clear, for example, what was meant by the phrase "subject to". The list of means of expressing consent to be bound by a treaty was incomplete, since it was the same as the one contained in the definition of reservations in article 2, paragraph 1 (d), of the Convention, which did not cover all the elements in

⁸ *Yearbook* . . . 1962, vol. II, p. 182, document A/5209.

⁹ *Yearbook* . . . 1966, vol. II, pp. 210–211, document A/6309/Rev.1 (part II).

¹⁰ *Yearbook* . . . 1975, vol. II, p. 38, document A/CN.4/285, and *Yearbook* . . . 1976, vol. II (Part One), p. 146, document A/CN.4/290 and Add.1.

⁷ See 2632nd meeting, footnote 6.

its article 11. That lacuna had in fact led the Commission to adopt draft guideline 1.1.2, which bridged the gap. The more comprehensive wording of draft guideline 1.1.2 could be used in the current instance, but he did not think that was necessary: a reference in the commentary to the missing elements, essentially an exchange of letters, would suffice.

63. Similarly, he did not think it necessary to supplement article 23, paragraph 2, of the 1969 Vienna Convention to take into account succession of States. The Commission had agreed that all guidelines on that subject would be combined in a separate section, and in any event the word “State” covered the concept of successor State. When a successor State ratified a treaty, it was acting first and foremost as a State, not as a successor State. In draft guideline 2.2.1, therefore, it was fitting simply to reproduce the wording of article 23, paragraph 2, of the Convention without referring specifically to succession of States, and perhaps to include more on that subject in the commentary than had the framers of the Convention. In general, the wording of that Convention should, wherever possible, be used as the point of departure and greater precision introduced as and when necessary.

64. One point on which greater precision was indeed needed was addressed in a separate guideline, draft guideline 2.2.2, entitled “Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation”. The reasons for making a separate provision rather than simply expanding draft guideline 2.2.1 were both of principle and practicality. The 1969 Vienna Convention should not be rewritten and draft guideline 2.2.1 was fairly long already. Draft guideline 2.2.2 simply reinstated the text proposed by the Commission during the elaboration of the Convention, and which had disappeared in circumstances which Ruda had described as “mysterious”,¹¹ as noted in paragraphs 241 and 254 of the report. The text had simply disappeared, and no justification had ever been given for its disappearance.

65. The additional detail he was proposing in draft guideline 2.2.2 would be to extend the rule in draft guideline 2.2.1 to embryo reservations formulated when a treaty was being negotiated, adopted or authenticated. The reason was to be found in the report of the Commission on the work of its eighteenth session¹² and was reproduced in paragraph 253 of his report. Embryo reservations were sometimes relied on as amounting to formal reservations and, in the Commission’s view, it was essential for the State concerned to formally reiterate the relevant statements when signing, ratifying, accepting, approving or acceding to a treaty.

66. There were two other points on which article 23, paragraph 2, of the 1969 Vienna Convention needed to be supplemented. The first was covered in draft guideline 2.2.3: a reservation did not require subsequent confirmation if it was formulated when signing an agreement in

simplified form, in other words, if the treaty entered into force solely by being signed. That rule could be deduced *a contrario* from draft guideline 2.2.1, but what went without saying went even better when it was said, and that was all the more true since the Commission was elaborating a guide to practice. It would also remove the ambiguity of the words “subject to” in article 23, paragraph 2, of the Convention which were reproduced in draft guideline 2.2.1. The only real problem he could foresee was one of drafting. Should the treaty in question be described as “an agreement in simplified form”, wording that civil law practitioners would be comfortable with, or as “a treaty that enters into force solely by being signed”, which meant the same thing but was more acceptable, perhaps, to common law practitioners.

67. The last draft guideline on reservations formulated prior to the expression of final consent to be bound by a treaty was draft guideline 2.2.4, reservations, entitled “Reservations formulated when signing for which the treaty makes express provision”. The subject matter was not of crucial importance, but adoption of the draft guideline would usefully clarify a point on which practice was variable and poorly established. In paragraph 262 he cited the example of the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality. It provided that the parties could make reservations when signing the Convention, even though it was an instrument that had to be formally ratified. Was it logical, in such instances, to demand that a State availing itself of the Convention’s authorization to make a reservation upon signature should confirm its reservation when it expressed its final consent to be bound by the instrument? He was quite convinced that it was not, and that it could also cause big practical problems, at any rate with regard to reservations made in the past in such situations, many of which had not been confirmed, doubtless on the strength of the authorization expressly set out in the treaty. True, other States, or the same States in the context of other treaties, had taken the precaution of confirming reservations formulated upon signature, but that happened less often than did non-confirmation.

68. As to late reservations, everyone agreed that, unless otherwise provided by a treaty, the expression of final consent to be bound constituted the last time at which a party to a treaty could formulate a reservation. That rule arose from the very definition of reservations and was also implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions. It was mentioned by ICJ in the case concerning *Border and Transborder Armed Actions*, by the Inter-American Court of Human Rights in its advisory opinion concerning *Restrictions to the death penalty*, and also by the Swiss Federal Court in a very interesting case¹³ cited in paragraph 282 of his report. Other precedents, which he described in paragraphs 281 to 285, had fairly clear consequences. The principle by which a reservation could not be formulated after the expression of final consent to be bound was a stringent rule which States should not be able to get around, whether by interpretation (as shown in the Inter-American

¹¹ J. M. Ruda, “Reservations to treaties”, *Collected Courses of the Hague Academy of International Law, 1975-III* (Leiden, Sijthoff, 1977), vol. 146, p. 195.

¹² See paragraph (3) of the commentary to article 18 (footnote 9 above), p. 208.

¹³ Swiss Federal Supreme Court, *F. v. R. and State Council of the Canton of Thurgau*, decision of 17 December 1992, *Journal des Tribunaux*, 1995, p. 536.

Court of Human Rights findings) or by adding conditions or limitations to a declaration made under an optional clause (as in the decision of the European Commission on Human Rights in the *Chrysostomos* case and in the judgment of the European Court of Human Rights in the *Loizidou* case). That principle needed to be spelled out in the Guide to Practice, and that was what he was proposing in draft guideline 2.3.4, entitled “Late exclusion or modification of the legal effects of a treaty by procedures other than reservations”.

69. The principle was not open to doubt and must be interpreted rigorously, but could be the object of a contrary provision. Nothing, in fact, prevented the contracting parties from stating that a reservation could be formulated or even made after the expression of consent to be bound or after the treaty’s entry into force. Examples of such authorizations of reservation after ratification, ranging in date from 1912 to 1999, were given in paragraph 289 of the report. Owing to the firmness of the principle of customary law that where a treaty was silent, a reservation must be formulated at the latest at the time of consent to be bound, any derogation would have to be express. In draft guidelines 2.3.4 and in 2.3.1, the phrases “unless the treaty provides otherwise” or “unless otherwise provided in the treaty” were signals to States that in order to derogate from the principle, the treaty must expressly provide for such derogation.

70. He proposed going even further and offering to States, together with draft guideline 2.3.1, model clauses for derogations that could be included in future treaties if the negotiators so desired. In that connection, he recalled the Commission’s report on the work of its forty-seventh session, which indicated that the guidelines for the practice of States would, if necessary, be accompanied by model clauses.¹⁴ He envisaged those model clauses, and so, he believed, did the Commission, as simple examples of provisions that could be included in treaties to prevent problems of implementation with respect to reservations. Such was the purpose of the model clauses in paragraph 312, which he hoped the Drafting Committee would discuss in conjunction with draft guideline 2.3.1.

71. The text of the draft guideline could be improved stylistically by the Drafting Committee, but it pinpointed the two fundamental exceptions to the prohibition on formulation of reservations after the expression of consent: “unless the treaty provides otherwise”, and “unless the other contracting Parties do not object”. The first of those exceptions was self-evident and the second was logical and stemmed from well-established practice. It was logical because States could not be forced to agree to set aside the application of a customary rule which obviously was not preemptory. Since a party could withdraw from a treaty and formulate additional reservations when it re-acceded, it would not be wise to take an unnecessarily rigid stance: the party should be authorized to make reservations directly, without going through the process of withdrawal, as long as no other party objected.

72. It was in response to a situation of that nature that the Secretary-General had softened his earlier position consid-

erably in the late 1970s. In 1979, France had indicated its intention to denounce the Convention providing a Uniform Law for Cheques with a view to re-acceding to it with new reservations.¹⁵ The Legal Counsel, acting on behalf of the Secretary-General, the depositary, had suggested that France could address to the Secretary-General a letter, which he would communicate to the other parties, and in the absence of any objection, the reservations would be considered to take effect. That was done, and the practice was subsequently followed by the Secretary-General for the treaties of which he was depositary. A number of examples of similar instances involving other depositaries were given in paragraphs 298 to 302 of the report. That approach had undoubtedly prevented a number of instruments from being denounced outright, and in fact, any contracting party that considered the reservation an abuse could object to it. That thinking had led him to propose draft guideline 2.3.3, entitled “Objections to reservations formulated late”.

73. It was suggested in the literature that such objections should have the same effect as objections to reservations in general, and that objections would prevent a late reservation from taking effect only as between the objecting State and the reserving State. Personally, he did not agree, because it would mean that all the rules concerning the time limitation on the formulation of reservations would be called into question. Any State or any organization would be able to formulate a new reservation at any time and that would constitute a serious threat to the security and stability of legal relations. The very principle of *pacta sunt servanda* would be undermined. Moreover, that interpretation did not correspond to the practice of depositaries, who had always considered, in the words of the United Nations Legal Counsel, that a late reservation would be regarded as taking effect in the absence of any objection by the States parties.

74. In draft guidelines 2.3.1 and 2.3.3, the most important thing was that no State objected to the late formulation of a reservation. On the other hand, once the principle of late formulation was accepted, the usual legal regime for reservations should apply and nothing prevented a State party not objecting to late formulation of a reservation from objecting to the reservation itself and even refusing to be bound to the reserving State. That possibility was left open in draft guideline 2.3.3. He had wondered whether express rather than tacit acceptance of reservations should be required, but that was not in keeping with the practice of depositaries and State practice and would not be realistic. The most that could be asked of States was not to object to reservations.

75. The last, difficult, problem that remained was the time period within which objections could be made to the late formulation of reservations. Practice was ambiguous in that area. Most depositaries who had faced the problem had managed not to take a position on it. As recently as 4 April 2000, the Secretary-General of the United Nations had announced a change from 90 days to 12 months in response to representations made by the European Union. Certainly, 90 days had been too short; States had had no time to examine the proposed reservations.

¹⁴ *Yearbook . . . 1995*, vol. II (Part Two), pp. 108–109, paras. 488 and 496.

¹⁵ See United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), pp. 199–200.

That is also true a fortiori of the month applied by the Secretary-General of IMO which was obviously much too short. Twelve months, on the other hand, was quite long because, for that whole period, States were uncertain as to the fate of the reservation. However, article 20, paragraph 5, of the 1969 Vienna Convention allowed 12 months for objections to reservations, and taking into account also the position of the Secretary-General of the United Nations, he nevertheless proposed setting a time limit at 12 months, rather than 6 months, which he would have preferred.

76. As to the formulation *ratione temporis* of interpretative declarations, late interpretative declarations occurred very rarely, since contrary to the definition of reservations, draft guideline 1.2, which defined interpretative declarations, contained no time element. That meant an interpretative declaration could be made at any time, even though that was not spelled out in any of the draft guidelines adopted so far. However, some treaties placed express limitations on the moment at which interpretative declarations could be formulated. Such was the case with article 310 of the United Nations Convention on the Law of the Sea and article 43 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. In that case, an interpretative declaration could be late and should be dealt with by analogy like a late reservation. That was made clear in draft guideline 2.4.3, with regard to simple interpretative declarations. Draft guideline 1.2.1 indicated that conditional interpretative declarations could be formulated only at the time of expression of consent to be bound by the treaty. A separate draft guideline would have to be included on conditional interpretative declarations. Since such declarations operated like reservations, he proposed that draft guidelines 2.2.3 and 2.2.4 should be transposed to draft guidelines 2.4.4, 2.4.6 and 2.4.7 for conditional interpretative declarations.

77. With those remarks, he was submitting the 14 draft guidelines contained in chapter III of his fifth report to the Commission for its consideration and expressed the hope that they would be referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

2652nd MEETING

Friday, 4 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner,

Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda, 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. Mr. TOMKA recalled that, at the fiftieth session, since the Special Rapporteur had unsuccessfully proposed that article 19 and articles 51 to 53 of the draft should be deleted, the Commission had reached a compromise, discussed in paragraph 369 of the third report of the Special Rapporteur (A/CN.4/507 and Add. 1–4), as to the further procedure in considering the issues involved. Although the Special Rapporteur, as apparent from paragraph 371 of the report, had made genuine efforts to discharge his mandate, a number of questions remained unanswered.

2. For example, when the Special Rapporteur dealt in chapter IV of the third report with “responsibility to a group of States or to the international community”, was it to be inferred that the responsibility was the same or that the legal consequences of a breach of an obligation to a group of States and an obligation to the international community were the same? Was that concept deemed to replace the unfortunate expression “international crime”, used in article 19, when article 19 related more to breaches of obligations to the international community as a whole and not to a group of States?

3. Again, some notions used in the report were, despite the Special Rapporteur’s efforts, comparatively “foggy”. That was true of *erga omnes* obligations, peremptory norms (*jus cogens*), most serious breaches and collective obligations. In article 40 bis, paragraph 2 (a), the Special Rapporteur used the term *erga omnes* to qualify an obligation owed to the international community as a whole. In paragraph 373 of the report, he affirmed that the content of obligations to the international community as a whole was largely coextensive with the content of peremptory norms, that by definition a peremptory norm must have the same status vis-à-vis all States, that they were norms with an *erga omnes* effect and no derogation was permitted. But the Special Rapporteur himself noted that an obligation might exist *erga omnes* yet be subject to modification as between two particular States by virtue of an agreement between them, and it would follow that the obligation was not peremptory. The Special Rapporteur went on to conclude that it would follow that, in the event

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).